

1 MARK D. HARRISON, SBN 142958  
2 SEAN K. HUNGERFORD, SBN 200268  
3 BRADLEY B. JOHNSON, SBN 257220  
4 HARRISON, TEMBLADOR, HUNGERFORD  
& JOHNSON LLP  
5 400 Capitol Mall, Suite 1800  
6 Sacramento, CA 95814-4413  
7 Telephone: (916) 492-5050  
8 Facsimile: (916) 446-4535

FILED Santa Clara County  
08/11/11 2:04pm  
David H. Yemasaki  
Chief Executive Officer  
By: Ikontorovsky DISC:V010118  
R#201100087849  
CK \$395.00  
TL \$395.00  
Case: 1-11-CV-207037 L. Kontorovsky

9 Attorneys for Petitioners, Lehigh Southwest Cement Company,  
10 Hanson Permanente Cement, Inc., Associated General Contractors  
11 of California, International Union of Operating Engineers, Santa  
12 Clara & San Benito Counties Building & Construction Trades  
13 Council, and California Alliance for Jobs

14 SUPERIOR COURT OF CALIFORNIA

15 COUNTY OF SANTA CLARA  
16 UNLIMITED JURISDICTION

17 LEHIGH SOUTHWEST CEMENT COMPANY,  
18 a California corporation; HANSON  
19 PERMANENTE CEMENT, INC., an Arizona  
20 corporation; ASSOCIATED GENERAL  
21 CONTRACTORS OF CALIFORNIA, a  
22 California non-profit corporation;  
23 INTERNATIONAL UNION OF OPERATING  
24 ENGINEERS, a California non-profit  
25 corporation; SANTA CLARA & SAN BENITO  
26 COUNTIES BUILDING & CONSTRUCTION  
27 TRADES COUNCIL, a California non-profit  
28 corporation; CALIFORNIA ALLIANCE FOR  
JOBS, a California non-profit corporation,

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
CONSERVATION, a California state agency;  
DEREK CHERNOW, an individual; and DOES  
1-100, inclusive;

Respondents and Defendants.

CASE No 1 CV 207037

COMPLAINT AND PETITION FOR  
WRIT OF MANDATE,  
DECLARATORY RELIEF,  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY AND  
PERMANENT INJUNCTIONS

BY FAX



1 before delisting a mining operation, and recognize in various forms that a mining operation should  
2 be allowed to continue operating under exactly the same circumstances. The DOC refuses,  
3 however, to afford the same rights to the Facility here.

4 D. The threatened action would violate state law, which permits mining  
5 operations a reasonable time to correct alleged violations. The Facility's lead agency under state  
6 mining law, the County of Santa Clara, has established a compliance schedule for the Facility and  
7 the Facility has met every single deadline.

8 E. The DOC's action is arbitrary and capricious. The Facility has operated in  
9 the present manner for decades, without any changes to justify AB 3098 List removal at this time.  
10 The Facility also has been working since 2006 under a compliance schedule set by the County of  
11 Santa Clara, which was established with the DOC's input, and the Facility has met all deadlines.  
12 The only recent change has been the DOC's own interpretation of the applicable legal  
13 requirements.

14 F. The DOC has failed to maintain the AB 3098 List in the manner required by  
15 law by cloaking the information needed to properly apply the list through the manner in which the  
16 list is kept.

17 Accordingly, to preserve the integrity of state law and due process, and to protect a  
18 longstanding business, its employees and the stability of the construction materials markets, the  
19 Petitioners are forced to commence this lawsuit.

## 20 PARTIES

21 2. Petitioner Lehigh Southwest Cement Company ("Lehigh") is, and at all times  
22 mentioned in this Petition and Complaint (hereinafter, "Petition") was, a corporation organized  
23 and existing under the laws of the State of California, and the current operator of the Facility.

