

County of Santa Clara

Department of Planning and Development
Planning Office

County Government Center, East Wing, 7th Floor
70 West Hedding Street
San Jose, California 95110-1705
(408) 299-5770 FAX (408) 288-9198
www.sccplanning.org




MEMORANDUM

Date: January 24, 2011

To: **President Dave Cortese and Members of the Board of Supervisors**

Jeffrey V. Smith, County Executive
Gary Graves, Deputy County Executive
Sylvia Gallegos, Deputy County Executive

From: Gary Rudholm, Senior Planner, Planning Office 

Re: **Responses to comments made during the Public Comment portion of the Board of Supervisors Meeting on January 11, 2011, related to Lehigh Southwest Cement Plant and the Permanente Quarry**

During the Public Comment portion of the January 11, 2011, meeting of the Board of Supervisors 15 speakers made statements to the Board regarding the Lehigh Southwest Cement Plant and the reclamation plan amendments currently under review by the Planning Office for the adjacent Permanente Quarry. Staff has prepared the following responses to questions and comments regarding factual issues known to County staff, for your information.

SPEAKER ONE: Chung Lee

"Good morning. I'm Chung Lee. I have a commenting on Lehigh Cement Plant. I hope we don't forget that all the decisions or discussion needs to be based on protecting the public health and environment and that's why all the laws and regulations exist. I'm holding a letter from Santa Clara County Medical Association to E. P. A., September 2, 2009 signed by William Parish JR. I'd like to read one paragraph. "Santa Clara County is home to the Leigh Southwest Cement Plant in Cupertino, California. One of the nation's largest emitters of mercury and other hazardous air pollutants. We believe there should be no exemption for those plants that run, burn high mercury limestone. If I could, I could submit this letter to you."

Response:

A public hearing is scheduled before the Board of Supervisors at 1:30 PM on February 8, 2011, to determine whether and to what extent a legal non-conforming use(s) exists on the site of the Permanente Quarry located on lands owned by Heidelberg Cement, Incorporated, and operated by Lehigh Southwest Cement Company. The cement plant is not the subject of the hearing, nor is it the subject of the reclamation plan amendments under review by County staff and its

consultants. The determination by the Board at that hearing will not be a land use authorization. Rather, for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments. Both Reclamation Plan Amendments are subject to CEQA and the preparation of Environmental Impact Reports.

Staff is so far unable to confirm whether the cement plant is in fact “[o]ne of the nation’s largest emitters of mercury and other hazardous air pollutants.” Staff from the BAAQMD were not aware of a survey that provides such information. Staff is continuing to find a source of information that may have formed the basis for the statement above.

The Cement Plant itself is a separate land use that operates under a use permit originally granted in 1939 (County File No. 173.023). The Cement Plant is subject to compliance with, and not exempt from, laws and regulations implemented by the U.S. EPA, State Water Quality Control Board, California Air Resources Board, and the Bay Area Air Quality Management District, in addition to requirements enforced by the federal Mine Safety and Health Administration, the state Surface Mine and Reclamation Act, and County zoning regulations.

SPEAKER TWO: Cindy Russell

“Good morning. I’m Cindy Russell. I’m Chair of the Environmental Health Committee for Santa Clara County Medical Association, speaking on the behalf of VPA Medical Health the for the Santa Clara County Medical Association and stating their full support for the current E.P.A. very strict mercury guidelines for the Leigh High Cement Plan. And speaking on behalf of myself, I’m very concerned about the past mercury emissions, current emissions and the future planned expansion and vested rights issue for the cement plant. Mercury is a super toxin in any level. For children under the age of 6 months, they cannot excrete it. They do not have the enzymatic capacity to excrete mercury. And thereafter, there are, apparently there is a genetic variation of this thereafter. It is an extreme toxin. The mercury actually deposits in the earth. And in a balance up and down and inorganic and menthol mercury and can pollute for years. It is currently accumulating. I’m asking the Board of Supervisors to find other building methods besides supporting in the South Bay, that use green building methods, that use little cement and I also want to add that as you vest rights for this cement plant your vesting future pollution and think of ways to tax and fine pollution that would help with your issues. Thank you.”

Response:

The vested right of the Cement Plant is not under consideration and will not be the subject of the public hearing scheduled for 1:30 PM on February 8, 2011. Rather, that hearing is to determine whether and to what extent there is a legal right to conduct quarrying activities on lands adjacent to the cement plant and also owned by Heidelberg Cement, Incorporated, and operated by Lehigh Southwest Cement Company. That hearing will not be a land use authorization. Rather, for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments. Both Plan Amendments are subject to CEQA and the preparation of Environmental Impact Reports. The Cement Plant itself is a separate land use that operates under a use permit originally granted in 1939 (County File No. 173.023). The Cement

Plant is subject to compliance with, and not exempt from, laws and regulations implemented by the U.S. EPA, State Water Quality Control Board, California Air Resources Board, Bay Area Air Quality Management District, the federal Mine Safety and Health Administration, the state Surface Mine and Reclamation Act, and County zoning regulations.

SPEAKER THREE: Heidi Finin

“Good morning. I’ve been a resident of Santa Clara County for 30 years. I live in Cupertino. I’ve lived there for 20 years and I’m here to discuss not allowing Leigh to expand their operations at the cement plant. They’ve continued to violate emissions laws for the last several years and I’m just wondering why we would want to expand that and allow them to continue that. I don’t see a sudden change happening. They haven’t been a good neighbor and I don’t think allowing them to expand is going to change that I’d like to encourage you to not permit them to expand.”

Response:

Expansion of the cement plant is not before the Board of Supervisors for consideration. The public hearing scheduled for February 8, 2011, is to determine whether and to what extent there is a legal right to conduct quarrying activities at the Permanent Quarry located on lands owned by Heidelberg Cement, Incorporated, and operated by Lehigh Southwest Cement Company. That hearing will not be a land use authorization. Rather for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments. Both Plan Amendments are subject to CEQA and the preparation of Environmental Impact Reports.

The Cement Plant itself is a separate land use that operates under a use permit originally granted in 1939 (County File No. 173.023). The Cement Plant is subject to compliance with, and not exempt from, laws and regulations implemented by the U.S. EPA, State Water Quality Control Board, California Air Resources Board, Bay Area Air Quality Management District, the federal Mine Safety and Health Administration, the state Surface Mine and Reclamation Act, and County zoning regulations.

