



Midpeninsula Regional Open Space District

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June 22, 2012

Mr. George Shirakawa, President of the Board and
Members of the Board of Supervisors for Santa Clara County
70 West Hedding Street
San Jose, CA 95110

RE: Appeal of Permanente Quarry Reclamation Plan Amendment and of Environmental
Impact Report Certification

President Shirakawa and Members of the Board,

The Midpeninsula Regional Open Space District (District) hereby appeals the Santa Clara County Planning Commission's June 7, 2012 approval of the Lehigh Permanente Quarry Reclamation Plan Amendment (Project) and related Environmental Impact Report certification. This is a bit awkward, as we are not accustomed to challenging the administrative decisions of sister agencies, we have great respect for the County, its leadership and staff, and the challenging nature of this matter. We do not take this step lightly.

We do, however, have serious concerns about the Project's impacts on the environment in this region, and specifically of course, the impacts on Rancho San Antonioⁱ -- the most heavily used unit in our system -- the roughly a half-million visitors received there per year, and the 30 District employees regularly assigned there. We are concerned mostly about water and air quality, visual impacts and related recreational value diminution, as well as the underlying issues of hazardous materials, vested rights, related EIR baseline identification, and the very stunted and one-sided economic views provided by Lehigh as a rationale for the findings of overriding considerations. As laid out below, and in our previous comments submitted in the prior proceedings on this matter,ⁱⁱ these impacts have not been adequately analyzed or mitigated. We ask your assistance in correcting those errors.

Our goal in this appeal is to be sure these effects on the public, our employees, and the environment are dealt with to the greatest extent possible. We recognize the economic importance of any business in these difficult times, and this is not an attempt to curtail the quarry or its related cement plant operations. But the environmental issues must be dealt with, and Lehigh must be held to account for the effects of its business decisions.

The District actively participated in the Reclamation Plan Amendment (Amendment)/ Environmental Impact Report (EIR) review process. Therefore, none of the issues summarized below are new, but some reflect recently expanded understanding and data for your consideration.

One necessarily new matter, though, is the appeal also filed by Lehigh. The District requests that the Board of Supervisors decline retreating from any of the conditions and provisions objected to by Lehigh in their appeal, for all of the reasons laid out in the previous record supporting the inclusion or exclusion of those conditions and provisions, as approved by the Planning Commission.

Finally, before getting into the detailed summary of the District's issues on appeal, we also respectfully request that the hearing on this matter be rescheduled from the present date, June 26, 2012 -- presently just one working day after the closure of the appeal period and the date of this appeal -- to allow time for all the interested parties, including the District, to prepare for the hearing.

Visual Resource Degradation, Recreational Use and Value Diminution, related Scenic Easement

The EIR does not adequately address alternatives that would avoid the impacts associated with the dumping of quarry waste at the area known as the East Materials Storage Area (EMSA), and the permanent storage immediately adjacent to Rancho San Antonio County Park and the District's Open Space Preserve. The EIR also did not adequately consider or analyze the Permanente Ridge Scenic Easement (Scenic Easement), which has already been impacted by quarry-related landslides. This Scenic Easement was mitigation for significant impacts in the original 1986 Reclamation Plan and the County Mitigated Negative Declaration to support the 1986 Reclamation Plan. This problem was carved out as a legal matter and not addressed as part of the Project approval or CEQA mitigations. Left unaddressed, this adds to the unanalyzed cumulative and significant visual impacts.

Water Quality

The conclusions in the EIR and Statement of Overriding Considerations regarding the infeasibility of water treatment measures are not adequately supported. The EIR documents ongoing selenium pollution impacts from quarry operations to Permanente Creek. The EIR also provides that the Project will add additional substantial sources of selenium (via the EMSA), and volume of selenium (via quarry pit deepening and additional groundwater interception and storage within the quarry pit). Additionally, the Project does not meet the water quality protection mandates of Surface Mining and Reclamation Act of 1975 (SMARA) per the San Francisco Bay Regional Water Quality Control Board nor the applicable requirements of the Clean Water Act. Yet the EIR and Statement of Overriding Considerations conclude that water treatment is infeasible, based on wildly overstated and one-sided cost estimates provided by Lehigh. Given the Project's significant impacts to water quality, incorporation of water treatment measures and the Financial Assurance required under SMARA must be incorporated to mitigate such impacts.