24 3. Petitioner Hanson Permanente Cement, Inc. ("Hanson") is, and at all times  
25 mentioned in this Petition was, a corporation organized and existing under the laws of the State of  
26 Arizona, and the current owner of the property on which Lehigh's mining and cement  
27 manufacturing take place.

28 4. Petitioner Associated General Contractors of California is, and at all times

1 mentioned in this Petition was, an organization composed of nearly 600 contractors and specialty  
2 subcontractor members companies throughout California, and more than 400 associate companies  
3 and firms that support California's construction industry. Many of these members are involved in  
4 state and local public construction projects which rely on materials produced by the Facility.  
5 Their work and finances would be directly and adversely affected if the Facility were shut down.

6 5. Petitioner International Union of Operating Engineers is, and at all times mentioned  
7 in this Petition was, an organization formed in 1896 in Chicago that is devoted to improving the  
8 health, job safety and economic conditions of the approximately 400,000 members and their  
9 families, including those living and working in the San Francisco Bay Area. Many of members  
10 are employed at the Facility, and by contractors relying on the Facility's materials. Their  
11 livelihood and income would be directly affected if the DOC's action is allowed to take effect.

12 6. Petitioner Santa Clara & San Benito Counties Building & Construction Trades  
13 Council is, and at all times mentioned in this Petition was, an organization devoted to improving  
14 the health, job safety and economic conditions of the approximately 30,000 construction workers  
15 and their families in Santa Clara County and San Benito County. Many members are employed at  
16 the Facility and would be directly affected by a shut down or significant reduction in Facility  
17 production. Other members are employed in construction that relies on the Facility's materials  
18 and would be adversely affected in their work and employment.

19 7. Petitioner California Alliance for Jobs is, and at all times mentioned in this Petition  
20 was, an organization dedicated to improving the livelihoods of men and women in the Northern  
21 and Central California heavy construction industries, and represents more than 2,000 heavy  
22 construction companies and 80,000 union construction workers. Many members are employed at  
23 the Facility and would be directly affected by a shut down or reduction in production. Other  
24 members are employed in construction that relies on the Facility's materials and would be  
25 adversely affected in their work and employment.

26 8. Respondent and Defendant California Department of Conservation ("DOC") is, at all  
27 times mentioned in this Petition was, an agency of the State of California with its headquarters  
28 located in Sacramento.



1 desirable low-alkali cement which is critical to preventing structural disintegration from an alkali-  
2 silica reaction between cement and aggregate. Cement applications in the San Francisco Bay Area  
3 are considered relatively free of the issues caused by the alkali-silica reaction due to the use of the  
4 Facility's materials, which are present in other regions. There are few deposits of limestone  
5 within the state that allow for this quality of material, and none so favourably close to the San  
6 Francisco Bay Area.

7 15. A substantial portion of the Facility's materials are used to supply state and local  
8 government construction projects. These materials are used in roads, freeways, bridges, tunnels,  
9 canals, schools and a wide range of other public infrastructure. Current projects being built with  
10 the Facility's materials include:

- 11 ○ CalTrans Doyle Drive (Golden Gate Bridge) retrofit – San Francisco (SF)
- 12 ○ Golden Gate Bridge Seismic upgrade – SF
- 13 ○ San Francisco Mission Bay development -- SF
- 14 ○ CalTrans San Francisco – Oakland Bay Bridge new construction
- 15 ○ BART – Warm Springs Station – Fremont
- 16 ○ San Francisco General Hospital new construction- SF
- 17 ○ San Francisco Trans-Bay Terminal – SF
- 18 ○ Rincon Center high rise buildings – SF
- 19 ○ San Francisco Public Utilities Commission (SFPUC) new building – SF
- 20 ○ San Francisco PUC Hetch Hetchy Water Delivery System reconstruction – SF
- 21 ○ Stanford Hospital and Parking Garage – Palo Alto
- 22 ○ CalTrans Interstate 80 concrete paving – Emigrant Gap
- 23 ○ CalTrans Interstate 680 structures and concrete paving – Livermore
- 24 ○ CalTrans Interstate 680 lean base paving – San Jose
- 25 ○ CalTrans Interstate 580 structures and concrete paving – Danville
- 26 ○ Oakland International Airport expansion – Oakland
- 27 ○ San Jose Mineta International Airport expansion – San Jose
- 28 ○ Highway 17 reconstruction – Santa Cruz
- CalTrans Highway 880 reconstruction and expansion – Oakland
- CalTrans Highway 101 reconstruction and expansion – Marin/Sonoma
- Oakland 12<sup>th</sup> Street Lake Merritt Bridge reconstruction – Oakland
- Contra Costa Water Los Vaqueros Dam reconstruction - Byron
- CalTrain San Bruno Grade Separation – San Bruno
- SFPUC Bay Division Tunnel – Palo Alto
- CalTrans Hwy 1 Bridge – Lucia
- SFPUC San Joaquin Pipeline – Tracy
- SFPUC New Irvington Tunnel – Newark
- SFPUC Crystal Springs Reservoir – San Mateo
- CalTrans Highway 4 Structures – Antioch; and
- SFPUC Lake Merced - SF



1 these minimum requirements from supplying material to public projects. The AB 3098 List was  
2 the mechanism created to implement AB 3098. It lists mines having approved reclamation plans  
3 and financial assurances, among other things. Unless a mining operation is present upon the AB  
4 3098 List, it cannot legally supply material for state and local public projects. (Public Resources  
5 Code, § 2717(b); Public Contract Code §§ 10295.5, 20676). Based upon amendments introduced  
6 in 2003, the AB 3098 List must include other information, but preserve the same fundamental  
7 requirements for a mining operation to be listed. The Director maintains and updates the list  
8 periodically.

9 20. On information and belief, the DOC takes the position that the prohibition on  
10 material from non-listed mining operations also extends to processed construction materials, such  
11 as cement or blended rock products which contain rock in some proportion from a mining  
12 operation that is not on the AB 3098 List.

13 21. The Director of the DOC has never formally adopted regulations concerning the  
14 administration of the AB 3098 List.

15 22. The Facility has had an approved reclamation plan and an approved financial  
16 assurance in effect at all times since 1985. The County approved the Facility's current reclamation  
17 plan in March 1985 ("Reclamation Plan"). The Reclamation Plan, importantly, was not written to  
18 cover all mining operations on the Facility Property. The Reclamation Plan covered active mining  
19 and rock stockpiling areas, but did not include certain conveyors, processing areas, access roads or  
20 stockpiles. Omitting these features was not unusual, in light of how SMARA was interpreted in  
21 1985.

22 23. The Facility has maintained its Reclamation Plan and a financial assurance in full  
23 force and effect since 1985, and accordingly it has been included on the AB 3098 List at all times  
24 beginning when the list was originally published in 1992.

#### 25 COMPLIANCE HISTORY

26 24. By 2006, after 67 years of continuous operation, the Facility had achieved a  
27 compliance record of never receiving a SMARA violation for mining operations from either the  
28 state or the Facility's lead agency. This included a period of thirty years of operation under



1 SMARA, and more than 20 years under its approved Reclamation Plan.

2 25. On September 22, 2006, in a letter to the County, the DOC contended for the first  
3 time that the Reclamation Plan was inadequate. The letter advised that the Reclamation Plan was  
4 inadequate because it did not cover all mining operations on the Facility Property. The DOC made  
5 such claims despite evidence that mining activities in 2006 were in substantially the same location  
6 as in 1985, and despite regular reports to the DOC regarding the Facility's operations after 1992.  
7 The DOC offered no explanation for its 20-year delay in raising its concern or why its views had  
8 not been presented years earlier. The DOC's claims were not, Petitioners believe, a legally valid  
9 interpretation of SMARA or the Reclamation Plan.