SPEAKER FOUR: Janet Geiger

“I’m Janet Geiger and I’ve been a resident of Santa Clara County for 20 years and a resident of California my whole life in the Bay Area, and I won’t say how long that is. The proposed open pit mine is on a highly visible hillside in the Santa Clara Valley view shed. It’s suppose to be preserved per the Santa Clara County Zoning Ordinance. The proposed open pit mine would intensify issues already effecting the public health, safety, and welfare associated with existing Lehigh operation. These issues include pollution of the air with vaporized mercury particulates and poison gases, heavy metal pollution of local waterways and the San Francisco bay, and issues associated with mechanical noise, truck traffic, and blasting. Lehigh doesn’t have a good tract record. The pollution continues in spite of numerous NOV’s from oversight agencies since at least 1996. I’ll skip to the bottom. I understand that the present use is grandfathered in, but a legal and dangerous business is not. If they can’t do it clean they should not be doing it.

Finally, please consider the EMSA and pit mine issues separately and with plenty of public notice. See that the current operations are done properly and recognize that we are well into the 21st century and don't want to open a turn-of-the-century mercury mine in our back yard. Thank you and happy New Year."

Response:

A public hearing is scheduled for 1:30 PM on February 8, 2011, in the Board of Supervisors Chambers to determine whether and to what extent there is a legal right to conduct quarrying activities at the Permanent Quarry located on lands owned by Heidelberg Cement, Incorporated, and operated by Lehigh Southwest Cement Company. That hearing will not be a land use authorization for surface mining operations. Rather, for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments, one for the East Materials Storage Area (EMSA) and the second, a comprehensive reclamation plan for the site. Both Plan Amendments are subject to the California Environmental Quality Act (CEQA), which requires preparation of Environmental Impact Reports.

The legal non-conforming use determination was initially scheduled for November 23, 2010, to consider only the EMSA; however, staff found that it did not have sufficient information and time to research and write a complete report of the facts the Board of Supervisors would need to consider when making the determination. As research progressed, it became clear that there was significant overlap in the information and necessary analyses related to the proposed EMSA Reclamation Plan Amendment and the separate Comprehensive Reclamation Plan Amendment. It is also much more convenient for the Board and the public to hold one hearing addressing all of the Quarry's unincorporated property.

The reference to a notice of violation since 1996 appears to relate to the Notice of Violation and Finding of Violation (NOV/FOV) issued by the U.S. EPA to Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants. As a result of the increase in emissions, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify PSD requirements in its application submitted to the BAAQMD after installing the modifications. The NOV describes enforcement that may be taken by the EPA, including the assessment of penalties, but it does not invalidate the Title V Permit that Lehigh currently holds. The EPA is using the NOV/FOV process to enforce air quality regulations. While the NOV/FOV is being processed by the EPA Lehigh is allowed to continue its operations.

SPEAKER FIVE: Phillip Flagger

"Good morning. My name is Phillip Flagger. I'm a long time Santa Clara County Valley resident, and I'm here to request the Supervisors move their February 8th meeting regarding Leigh Southwest Cement Company closer to Cupertino so that the residents in that area have an opportunity to address this issue and hold it at a time, maybe in the evening, when people have time to be there when they're not at work. Lehigh Cement would like to open a new 200-acre

open pit mine and I believe that would add to whatever they're doing up there would add to the problems of the valley. They started that mine in the time when there were very few people in the valley. Now, the valley is very congested with people, and I think its problems are caused by that operation."

Response:

A public hearing is scheduled before the Board of Supervisors at 1:30 PM on February 8, 2011. This date and time was established by the Clerk of the Board and is based on the availability of all the members of the Board of Supervisors. Rescheduling the hearing to another date, or different time, or different location was considered and determined not to be feasible.

The proposed new pit mine is not the subject of the public hearing scheduled for February 8, 2011. Rather, that public hearing has been scheduled to determine whether and to what extent there is a legal right to conduct quarrying activities at the Permanent Quarry located on lands owned by Heidelberg Cement, Incorporated, and operated by Lehigh Southwest Cement Company. That hearing will not be a land use authorization. Rather for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments, one for the East Materials Storage Area and the second, a comprehensive reclamation plan for the site. The proposed Comprehensive Reclamation Plan Amendment does include a second/new pit mine. Both Plan Amendments are subject to CEQA and the preparation of Environmental Impact Reports.

The existing open mine pit was constructed at a time when the valley had a comparatively low population. The mine operation began operation in the early 20th century. As of 1900, the total population of Santa Clara County was 60,216. The population of the County was 100,676 in 1920, 174,949 in 1940, 642,315 in 1960, 1,295,071 in 1980, and 1,682,585 in 2010, according to U.S. Census figures. The State of California Department of Finance estimated that as of January 1, 2010, the total population for Santa Clara County was 1,880,876. Numerous factors led to the increase in population of the County over the years. The mine operation has been one of many industries that contributed to, or was affected by that growth.

SPEAKER SIX: Cathy Helgerson

"Hello. My name is Cathy Helegson. I agree with him about moving the meeting. I'm here to let you know that I'm a victim of the Lehigh Cement Plant and also Stevens Creek Quarry, and possible Apple Computer R&D facility with residual emissions. I lost both my breasts. They're gone. The last one a month ago. It's a new cancer. Cancer is now 1 out of 2 people. Santa Clara County asked me to prove there is a health hazard. There is also health and safety hazards that are going on at Lehigh. There's a lot of proof out there. And, I understand the East Materials Storage Area is overburdened and I've asked Santa Clara County to test that soil. The runoff is going into the Permanente Creek. I have pictures of the drainage that's from the State Water Board. There's an NOV for water and air. I'm working with Washington right now to get something done about extending the N. O. V. to possibly another inspection. I've very concerned that this pollution is killing us. Please, Liz, I'm directing this to you, especially. Please help us. I don't know what else to do. Please."

Response:

A public hearing is scheduled before the Board of Supervisors at 1:30 PM on February 8, 2011. This date and time was established by the Clerk of the Board and is based on the availability of all the members of the Board of Supervisors. Rescheduling the hearing to another date, or different time, or different location was considered and determined not to be feasible.