Hazardous Materials

The EIR does not adequately address the potential for hazardous materials in soils, building remnants, and groundwater associated with the former metals manufacturing facilities, operated from the late 1930's through 1993, within the Project footprint (the EMSA), and adjacent areas.

The Project proposes to excavate/disturb substantial areas of soil associated within the former metals facilities area that is located within the Project footprintⁱⁱⁱ. However, the EIR does not contain any investigation or characterization of these soils within this portion of the Project area. This appears to have arisen from a mischaracterization of many of the chemical processing outbuildings associated with the former metals facilities area as not being under the magnesium or aluminum plant buildings. What is not addressed is the fact that all the other buildings, which ARE under the Project footprint, had historic uses that are highly indicative of the presence of hazardous materials such mercury, PCBs, cadmium and selenium.

A Preliminary Assessment Report (PAR) for the Kaiser Cement Corp. Permanente Plant Cupertino, California, prepared for the U.S. EPA, Region 9, was just completed in May 2012, between Planning Commission hearings on the EIR. (Copy attached hereto.) The PAR documents mercury, PCB's, cadmium, and selenium detections at elevated

concentrations in Project site soils. The PAR maps locations of interest within the footprint of the EMSA portion of the Project (Figures 2 and 3). These locations include an unlined dump associated with the former aluminum factory, known as the Upper Level Landfill, where toxic kiln bricks and cement kiln dust were disposed. Additionally, the Dry Canyon Storage Area is located within the EMSA footprint. PCB's were detected in the Dry Canyon Storage Area at a maximum concentration of 400 mg/kg, where the Regional Screening Level for industrial soil is 0.74 mg/kg. Figure 3 notes "Former Research Building Complex" within the proposed footprint of the EMSA. Here, mercury levels in soil ranged from 27-346 mg/kg. For a comparison, of 37 sites tested for soil contamination within Almaden Quicksilver County Park, the median mercury levels was found to be only 84 mg/kg, associated with the New Almaden Mercury Mines.

The PAR documents the presence of hazardous materials within the Project area. Yet, the presence of hazardous materials and potential, substantial disturbance within the EMSA was not presented or analyzed in the EIR. Moreover, the Project's related massive grading disturbance (proposed and ongoing) within this area of known hazardous materials is not discussed or analyzed in the PAR.

The EIR states that hazardous site databases were consulted in its preparation and that no database listed the quarry as a known potentially hazardous site. However, the PAR states that between 1984 and 1992 soils and soil and groundwater samples were collected from the Kaiser Aluminum facility, including the PCB sample mentioned above. The Kaiser Cement Plant was identified as a potential hazardous waste site and was entered into the EPA's CERCLIS database on June 1, 1981. In January 1986, the Department of Toxic Substances Control (DTSC) completed a Preliminary Assessment of the Kaiser Cement site per the direction of the EPA, and noted the disposal of toxic waste kiln bricks on the former Kaiser Aluminum facility.

The potential toxic legacy associated with the former metals facilities within the Project footprint existed in the record prior to the preparation of the EIR. Yet, it was not included or analyzed in the EIR. These areas, which are adjacent to County and District recreation facilities, are already being disturbed and would be subject to further, substantial disturbance upon implementation of the Project.

Economic Analysis

The economic analysis utilized to support the Statement of Overriding Consideration is inadequate and substantially flawed. The EIR does not include an appropriate economic analysis. The Project's potential economic benefit is the only information presented and

relied upon by the Planning Commission in the Statement of Overriding Consideration. The Project's environmental costs associated with: substantial scenic degradation, impacts to the Permanente Ridge Scenic Easement, ongoing and future water pollution, recreational impacts and air/health impacts are not quantified or analyzed. The EIR's economic analysis does not factor in the economic impact attributable to the Project's environmental costs.