10 26. The DOC's September 22, 2006 letter advised that unless the County took  
11 "appropriate action" to require the Facility to correct these inadequacies, the DOC would pursue  
12 certain procedural remedies that would allow it to assume direct enforcement authority over the  
13 Facility, and effectively replace the County as lead agency over the Facility for enforcement  
14 purposes. (See Pub. Resources Code, § 2774.1(f).)

15 27. The County responded to the DOC by initiating an enforcement action against the  
16 Facility. On October 10, 2006 the County issued a notice of violation ("2006 NOV") that directed  
17 the Facility to file an amended reclamation plan, and included a compliance schedule with various  
18 dates to be met to process the amended plan expeditiously. The schedule included a December 30,  
19 2007 target for approving the amended plan. This was an aggressive target because environmental  
20 review under the California Environmental Quality Act ("CEQA") for this size of project typically  
21 requires a substantial time to complete. The Facility nonetheless agreed to work cooperatively  
22 with the County to meet this schedule, while reserving its rights to challenge it.

23 28. At no time after the 2006 NOV did the DOC make any attempt to assume direct  
24 enforcement authority over the Facility, indicating that the DOC was satisfied by the enforcement  
25 action.

26 29. On January 5, 2007, the Facility presented the County with an amendment to the  
27 Reclamation Plan, accompanied by voluminous technical reports and supporting documents (the  
28 "Amendment"). The County immediately began processing the Amendment in order to meet the

1 December 30, 2007 approval date.

2 30. On May 18, 2007, however, the DOC issued a letter that affected the compliancé  
3 schedule. The DOC contended that the geotechnical analysis supporting the Amendment was not  
4 complete because it relied on ongoing fieldwork to support certain technical assumptions. The  
5 DOC asserted that, until further investigation occurred, the Amendment was legally incomplete  
6 and could not be processed: "We recommend that the Amendment be re-submitted along with all  
7 supporting geotechnical evaluations when they have been completed."

8 31. The practical effect and meaning of the DOC's May 18, 2007 comments was  
9 abundantly clear. Any further geotechnical investigation invariably required a substantial amount  
10 of fieldwork and technical modeling, which could not be completed in the time period allowed by  
11 the 2006 NOV compliance schedule. Thus, complying with the DOC's recommendations would  
12 make it impossible to meet the County's December 30, 2007 schedule for approving the  
13 Amendment.

14 32. In furtherance of the County's and Facility's ongoing cooperation with the DOC, the  
15 Facility proceeded to hire geotechnical experts to prepare a scope of work and schedule for further  
16 study needed to meet the DOC's recommendations. The results indicated that approximately two  
17 years of geologic drilling, fieldwork, testing and modeling would be needed. Between November  
18 2007 and April 2008, the Facility and County independently met with the DOC on multiple  
19 occasions to discuss the proposed schedule. The DOC confirmed in April 2008 that the time  
20 estimate to prepare a reclamation plan amendment was reasonable.

21 33. Based on the DOC's concurrence with the time estimate, the County prepared a  
22 revised compliance schedule which reflected the time needed for that geotechnical investigation,  
23 and issued the schedule on May 21, 2008. Under this schedule, the Facility's geotechnical experts  
24 would complete their investigation and study over a two-year period ending on December 1, 2009.  
25 The results would be incorporated in the Amendment, with the Amendment to be resubmitted in  
26 February 2010. The revised compliance schedule targeted September 2011 to approve the finish  
27 the CEQA process and approve the Amendment, and also recognized that the schedule "may be  
28 subject to change depending on the complexity of the environmental review." In April 2009, the

1 County granted a short three-month extension to this schedule, which extended the submittal date  
2 to May 2010, and the approval date to December 2011. The Facility mobilized its experts and  
3 commenced the geotechnical investigation to meet these dates.