As noted in August 2010 regarding an "NOV" for air quality, the U.S. EPA issued a Notice of Violation and Finding of Violation (NOV/FOV) to Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants. As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify PSD requirements in its application submitted to the BAAQMD after installing the modifications.

The NOV describes enforcement that may be taken by the EPA, including the assessment of penalties, but it does not invalidate the Title V Permit that Lehigh currently holds.

Staff was advised by staff of the Regional Water Quality Control Board that a letter will be issued to Lehigh regarding responses made by the operator to a Notice of Violation issued in March 2010. This letter is expected to be issued in January 2011. As of January 21, 2011, County staff has not received a copy of this letter/update from the RWQCB.

SPEAKER SEVEN: Amy McDowell

"Good Morning. My name is Amy Mc Dowell and I'm a resident of Cupertino. I come before the Board today to express my grave concerns about health risks posed by the Lehigh Southwest Cement Plant operating in the foothills near Cupertino. Specifically, I want to talk about Mercury, which is known to cause neurological damage especially in children. The Lehigh Cement Plant provides self reported numbers about its pollution. Recently, they announced that they omitted they released 1,284 pounds of mercury into our environment in the year 2005. I attended the Cupertino City Council meeting on December 21st. I listened to the Lehigh Plant Manager, Mr Henrik Wesseling, speak about their operation. The manager said, and I quote, "What we have to accomplish here is implementing brand new technology which is not out there in the market" Permanente will be the first cement plant as far as I know to do this, so, I'm very concerned about them with this unproven technology. Thank you."

Response:

The EPA published a rule on September 9, 2010, that set national emissions standards for hazardous air pollutants (NESHAP) and new source performance standards for the portland cement industry (40 C.F.R. Parts 60 and 63 (75 Fed. Reg. 54,970)). The rule requires cement kilns to control emissions of mercury, total hydrocarbons, and particulate matter for both major-source cement kilns and the smaller area-source kilns.

The Title V Permit process is administered by the Bay Area Air Quality Management District (BAAQMD). BAAQMD staff advised County staff that, under the EPA rule, Lehigh has until 2013 to implement the new standard. The BAAQMD incorporated the new NESHAP requirements into a revised, proposed Title V Permit for Lehigh. The proposed permit was posted on the BAAQMD web page, along with a public notice, on January 21, 2011. The notice states that written comments regarding the proposed permit may be submitted to the District through March 25, 2011. According to District staff, in order to meet the new standards all cement plant operators including Lehigh will be required to install and implement new technology. All installations will be required to be tested to establish whether they do or do not meet the new requirements.

SPEAKER EIGHT: Jack Travel

“Hi. I’m Jack Travel, resident of Santa Clara County for about 40 years. I won’t go over what has already been said about the violations and the talks, which has concerned me for the last several years. What does concern me is the Council actually not listening to the people who live in that area, and I think more should be done to look at the plant and what toxins are coming out of there.”

Response:

A variety of federal and state regulations affect the operations of the cement plant. These are described some detail in a summary written by the Cupertino City Attorney in a memorandum addressed to Mayor Wang and Members of the [Cupertino] City Council, a copy of which is attached to this memo. In particular the U.S. EPA, the state Air Resources Control Board, the State Regional Water Quality Control Board, and the Bay Area Air Management District have the authority and responsibility for implementing those regulations. Currently, the BAAQMD is processing renewal of the Title V Permit for the Lehigh Cement plant. The BAAQMD posted a proposed permit in January 2011. The public review and comment period commenced on January 21, 2011, and the District will accept comments on the permit through March 25, 2011. (Refer to public notice distributed via email, attached.)

SPEAKER NINE: Arther Franowski:

“Good morning. My name is Arther Franowski. I am a Cupertino resident. I am deeply disturbed seeing that the February 8, 2011 public hearing on Lehigh Vested Right concern all plans parcels that of total of 2700 acres as opposed to approximately 90 acres of so called EMSA area which was subject to the November notice last year. So, this is 30 times increasing the area of the plans to legal non-conforming use and they want to operate this land without compliance with Title 5 permit. So, therefore, because of the impact of this decision of vested right on the health of millions of Santa Clara residents, I request that before any determination of such a right, that the Planning Office could hold a notice of violation on the record, under public hearing folder, so that everyone has access to that and could understand how the company operates on this area. Thank you.”

A public hearing is scheduled for 1:30 PM on February 8, 2011, in the Board of Supervisors Chambers to determine whether and to what extent there is a legal right to conduct quarrying activities at the Permanent Quarry located on lands owned by Heidelberg Cement, Incorporated,

and operated by Lehigh Southwest Cement Company. That hearing will not be a land use authorization for surface mining operations. Rather, for any areas where legal-non-conforming uses are determined by the Board not to exist, applications for Use permits would be required to be filed by the owner and would be processed along with two pending Reclamation Plan Amendments, one for the East Materials Storage Area (EMSA) and the second, a comprehensive reclamation plan for the site. Both Plan Amendments are subject to the California Environmental Quality Act (CEQA), which requires preparation of Environmental Impact Reports.

The two NOV's issued by the County are posted on the County Planning Office website at www.sccplanning.org on the Lehigh "page" and are available at the public counter in the Planning Office for review during normal business hours.

Staff originally proposed that the Board hold two separate hearings – one pertaining to the EMSA property and pending Reclamation Plan Amendment, and a second for the remainder of the Quarry property and pending Comprehensive Reclamation Plan Amendment. However, as research progressed, it became clear that there was significant overlap in the information and necessary analyses related to the proposed EMSA Reclamation Plan Amendment and the separate Comprehensive Reclamation Plan Amendment. It is also much more convenient for the Board and the public to hold one hearing addressing all of the Quarry's unincorporated property.

Although Lehigh owns approximately 3,500 acres, this analysis only addresses 2,656 acres, which is the portion located in unincorporated Santa Clara County.