Although the economic benefit study relied upon by the Planning Commission includes the economic benefit of the cement plant operation, that benefit is already realized by the cement plant's current operations, and not a part of this approval. Per Lehigh, the cement plant is capable of producing cement at the plant regardless of having the Permanente Quarry. This has recently been substantiated by Lehigh's stated recent use of imported limestone from Canada in their cement production. Thus, the economic benefits of the cement plant can be realized independent of the quarry. Moreover, the EIR repeatedly states that the cement plant is not a part of the Project. An appropriate economic analysis must only include the economic benefit of the Project (quarry operation), and quantify and factor in the environmental impacts noted above.

Air Quality

The air quality assessments included in the EIR are inadequate and remain a significant concern for the District. Specifically, the District questions whether the models and data input into these models used to reach the conclusions presented were adequate. The District will defer to the questions and comments raised by others related to the specifics of the models and model inputs, specifically including those raised in the appeal by "Quarry No." Additionally, the southeast portion of the District's Rancho San Antonio Open Space Preserve (adjacent to the north quarry boundary) has been identified as a "point of maximum impact" in a number of studies presented in the AMEC Geomatrix Health Risk Assessment referenced in the EIR, and an area exceeding the "Regulatory Notification Level." As noted in Figure 6 in that document, a Regulatory Notification Level is triggered where the predicted cancer risk exceeds the trigger level (1×10^{-6}), prompting a public notification requirement for predicted risks, arising on District lands from Project operations in 2013.

For all of these reasons, and those previously noted in our comment letters, the District remains very concerned with the Project's impact on air quality at our shared property boundary and at our nearby Foothills Field Office. A continuous air quality monitoring station must be established and operated adjacent to the shared property boundary to

monitor existing and future air quality. The cumulative impact of quarry operations and the cement plant must be adequately analyzed in the EIR.

EIR Baseline

The EIR established baseline of 2007 is inadequate for the EIR's environmental impact analysis. The 2007 date immediately follows the initiation of unpermitted dumping at the EMSA by Lehigh/ Hanson, so the cumulative impacts, alternatives analysis, and the analysis of visual impacts, water quality, air quality and recreation are all skewed with the grandfathered presence of the recently initiated EMSA. Rather than using the arbitrary 2007 date as a baseline, the more appropriate baseline should be 1986 – when the original Reclamation Plan (that is now the subject of the proposed Amendment) was approved, including quarry and waste storage area dimensions of record.

Cement Plant

The EIR is also substantially flawed because it does not include the cement plant as part of the Project. Lehigh initiated dumping in the EMSA. The former metals manufacturing facility, and cement plant have been investigated jointly as related units by other agencies (EPA, RWQCB, DTSC), and shared in the dumping of manufacturing facilities waste within the former manufacturing "plant" facilities' footprint. Lehigh's recent dumping of quarry waste at these former plant facilities has blurred the lines of separation between the manufacturing plant facilities and the quarry operations. Additionally, the economic justification for the Statement of Overriding Considerations as the basis for approval of the Project despite significant and unavoidable environmental impacts relied heavily on the economic benefit derived from the cement plant. Accordingly, the District contends that the EIR is substantially flawed for not including the cement plant as a part of the Project.

Diminution of Recreational Values

The recreational values of the Rancho San Antonio Open Space Preserve have been substantially diminished by Lehigh's ongoing operations and will be increasingly diminished with the Project's implementation. The EIR does not adequately address these impacts, nor does it contain any assessment or quantification of the economic value of those lost public benefits. Per our former comments, recreational impacts and visual impacts are inseparable in this setting. The EIR is inadequate because it does not adequately address this cohesive recreational value, finding it insignificant, giving it short shrift and subsuming it as a part of the general dust, noise and aesthetics discussions. Further, and glaring by omission, the EIR does not quantify these impacts

to recreation and does not mitigate for it, though it is mitigable with project design changes. In plain English, unlike more generalized visual, noise, and air quality impacts, those relating to adjacent recreational uses are heightened and focused. The affected outdoor uses are heavily in demand for public use, and people are less likely to take enjoyment and related benefits from trails where the views are dominated by barren mountains of tailings and dust. These impacts warrant proper analysis and mitigation. (See *Ocean Harbor House Homeowners Assoc. v. Calif. Coastal Comm'n* (2008) 163 Cal.App.4th 215.)