4 34. In May 2010, the Facility resubmitted the Amendment, on schedule.

5 35. At no point in time whatsoever has the Facility ever failed to meet a target date  
6 established by the compliance schedule for correcting the violations listed in the 2006 NOV. The  
7 Facility continues to be in full compliance, and is working as quickly as possible to ensure that the  
8 reclamation plan amendment is approved on time.

#### 9 **REMOVAL FROM THE AB 3098 LIST**

10 36. On July 20, 2011, the DOC abruptly gave notice that it intended to remove the  
11 Facility from the AB 3098 List in 30 days ("30-Day Notice"). The DOC justified its issuance of  
12 the 30-Day Notice based on the Facility's failure to obtain approval of an amended Reclamation  
13 Plan.

14 37. The DOC's 30-Day Notice dismissed the fact that the Facility was satisfying the  
15 compliance schedule issued by the County, the lead agency under SMARA. The 30-Day Notice  
16 also made no mention of the DOC's own role in extending the compliance process, first through  
17 its comments in 2008 that the Amendment was incomplete and required further work, and second,  
18 by affirming the reasonableness of the compliance schedule in 2009 and thereafter remaining  
19 silent while it was kept laboriously apprised of the Facility's good progress.

20 38. The 30-Day Notice also did not attempt to address its fundamental conflict with  
21 California law. Public Contract Code sections 10295.5 and 20676 authorize mining operations to  
22 supply material to public projects by having an approved reclamation plan and financial assurance  
23 and the Facility has both. Nowhere in SMARA or the Public Contract Code is there authority for  
24 delisting a mining operation based on an alleged violation issued by the lead agency. In fact,  
25 violations of SMARA are covered by a different set of procedures which do not authorize AB  
26 3098 List removal as a remedy. (Pub. Resources Code, § 2774.1.)

27 39. Petitioners have attempted to persuade the DOC to rescind the 30-Day Notice. In  
28 particular, Lehigh met with the DOC to emphasize that AB 3098 List removal for the Facility was

1 a highly unusual action and is not supported by state law. Lehigh also explained that the only way  
2 to updated the Reclamation Plan is to continue processing the Amendment, which is currently  
3 undergoing environmental review and being processed as rapidly as possible given the complexity  
4 of CEQA and public involvement. The DOC has refused, however, to reverse its position.

5 40. Damage to Petitioners has occurred and will continue as a result of the 30-Day  
6 Notice. The 30-Day Notice is a public document that has circulated in the construction materials  
7 market and calls in question the Facility's ability to supply the material needs of current and future  
8 state and government projects. The 30-Day Notice has, on information and belief, resulted in and  
9 will continue to result in lost business and employment for Lehigh and Hanson.

10 41. To the contracting and building industry, the DOC's action would require  
11 construction companies to locate a substitute source of material that is comparable in quality and  
12 meets the specifications for public projects. The process for locating, testing and approving  
13 substitute materials is difficult and time consuming, and will result in significant project delays,  
14 higher materials costs, and pressures on employment. It also exposes contractors to liquidated  
15 damages claims, which in the case of large public-sector projects can be significant.

16 42. To workers in the construction industry, many of whom are already struggling in the  
17 economy, the DOC's action also will have an immediate, direct and catastrophic economic  
18 impact. Trucking and other trades rely on the flow of materials from the Facility, which could be  
19 significantly curtailed. Finding a substitute supply for the Facility's materials necessarily means  
20 importing materials from out of the area to meet local needs. This sends jobs out of the area and  
21 increases the local costs of construction, which in turn means fewer projects and jobs for  
22 construction workers.