SPEAKER TEN: Barry Chang

“Good morning. Honorable Supervisors, Happy New Year. My name is Barry Chang. I’m a Cupertino City Council member, and this is my 11th time here to please ask you to put Lehigh’s Notice of Violation on the agenda. My 11th time here. On your 2008 Notice of Violation mentioned that they have to cease depositing the material in the mining west in the area described about, which is an east material area. As of today, they still continue violation. There is no enforcement. Please look at your own Notice of Violation, Page 2, carefully, your self. And also recently, the Department of Labor, Mining, and Safety and Health, did an inspection issued 185 citation, and 21 older to correct. And then why in one year they got so many Notice of Violation and, then County, for over 70 year, only two notice of violation, so County is too lenient to the polluter to poison all of us. I’m really surprised. Thank you.”

Response:

The County of Santa Clara issued a Notice of Violation (NOV) in June 2008 to the mine operator of Permanente Quarry for stockpiling overburden material in the area commonly referred to as the East Materials Storage Area (EMSA) because it is not within the boundary of the 1985 Permanente Quarry Reclamation Plan. The original complaint made to the County was that petroleum coke was being stored in this location. Following a field inspection the County determined the material that was suspected to be petroleum coke was actually overburden excavated from the mine pit. The NOV provided the operator with two options for addressing the violation: (1) remove the material, or (2) apply for and obtain an amendment to the existing

approved reclamation plan for Permanente Quarry. An approved amended reclamation plan would authorize retaining the material in the EMSA and provide for reclamation consistent with state and County mine reclamation standards. The mine operator chose to apply for the reclamation plan amendment and this application is under review.

The NOV also required that mine operator cease use of the EMSA. The operator approached the County and explained that immediate use of the EMSA is necessary for operational reasons, because the approved location to permanently store the overburden was near capacity. Without using the EMSA the operator would be forced to leave the material in the pit, which would prevent the operator from excavating some of the remaining mineral reserves. Following consultation with the State Office of Mine Reclamation, the County signed an agreement with Lehigh stipulating a rigorous schedule to complete the work necessary to submit a reclamation plan amendment application, and all other information required to complete the environmental impact review. The agreement stipulates that the County retains its authority to impose fines against the operator, and that the agreement will be voided should a use permit, if required, and/or the EMSA Reclamation Plan Amendment not be approved. Section 3 of this agreement states, “*Nothing in this agreement shall be interpreted in a manner that indicates the County will approve the EMSA Amendment or will allow the Company to continue using the EMSA if the EMSA [Reclamation Plan] Amendment application is denied or if the Company withdraws the EMSA Amendment application prior to the County taking final action on the application. Nor shall anything in this Agreement be interpreted as a waiver of the County’s legal authority, including but not limited to its enforcement authority under SMARA.*”

SPEAKER ELEVEN: Dave Grant:

“I’m a resident of Santa Clara County for more than 40 years and Cupertino for 30 years. I’m just one of a growing group of citizens that are very concerned about the toxic mercury pollution emanating from the Lehigh Cement Plant. I understand you’re going to consider the East Material Storage Area vested rights in a couple weeks. That includes the opening of another 200+acre open pit mine. I’d like you to move that meeting to Cupertino to facilitate you hearing the voices of the many, many concerned citizens that really can’t come down and attend this meeting. Move it to Cupertino, move it to the evening. Give them a chance to speak. If not for the children that are suffering in Cupertino, then do it to protect your revenue from the property taxes. If those property values fall, your revenue to your Council here is going to fall with it. So, please, move the meeting. Listen to the people of Cupertino. Listen to the people of the surrounding communities.”

Response:

A public hearing is scheduled before the Board of Supervisors at 1:30 PM on February 8, 2011. This date and time was established by the Clerk of the Board and is based on the availability of all the members of the Board of Supervisors. Rescheduling the hearing to another date, or different time, or different location was considered and determined not to be feasible.

SPEAKER TWELVE: Paula Walisson

“Good morning. My name is Paula Walisson, resident of Cupertino. The County, The Bay Area Quality Management District, and Lehigh, continue to insist that Lehigh is operating under a valid Title V Permit. But, when I spoke to Charles Aldred at the EPA in San Francisco in early December, he said, in fact, Lehigh does not have a valid permit, but it can continue to operate without a permit if it is trying to come into compliance. This is unacceptable to us. If we can't enforce the laws that are already on the books, what is the point of going through all this regulatory process. Please listen to your staff members. Please insist that Lehigh clean up their act up there. And, I also request that we have an evening meeting so that more Santa Clara County residents can come to that meeting and express their concerns about this very vital issue. Thank you so much.”

Response:

The Title V Permit for Lehigh is issued by the Bay Area Air Quality Management District (District), not by the EPA. Therefore, our contact has been with the District on this point. According to the District, the Lehigh Southwest Cement Company's Title V permit is still valid. The District issued a Title V permit for the facility on November 5, 2003. The operator (Lehigh) submitted an application to the District for renewal of the Title V Permit on April 28, 2008. On January 5, 2010, the District withdrew the proposed Title V permit renewal for the Lehigh facility because the Federal EPA was expected to adopt significantly more stringent standards for mercury and other air contaminants from cement plants. The new standards were adopted on September 9, 2010. The District incorporate those standards in a proposed Title V renewal. The BAAQMD posted the proposed permit on January 21, 2011. The public review and comment period commenced on January 21, 2011, and the District will accept comments on the permit through March 25, 2011. (Refer to public notice distributed via email, attached.) According to District staff the Title V permit previously issued to Lehigh will remain valid until the District takes an action regarding the renewal application.

Staff contacted Mr. Charles Aldred of the U.S. EPA, Region 9, regarding comments made to Ms. Walisson. Mr. Aldred reports advised that no new information regarding the NOV/FOV is available, and could not elaborate further because it is EPA policy not to comment on active cases, which includes the Lehigh case.

A public hearing is scheduled before the Board of Supervisors at 1:30 PM on February 8, 2011, regarding a determination of whether and to what extent a legal non-conforming use exists on the Permanente Quarry property. This date and time was established by the Clerk of the Board and is based on the availability of all the members of the Board of Supervisors. Rescheduling the hearing to another date, or different time, or different location was considered and determined not to be feasible.