Alternatives Analysis

The Alternatives Analysis in the EIR is inadequate and contains flawed assumptions. Assumptions are made in a manner to force the selection the preferred alternative and dismiss other alternatives. This approach is most egregious for the no-project alternative, wherein reclamation of the EMSA is delayed to support a conclusion of greater water quality impact (by prolonging the reclamation timeline) under that alternative. This is a straw man, because a legitimate lesser impact alternative would include an acceptable timeline for reclamation. The analysis is also inadequate because it fails to address the fact that the EMSA, which is the source of the selenium, is permitted to grow extraordinarily larger under the preferred alternative presented. The Alternatives Analysis is also flawed in that it excludes the a lesser impact alternative that would utilize the existing rail line as a feasible alternative to haul away quarry waste, which would have reduced various of the impacts, and avoided the “significant and unavoidable” impacts to water quality, and scenic resources

Vested Rights

We are concerned that the vested rights issue may be improperly driving the County into mistakenly concluding that it is compelled to approve the Project as proposed, making findings of overriding considerations and giving approvals that it might not prefer to give without further analysis and mitigation. We firmly believe that the Board of Supervisors should not be unduly constrained by its erroneous previous decision to grant Lehigh a legal non-conforming use (vested right) to the area known as the East Materials Storage Area (EMSA). EMSA is now being utilized by Lehigh to dump a significant volume of quarry waste. However, this area is well-documented in the record as a metals manufacturing facility, adjacent to the cement plant facility. The Board may have been misled by submittals from Lehigh, including grading volumes associated with metals plant facilities grading, and cement plant and metals plant waste

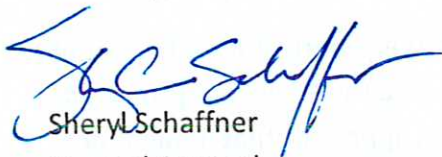
disposal, which appear to have been misrepresented as quarry-related waste. Although Lehigh currently possesses a vested right to the EMSA, this right appears to have been granted by the Board based on false pretenses. Moreover, Lehigh's vested rights to the EMSA were a critical factor cited by the Planning Commissioners in approving the EIR. Lehigh's acquisition of vested rights based on what appear to have been false pretenses undermines the entire CEQA analysis. The vested rights issue should be resolved prior to the County making a final decision on the Project, to ensure that it is based on an accurate understanding of the regulatory and environmental setting.

Summary

The District respectfully requests that the Santa Clara County Board of Supervisors overturn the Planning Commission approval of the EIR, mitigation monitoring program, statement of overriding considerations, and conditions of approval. The EIR should be revised to adequately address its many deficiencies, and recirculated for review and comment. Additionally, ongoing quarry disturbance and dumping within the polluted EMSA must be suspended until properly analyzed given the potential impacts to quarry workers, nearby County and District recreation facilities and the neighboring communities.

The District also respectfully requests that the Board deny the Lehigh appeal. If allowed the necessary time for a full and fair hearing on this matter, we could submit a more detailed rationale for that opposition.

Sincerely,



Sheryl Schaffner
General Counsel

Midpeninsula Regional Open Space District

Exhibits:

MROSD letters, and references therein.

May 31, 2011 from Matt Baldzikowski,

May 23, 2012 from Matt Baldzikowski,

May 17, 2011 from Matt Baldzikowski

February 17, 2011 from Matt Baldzikowski

February 3, 2011 from Stephen E. Abbors

May 21, 2010 from Ana Ruiz

June 20, 2007 from Matt Baldzikowski.

Preliminary Assessment Report Kaiser Cement Corp. Permanente Plant Cupertino, California. EPA ID No: CAD009109539. May 2012. Prepared for U.S. Environmental Protection Agency, Region 9.

Remedial Site Assessment Decision- EPA Region IX. 5/31/2012

ⁱ Rancho San Antonio County Park and Open Space Preserve. As the Board is aware, the District manages these two properties for public use as one unit, under and an agreement with the County.

ⁱⁱ The previous comments on this Project are attached for your convenience as exhibits.

ⁱⁱⁱ As the District previously commented, prior mapped metals facilities buildings within the Project footprint include: main laboratory, foundry/ research machine shop, compressor building-transformers, electrical building, switch house-substation, hydrogen building, nitrogen building, batter building, briquette building, electrical storage building, and an undefined storage building.