#### 23 **DRAFT AB 3098 REGULATIONS**

24 43. Concurrently with the DOC's action to remove the Facility from the AB 3098 List,  
25 the DOC also has proposed new state regulations for administering the AB 3098 List. The draft  
26 regulations include detailed procedures to ensure that mining operations threatened with removal  
27 from the AB 3098 List are given due process, including a notice, hearing and right to appeal. In a  
28 striking inconsistency, the Facility has been denied the same due process protections that the

1 DOC's own draft regulations contain.

2 44. The draft AB 3098 regulations are even more perplexing because they would,  
3 according to one recent version developed by the DOC, authorize a mining operation in violation  
4 of SMARA to remain on the AB 3098 List by working under a schedule for compliance issued by  
5 the lead agency. This process, which is allowed by SMARA and consistent with the DOC's  
6 longstanding prior administration of the AB 3098 List, is the same process the Facility has  
7 followed.

### 8 FIRST CAUSE OF ACTION

9 (Violation of Due Process)

10 45. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 44 of  
11 the Petition, inclusive, as though set forth in full.

12 46. From at least 1939, the Facility has supplied materials used in government  
13 construction projects. Government construction projects have comprised a significant part of the  
14 Facility's business during all periods of the Facility's existence, including the present. The  
15 Facility has always been allowed to supply material to such projects under state law, including  
16 since 1992 when the AB 3098 List was first published, because the Facility has been continuously  
17 present on that list. The Facility's business has developed through decades of operation, through  
18 decades of market development, and through massive long-term investment.

19 47. The Facility's ability to supply mined materials to state and local government  
20 projects, together with its status as a mining operation on the AB 3098 List, are legally protected  
21 rights and interest that cannot be stripped or abridged without due process of law.

22 48. The DOC has taken actions to remove the Facility from the AB 3098 List. Such  
23 actions have and will continue to unlawfully deprive Lehigh and Hanson of legal property rights  
24 and interests. Such deprivation was and continues to be made without due process in violation of  
25 the protections granted under the federal and state Constitutions, including but not limited to the  
26 Fifth Amendment and Fourteenth Amendment of the federal Constitution, and Article I, section 7  
27 of the state Constitution. The DOC's unlawful actions are ongoing and will continue to deprive  
28 Lehigh and Hanson of their legal property rights and interests until enjoined by an order of this

1 Court.

2 **SECOND CAUSE OF ACTION**

3 (Writ of Mandate – AB 3098 List Removal)

4 49. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 48 of  
5 the Petition, inclusive, as though set forth in full.

6 50. Under Code of Civil Procedure section 1085, the DOC has a clear, present and  
7 ministerial duty to include the Facility on the AB 3098 List, and authorize the Facility to sell  
8 mined material to state and local government projects, if the Facility has met the prerequisites  
9 established by law. Petitioners, and each of them, have a clear, present and beneficial right to the  
10 DOC's performance of that duty.

11 51. The DOC has failed to perform its clear, present and ministerial duty by taking  
12 actions to remove the Facility from the AB 3098 List, although the legal conditions for the  
13 Facility to be present on the list have been met. Such actions are not authorized by SMARA, and  
14 directly contradict Public Contract Code sections 10295.5 and 20676. The DOC's actions are also  
15 directly contrary to draft regulations by the DOC which recognize that mining operations have the  
16 right to due process notice and a hearing before AB 3098 List removal.

17 52. As a proximate result, Petitioners have been and will continue to suffer the  
18 following: deprivations of important rights and interests; damages as a result of their inability to  
19 supply material for state and local government projects; injury, harm and exposure to liability as a  
20 result of construction delays and heightened construction costs; and loss of employment within  
21 the construction industry.

22 53. Petitioners have no plain, speedy or adequate remedy at law other than the relief  
23 requested. Petitioners have performed all conditions precedent to this lawsuit, to the extent that  
24 any exist, and have exhausted any required administrative remedies through, among other things,  
25 repeated communications to the DOC to avoid AB 3098 removal.

26 **THIRD CAUSE OF ACTION**

27 (Writ of Mandate – Violation of SMARA)

28 54. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 53 of

1 the Petition, inclusive, as though set forth in full.