SPEAKER THIRTEEN: Rhoda Fry

“Hi. I'm Rhoda Fry. Thank you staff for posting Lehigh info. Shame on you, Supervisors, for allowing Lehigh to dump nearly 1,300 pounds of mercury on your voters in 2005. 2010 isn't looking as good as you were led to believe in the vaunted announcement this summer. Time for

a public apology. Lehigh has without merit threatened estoppel by failing to demonstrate investment in their business, their environment, and their employees. It could burn off natural gas but chose dirty pet coke. Pit and Quarry has just posted our County's employer as receiving, as Barry just said, the 185 Department of Labor citations last year. Finally, in 1992, the Company announced a housing development when their quarry ran out in 2012. Now that's what I call fully depreciated assets not subject to stopple. February 8th ends only....Thank you."

Response:

As stated in a Health Risk Analysis report distributed by the BAAQMD, mercury emissions by Lehigh Southwest Cement plant in 2005 was 582 pounds, not 1,300 pounds. This represents the total amount of mercury input from raw materials and fuel processed by the cement plant when it produced cement. In other words, the raw materials and fuel used by Lehigh, during the high production year of 2005, contained 582 pounds of mercury. This figure is not the amount of material actually emitted into the air. Current technology does not provide a means to measure the actual mercury emissions; however, under new rules adopted by the U.S. EPA in September 2010 all cement plants will be required to measure continuous mercury emissions that do reach the air. This requirement will take effect in 2013.

Pit & Quarry is a magazine written for the aggregates mining industry. An article published December 22, 2010, reports that Mine Safety and Health Administration (MSHA) inspectors issued 185 citations and 21 orders to Lehigh Permanente Cement Company in 2010. These citations and orders related to miner safety violations, an example of which, according to the article, included an incident where a supervisor failed to de-energize electrically powered equipment prior to removing a guard. A copy of this article is attached for reference. The article did not provide any comparison information with other cement operations elsewhere in the state or the rest of the country. The County does not attest to the accuracy of this article.

SPEAKER FOURTEEN: Neil (INAUDIBLE)

"Good morning. My name is Neil (inaudible) I'm a resident of Cupertino, but in a way I speak for the whole of Santa Clara County of which I have been a resident for almost 25 years now. I'm here to reinforce and second all the comments made by the previous speakers about Lehigh being granted further west EMSA rights. I'm really concerned about all the open NOV's issued against them. If I'm arrested let's say I do something wrong with my car and my car gets impounded because you take my permit away, and here is a big company, doing all kinds of violations, and I'm really appalled, especially the mercury emissions, but how they can keep on operating in the County where they give them further rights to do their own business."

Response:

The County of Santa Clara issued a Notice of Violation (NOV) in June 2008 to the mine operator of Permanente Quarry for stockpiling overburden material in the area commonly referred to as the East Materials Storage Area (EMSA) because it is not within the boundary of the 1985 Permanente Quarry Reclamation Plan. The original complaint made to the County was that petroleum coke was being stored in this location. Following a field inspection the County determined the material that was suspected to be petroleum coke was actually overburden

excavated from the mine pit. The NOV provided the operator with two options for addressing the violation: (1) remove the material, or (2) apply for and obtain an amendment to the existing approved reclamation plan for Permanente Quarry. An approved amended reclamation plan would authorize retaining the material in the EMSA and provide for reclamation consistent with state and County mine reclamation standards. The mine operator chose to apply for the reclamation plan amendment and this application is under review.

The NOV also required that mine operator cease use of the EMSA. The operator approached the County and explained that immediate use of the EMSA is necessary for operational reasons, because the approved location to permanently store the overburden was reaching capacity. Without using the EMSA the operator would be forced to leave the material in the pit, which would prevent the operator from excavating some of the remaining mineral reserves. Following consultation with the State Office of Mining and Reclamation, the County signed an agreement with Lehigh stipulating a rigorous schedule to complete the work necessary to submit a reclamation plan amendment application, and all other information required to complete the environmental impact review. The agreement also stipulates that the County retains its authority to impose fines against the operator.

As previously noted in previous responses to public comments made to the Board, the Surface Mine and Reclamation Act (SMARA) establishes a process to cure a violations including filing for and obtaining a Reclamation Plan Amendment from the lead agency. Fines may be imposed if the mine operator fails to take action to correct the violation(s). The mine operator has taken actions to correct the 2006 and 2008 Notices of Violation (NOV), therefore, no fines can or should be imposed at this time:

- Lehigh Southwest Cement Company (“Lehigh”) has submitted (comprehensive) Reclamation Plan Amendment application materials in response to the 2006 NOV, as required. Plan review is in process and will result in public hearings on the associated environmental impact report and Plan itself in spring 2012.
- Lehigh has also submitted a separate Reclamation Plan Amendment in response to the 2008 NOV. This plan specifically addresses the storage of overburden on an area referred to as the East Materials Storage Area (EMSA) In addition, the County and Lehigh have also entered into an agreement to allow the continued use of the EMSA subject to and on condition of filing/processing of the EMSA Reclamation Plan Amendment.

Approval of the proposed amendments would correct or “cure” the 2006 and 2008 violations and are thus the means of enforcement. The County has taken action by issuing NOV’s. And by filing for reclamation plan amendments, Lehigh has taken action to cure the violations. There are no other actions the County can or should take at this time.

SPEAKER FIFTEEN: Tim Brand

“Good morning. My name is Tim Brand. In October 2006 County, staff issued a belated NOV to Lehigh for operation outside the reclamation plan boundaries, but only did so upon threat from the State Office of Mine reclamation.

In 2007, Lehigh submitted an expanded Reclamation Plan including the EMSA, and the public CEQA process was initiated. But their application was inadequate, so they withdrew it and

promptly began using the EMSA anyway without a permit ignoring the issues already raised by the citizenry.

In 2008, County staff finally issued a Notice of Violation for this unpermitted dumping, but, again, this only occurred after repeated complaints by the citizenry. The notice demanded that Lehigh cease dumping in the EMSA, but they never stopped, and, finally the County agreed to let them continue, in a stunning review to the public process review intended by CEQA law. Once again, after the dirty deed is done, the County staff will consider public input. The pattern is clear. CEQA ignores the rules. The County staff accommodates them, and the public process is a façade.”

Response:

The County issued an NOV in 2006 for mine related disturbances of the land throughout the site of the mined area on the Heidelberg property. This NOV did not lead to and was completely separate from the NOV issued in 2008.

The 2008 NOV issued by the County related to stockpiling material in the EMSA, which was not included in the existing approved Permanent Quarry Reclamation Plan. The mine operator chose to file for a reclamation plan amendment to address the NOV. After receiving the NOV, Lehigh met with staff and explained that the EMSA is necessary for mine operation purposes, and that without access to the EMSA at this time would prevent Lehigh from accessing the mineral deposits in the mine pit.

Following consultation with County Counsel and other staff, the Director of Planning and Development entered into an agreement with Lehigh that allows access by Lehigh to the EMSA for continued mine operations, provided that Lehigh proceed to abate the 2008 NOV by processing a focused reclamation plan amendment for the EMSA and complying with rigorous requirements and time limitations. This agreement includes provisions for levying fines against Lehigh for failure to comply with the agreement. No approval of the EMSA reclamation plan amendment has been made, and no “temporary permit” has been issued.

This agreement will be voided should a use permit, if required, and/or the EMSA Reclamation Plan Amendment not be approved. Section 3 of this agreement states, “*Nothing in this agreement shall be interpreted in a manner that indicates the County will approve the EMSA Amendment or will allow the Company to continue using the EMSA if the EMSA [Reclamation Plan] Amendment application is denied or if the Company withdraws the EMSA Amendment application prior to the County taking final action on the application. Nor shall anything in this Agreement be interpreted as a waiver of the County’s legal authority, including but not limited to its enforcement authority under SMARA.*”

ATTACHMENTS:

- Memorandum from Carol Korade, City Attorney, to Mayor Wang and Members of the Cupertino City Council, dated April 16, 2010.
- “MSHA announces results of November impact inspections” from *Pit & Quarry*, December 22, 2010 (lasted visited from www.pitandquarry.com on January 21, 2011).
- Kristina Chu, “Comment Period for Lehigh Permit Renewal,” email dated January 21, 2011.

cc:

Colleen Valles, District One
Gustavo Caraveo, District Two
Mike Donohoe, District Three
Tony Filice, District Four
Scott Strickland, District Five

Jody Hall Esser, Director, Department of Planning & Development
Michael M. Lopez, Planning Manager, Planning Office
Rob Eastwood, Senior Planner
Marina Rush, Associate Planner

Miguel Márquez, County Counsel
Orry Korb, Assistant County Counsel
Lizanne Reynolds, Deputy County Counsel

DATE: April 16, 2010
TO: Mayor Wang and Members of the City Council
FROM: Carol Korade, City Attorney
RE: Lehigh Quarry and Cement Plant – In response to legal questions raised at the January 6, 2010 Study Session

Members of Council and community residents have inquired about the City's ability to protect the quality of life of City residents from impacts created by the Lehigh Quarry and Cement Plant ("Plant"), which lies outside the City's boundaries and is subject to Santa Clara County's land use control. The operation was previously known as the Hanson facility and more recently referred to as the Lehigh Southwest Cement Plant. The first part of this memorandum explains that the Plant is under the County's jurisdiction and outlines how the City and its residents can seek to influence the County's decision making. The second part of this memorandum discusses state, federal, and local environmental laws applicable to operation of the Plant and comments on means by which the City and its residents can seek enforcement of these laws to protect the quality of life in Cupertino.

I. THE COUNTY, NOT THE CITY, HAS JURISDICTION OVER THE PLANT.

The Plant is located at 24001 Stevens Creek Boulevard, in the western hillsides of Santa Clara County, west of Cupertino. Under the California Constitution, a city may make and enforce **within its limits** all local, police, sanitary, and other ordinances and regulations not in conflict with the general law. Because the Plant is located in the County, and not within the City, the **City has no control or permitting authority over the Plant**. Without such jurisdiction, the City cannot impose any conditions on the operation of the Plant. The City can, of course, regulate truck traffic on its streets, comment on the County's environmental reviews of the Plant and could, conceivably sue if the Plant's operations violated standards established by the government agencies that do have jurisdiction. However, the City does not have jurisdiction of its own.

A. County of Santa Clara Use Permit

The Plant's operation is authorized under a use permit, first issued by the County of Santa Clara on May 8, 1939. The use permit was modified in June 1950 and May 1955 to allow an additional rotary kiln at the Plant. Further, on December 5, 1977, the County approved a use permit modification for the modernization of the Plant and, in 1980, the Plant converted from a wet-process to a more efficient dry-process kiln system

Certain operations of the Plant are continuous, such as the kiln operation which must operate at extremely high temperatures and therefore cannot be efficiently turned on

and off every day because it requires substantial time and energy to reheat and to cool down.

The County use permit does not impose any conditions on the Plant's hours of operation or the number of trucks which may travel to and from the Plant or by what routes. The only noise condition of the use permit requires that noise at the property line must conform to the Noise Element of the County General Plan and the County's noise ordinances, which can be found at the following links:

[http://www.sccgov.org/SCC/docs/Planning,%20Office%20of%20\(DEP\)/attachments/Stanford/Stanford_CP.pdf](http://www.sccgov.org/SCC/docs/Planning,%20Office%20of%20(DEP)/attachments/Stanford/Stanford_CP.pdf)

http://library.municode.com/HTML/13790/level3/TB_DB11_CVIII.html

The County Department of Environmental Health enforces the County's noise ordinances. However, the County currently does not have a continuous noise monitoring program. During the summer of 2009, the County Planning Office contracted an outside consultant to monitor noise generated by the Plant and to determine whether the noise levels comply with County requirements. The County also contracted a consultant to evaluate truck traffic. The consultant's report, which addresses noise from operations and truck traffic, is currently in draft form and will likely be finalized and released within the next few weeks. While the County is not expected to hold public hearings on the report, the information will be included in the amended Reclamation Plan, including the environmental analysis which the Plant must submit for County review and approval under California's Surface Mining and Reclamation Act.

Any complaints regarding the operations of the Plant can be reported to the County Planning Office at (408) 299-5770. Possible violations of the County's noise ordinances can be reported to the County Environmental Health Staff at (408) 918-3400.