2 55. Under Code of Civil Procedure section 1085, the DOC has a clear, present and  
3 ministerial duty to follow Public Resources Code section 2774.1, which gives mining operations a  
4 "reasonable" time to correct violations and achieve compliance. Petitioners have a clear, present  
5 and beneficial right to the DOC's performance of that duty.

6 56. The DOC has failed to perform its clear, present and ministerial duties by taking  
7 steps to remove the Facility from the AB 3098 List without allowing a reasonable time to achieve  
8 compliance, and further, by trying to circumvent the lead agency's determination of a reasonable  
9 time as applied to the circumstances and as embodied in the compliance schedule.

10 57. As a proximate result of the DOC's actions, Petitioners have and will continue to be  
11 irreparably injured, harmed and damaged as stated herein.

12 58. Petitioners have no plain, speedy or adequate remedy at law other than the relief  
13 requested. Petitioners have performed all conditions precedent to this lawsuit, to the extent that  
14 any exist, and have exhausted any required administrative remedies through, among other things,  
15 repeated communications to the DOC to avoid AB 3098 removal.

#### 16 **FOURTH CAUSE OF ACTION**

17 (Arbitrary or Capricious Action)

18 59. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 58 of  
19 the Petition, inclusive, as though set forth in full.

20 60. The Facility has been operating within substantially the same location, and in  
21 substantially the same manner, since 1939 or earlier. In particular, the Facility operations in 2006,  
22 when the DOC first identified alleged violations of the Reclamation Plan, were virtually identical  
23 to the Facility operations in March 1985 when the Reclamation Plan was approved, to the Facility  
24 operations today. The Facility also has been working since 2006 under a compliance schedule set  
25 by the County of Santa Clara, which has been maintained and updated with the DOC's express  
26 concurrence, and the Facility has met all deadlines.

27 61. No changes have occurred in the location or manner of quarrying operations to  
28 justify the Facility's removal from the AB 3098 List at this time, and the Facility continues to

1 adhere to the compliance schedule. Accordingly, the DOC's action is arbitrary, capricious and  
2 entirely lacking in legal or evidentiary support under Code of Civil Procedure section 1085 and  
3 applicable law.

4 62. As a proximate result of the DOC's actions, Petitioners have and will continue to be  
5 irreparably injured, harmed and damaged as stated herein.

6 63. Petitioners have no plain, speedy or adequate remedy at law other than the relief  
7 requested. Petitioners have performed all conditions precedent to this lawsuit, to the extent that  
8 any exist, and have exhausted any required administrative remedies through, among other things,  
9 repeated communications to the DOC to avoid AB 3098 removal.

#### 10 FIFTH CAUSE OF ACTION

#### 11 (Underground Regulation)

12 64. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 63 of  
13 the Petition, inclusive, as though set forth in full.

14 65. The DOC has never formally adopted regulations pursuant to the California  
15 Administrative Procedures Act (Gov. Code, § 11340 *et seq.*) for administering the AB 3098 List.  
16 The DOC has, however, adopted an unwritten rule of general application that an alleged SMARA  
17 violation is legal grounds for removing a mining operation from the AB 3098 List, although the  
18 operation may have a validly approved reclamation plan and financial assurance. This rule  
19 constitutes a "regulation" within the meaning of the California Administrative Procedures Act,  
20 and an "underground regulation" as commonly understood in the law.

21 66. This unwritten rule is a legal interpretation of SMARA and the Public Contract  
22 Code, but does not represent the only legally tenable interpretation of the relevant statutes. To the  
23 contrary, the DOC's rule is not supported by the plain language of those statutes, or the legislative  
24 history.

25 67. The DOC's actions to remove the Facility from the AB 3098 List were made in  
26 furtherance of this unwritten rule. On information and belief, the DOC has applied this rule not  
27 only to the Facility but also to other similarly situated mining operations.