B. Reclamation Plan Amendments

In 1975, the State adopted the Surface Mining and Reclamation Act ("SMARA"), requiring local jurisdictions to adopt ordinances to provide a regulatory framework for the conduct of mining within their boundaries. It was adopted to ensure that land was properly reclaimed to usable and aesthetically acceptable condition after the closure of a mine and that local jurisdictions did not prevent exploitation of available mineral resources. SMARA mandates that every active surface mine have a reclamation plan to reclaim the land for subsequent use upon the closure of the mine and empowers local jurisdictions, in this case, the County of Santa Clara, to review and approve such plans. On March 7, 1985, the County approved the Reclamation Plan for the Plant. This plan is valid for 25 years, and thus will expire in March 2010 – *i.e.*, this month.

After the County approved the existing Reclamation Plan in 1985, it was found that the Reclamation Plan did not cover the entire operation of the Plant and the County therefore issued a Notice of Violation. Consequently, in January 2007, the Plant applied

to the County for approval of amendments to the approved Reclamation Plan. The proposed amended Reclamation Plan, currently on file with the County, would reconfigure the mining and materials storage areas and expand the operation to add a second mining pit. The principal environmental issues associated with the proposed amended Reclamation Plan include geology and slope stability, aesthetic issues including visibility of the new pit and the placement of overburden materials (*i.e.*, spoils from the mining process), biology, hydrology and drainage, and air quality (including fugitive dust). The County has determined that the application for an amended Reclamation Plan is not complete and has required the Plant to prepare an additional geology report. County staff expects to receive a completed application for amended Reclamation Plan by May 2010. Once the application has been deemed complete, the County is required to approve and certify an environmental impact report ("EIR") before approving the amended Reclamation Plan and, as detailed below, that process provides opportunities for the City and its residents to comment and to suggest measures to mitigate significant environmental impacts of the proposed amended Reclamation Plan. The EIR must distinguish between the impacts of the proposed amendment (*i.e.*, the new mining pit) from those of the existing operation, which the County has limited authority to regulate because of the Plant's vested land use right to continue the previously approved operation.

In June 2008, the County issued a second Notice of Violation instructing the Plant to cease depositing overburden material in an area known as the East Materials Storage Area ("EMSA"). In response, the Plant applied for a separate Reclamation Plan amendment in April 2009, and the County has allowed limited use of the EMSA while this amendment is in process. The review of this application for a permit to use EMSA will involve an additional environmental review.

C. EIR Process

The California Environmental Quality Act ("CEQA"), California Public Resources Code §§ 21000 et seq., requires that public agencies prepare an EIR when the approval of a proposed project may significantly and adversely affect the environment. CEQA and the CEQA Guidelines, 14 California Code of Regs. §§ 15000 et seq., detail the required content an EIR should contain and the process for approving it. An EIR must include sufficient analysis to allow the lead agency (here, the County) to make an informed decision on a project which accounts for its environmental consequences. An EIR must include: (1) an accurate description of the proposed project; (2) analysis of each significant environmental impact expected to result from the proposed project; (3) mitigation measures to reduce those impacts to the extent feasible; (4) a range of reasonable alternatives to the proposed project; and (5) a brief statement of the reasons for determining that the project's likely effects on the environment are not significant. Additionally, an EIR must describe any significant effects on the environment that would be unavoidable or irreversible if the project is implemented.

In this case, the Plant's application to amend the Reclamation Plan requires the County Planning Commission to certify an EIR addressing the environmental impacts of

the amended plan, before approving it. Likewise, the Planning Commission will consider the potential impacts of the use of EMSA and comply with CEQA before approving the EMSA reclamation plan amendment. Under County zoning regulations, Planning Commission decisions may be appealed to the Board of Supervisors. Action on the amended Reclamation Plan EIR is not imminent: County Planning staff estimate that the Planning Commission may hold hearings on this decision this summer.

Each EIR will be prepared in two steps: (1) a draft EIR, which will be circulated to the public and affected public agencies for review and comments for at least 30 days; and (2) a final EIR, including the comments submitted and responses to significant comments, which must be certified by the County Planning Commission as to completeness and adequacy. As soon as the County completes a draft EIR, it is required to notify the public and responsible agencies of their opportunity to comment on it. The draft EIRs will be available at the following URL:

www.sccgov.org/portal/site/planning/planningchp?path=%2Fv7%2FPlanning%2C%20Office%20of%20%28DEP%29%2FPermits%20%26%20Development%2FEnvironmental%20Protection%2FActive%20Environmental%20Documents

This website will also identify a contact person for public comments and the comment period. Before the draft EIR is released for comment, members of the public can also contact County Senior Planner Gary Rudholm at gary.rudholm@pln.sccgov.org or (408) 299-5747 to request mailed notice of the draft EIR's release. If comments are submitted, the County will respond in writing before certifying the final EIR. Responses must provide reasoned, good faith analysis regarding all significant environmental issues raised in EIR comments. Thus, to be effective, comments must identify: (1) specific environmental impacts of the proposed amendment to the Reclamation Plan (not the pre-existing Plant operation); (2) specific means to mitigate those impacts; and (3) some factual support (even if drawn from common sense and ordinary experience) for the claimed impacts and the contention that the proposed mitigation is feasible and will be effective to mitigate the project's impacts. Submitting effective comments is important because any person who later wishes to challenge the certified final EIRs, the approval of the amended Reclamation Plan, or the approval of use of the EMSA will have to demonstrate that he or she presented objections to the County Planning Commission before it acted on the EIRs and the approvals (*i.e.*, that he or she exhausted administrative remedies before suing).

The final EIR will include: (1) the draft EIR with any revisions made following the public review; (2) comments received on the draft EIR; (3) a list of persons and entities commenting on the draft EIR; (4) the County's responses to the comments; and (5) any other information added by the County before the EIR is certified. The County Planning Commission must certify that the final EIR was completed in compliance with CEQA and that it reviewed and considered the report before acting on the project. If there is an appeal of the Commission's decision, the Board of Supervisors will be required to make similar findings.

D. EIR Process for the EMSA and Public Scoping Meeting

As discussed above, the Plant has applied for a separate Reclamation Plan amendment for the EMSA in April 2009 and the County will be preparing a separate EIR for this project.

When the County determines that an EIR must be prepared, it is required to send out a Notice of Preparation to all public agencies with authority over the project to solicit advice on the scope and content of the EIR. However, for projects with regional or areawide significance, such as the Lehigh Plant, the County must also hold a public scoping meeting and provide notice to cities bordering the jurisdiction in which the project is located. Therefore, with respect to the EIR for the EMSA, the County will hold a public scoping meeting in the Cupertino Community Hall, Council Chambers, at 6:30pm, on April 28, 2010, to determine the scope and content of the draft EIR. A notice of this meeting has been posted on the City's website for the residents' review.