28 68. The DOC is unquestionably aware that its unwritten rule is an underground



1 regulation which has not been validly adopted as required by the Administrative Procedures Act.  
2 The draft AB 3098 regulations are compelling evidence of this because they would perform the  
3 same function as the DOC rule which is already being practiced. Indeed, if existing state law was  
4 so clear as to permit the Facility's removal from the AB 3098 List, there would be no need for  
5 regulations as the DOC has proposed.

6 69. The DOC did not follow the rulemaking process set forth in the California  
7 Administrative Procedures Act before adopting this rule. Petitioners are thus entitled to injunctive  
8 relief barring the implementation of the rule, and to a judicial declaration that the rule is an invalid  
9 regulation because the rulemaking process under the California Administrative Procedures Act  
10 has not been followed.

#### 11 SIXTH CAUSE OF ACTION

#### 12 (Declaratory Relief)

13 70. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 69 of  
14 the Petition, inclusive, as though set forth in full.

15 71. Petitioners contend that the Facility has met all of the legal requirements to supply  
16 mined materials to state and local government projects and to be on the AB 3098 List. Petitioners  
17 contend that, in removing the Facility from the AB 3098 List, the DOC failed to comply with state  
18 law, violated due process and legal property rights, and established a regulation without following  
19 the necessary rulemaking process.

20 72. Petitioners are informed and believe that the DOC disputes these contentions, and  
21 that the DOC believes it has correctly interpreted the legal requirements pertaining to the AB 3098  
22 List, and has acted according to law in removing the Facility from the AB 3098 List.

23 73. An actual and present controversy has arisen and exists between Petitioners, who  
24 contend that the DOC's interpretation and implementation of the AB 3098 List is contrary to law,  
25 and the DOC which, on information and belief, believes it has acted according to law in respect to  
26 the matters described above.

27 74. Petitioners seek a judicial declaration of their legal rights and the DOC's duties,  
28 including but not limited to a judicial declaration of the following: (a) that the DOC lacked a valid

1 legal basis for removing the Facility from the AB 3098 List; (b) that the Facility has a legal right  
2 to be present on the list; (c) that the DOC did not afford the Facility due process before removing  
3 the Facility from the list; (d) that the removal of the Facility from the list was a violation of  
4 Petitioners' legal rights; and (e) that the DOC adopted a regulation for the administration and  
5 implementation of the AB 3098 List without following a lawful rulemaking process.

6 75. Such a judicial declaration is necessary and appropriate at this time in order for the  
7 parties to ascertain their rights, duties and obligations under California law, the California  
8 Constitution and the United States Constitution.

9 **SEVENTH CAUSE OF ACTION**

10 (Injunctive Relief)

11 76. Petitioners hereby reallege, and incorporate by reference, Paragraphs 1 through 75 of  
12 the Petition, inclusive, as though set forth in full.

13 77. The Facility is the San Francisco Bay Area's largest producer of construction  
14 materials. This includes providing over half of the cement used in the San Francisco Bay Area  
15 and approximately two-thirds of the cement used in the County of Santa Clara. The markets for  
16 construction materials for state and local government projects depend on this supply and will be  
17 adversely affected if it was shut down. Moreover, such a shutdown would affected between 150  
18 and 200 people employed by the Facility, and likely thousands of construction workers, truck  
19 drivers, and others that depend on these materials. Further, because of the nature of the markets,  
20 even a temporary interruption in supply will result in a loss of business for the Facility that may  
21 never return.

22 78. Petitioners have no plain, speedy or adequate remedy at law other than a temporary  
23 restraining order and preliminary and permanent injunction to prevent the extreme damage which  
24 would result from the DOC's actions.

25 **PRAYER**

26 WHEREFORE, Petitioners pray for judgment against Respondents and Defendants, and  
27 each of them, as follows:

28 1. For a writ of mandate directing Respondents and Defendants to not to enforce, or.