Cupertino residents can provide input by public comments at the public scoping meeting and by providing written responses within 30 days of the Notice of Preparation to County Planner Marina Rush at marina.rush@pln.sccgov.org or County of Santa Clara Planning Office, Attention: Marina Rush, County Government Center, 70 West Hedding St., 7th Floor, East Wing, San Jose CA 95110. The City encourages the residents to provide public comments to shape this additional environmental review process so that it addresses the residents' concerns.

II. OTHER ENVIRONMENTAL REGULATIONS.

A variety of state, federal and local laws authorize various public agencies to regulate aspects of the Plant's operation. The City can comment in public hearings, provide evidence, and otherwise encourage these agencies to protect the quality of life in the City and, as noted below, can enforce noise and vehicle regulations.

A. Federal Clean Air Act

As a major facility under this law, the Plant must obtain operating permits under Title V of the 1990 Clean Air Act Amendments and the Federal Operating Permit Program. A Title V Permit compiles applicable local, state, and federal air quality requirements, including emissions limits and standards, monitoring, record-keeping, and reporting requirements. The Plant first applied for a Title V Permit on June 21, 1996, which it was issued on November 5, 2003.

On March 9, 2010, the United States Environmental Protection Agency ("EPA") issued the Plant a Notice of Violation under the Clean Air Act. The Notice of Violation states that, between 1996 and 1999, the Plant underwent a series of physical modifications resulting in significant increase in emissions of nitrogen dioxide and sulfur dioxide, without applying for a Prevention of Significant Deterioration ("PSD") permit as required under the Clean Air Act. Further, the Plant failed to identify the PSD

requirements in its application for the 2003 Title V Permit and therefore obtained a deficient permit. Under the Clean Air Act, the EPA has the authority to enforce the Notice of Violation by issuing an administrative penalty order or seeking an injunction or civil penalty. Initially, however, the EPA will conduct enforcement negotiations with the Plant. The negotiations will be confidential and may take several years, but if a settlement is reached, it will become public and may offer the possibility of public comment.

Title V Permits must be renewed every five years. The Plant applied to renew its Title V Permit on April 28, 2008. The Bay Area Air Quality Management District (“BAAQMD”) implements state and federal air quality laws in Cupertino and has authority to issue the Title V Permit renewals under the supervision of the EPA. Last fall, BAAQMD submitted a draft Title V Permit renewal to the EPA for review, but withdrew it on January 5, 2010. BAAQMD will resubmit a proposed permit to incorporate updated National Emissions Standards for Hazardous Air Pollutants, which the EPA is expected to issue June 6, 2010 to include stricter requirements for air emissions of mercury, hydrochloric acid, and total hydrocarbons, among other pollutants. Before BAAQMD can resubmit the Title V Permit renewal to the EPA, it must allow public comment on the proposed permit for at least 30 days. During that time members of the public can submit comments and request a public hearing on the proposal. BAAQMD expects the public comment period on the proposed permit for the Plant to begin in late July 2010. Members of the public can contact BAAQMD permit engineer Thu Bua at tbua@baaqmd.gov or (415) 749-5119 to request notice of the public comment period. Notice of the public comment period, as well as contact information for submitting comments, will also be available at:

www.baaqmd.gov/Divisions/Communications-and-Outreach/News-Media-and-Features.aspx.

B. The California Air Toxics “Hot Spots” Information and Assessment Act

In 1987, the State Legislature established a formal regulatory program for site-specific air toxic emissions inventories and health risk quantifications, which is enforced by local air agencies, such as BAAQMD. Under this program, a wide variety of industrial, commercial, and public facilities must report the types and quantities of toxic substances they routinely release into the air. The program is intended to collect emissions data, identify facilities with potential for localized health impacts, ascertain health risks, notify nearby residents of risks that warrant notice, and to reduce significant risks.

BAAQMD routinely conducts or reviews Health Risk Assessments (“HRA”) for new and modified sources of toxic air contaminants (“TAC”). In addition, BAAQMD periodically reviews toxic emission reports from existing facilities under the Air Toxics Hot Spots (“ATHS”) Program to assess these facilities’ potential to pose “significant risk” to the public. Facilities determined to pose a “significant risk” must conduct a risk reduction audit and develop a plan to implement risk reduction measures.

In 2008, BAAQMD conducted a health risk assessment for the Plant, which showed that the health risks from the Plant's operation were below the levels determined by BAAQMD to warrant either public notice or risk reduction measures. At BAAQMD's request, on March 30, 2009 the Plant submitted additional data regarding metallic toxic air contaminants in fugitive dust, emissions from the kiln's smokestack, and other sources of air pollution at the facility. BAAQMD's analysis of these data indicates that the risk levels were slightly higher than found in the previous health risk assessment, but still below the action levels of the Air Toxics Hot Spots Program.¹ BAAQMD will reevaluate the facility periodically and determine if an updated health risk assessment is necessary.

In July 2009, EPA and BAAQMD began monitoring air quality at Stevens Creek Elementary School, located approximately two miles from the Plant, to measure hexavalent chromium as part of the School Air Toxics Monitoring Initiative. No hexavalent chromium was detected in the first three samples. The first sample was intentionally taken when the cement kiln was not operating. In the fourth sample, EPA detected a very small amount of this substance – 0.0145 nanograms per cubic meter of air, which is 0.00000000000003 pounds. For comparison, EPA studies in cities across the country where no unusual levels of hexavalent chromium were expected, detected average levels of chromium of 0.05 nanograms per cubic meter of air, or about three-and-a-half times more than detected at the Stevens Creek Elementary School. Monitoring will continue through August 2010 and analysis of all results will take some time. EPA will evaluate wind patterns, Plant operations, and other pertinent information to complete its analysis. Unfortunately, the EPA cannot yet provide more information on those issues.

To date, the results from the Stevens Creek Elementary School are consistent with BAAQMD's health risk assessment, which shows the hexavalent chromium emissions from the Plant do not present significant health risks. Periodic results of this school air quality study, along with a press release and a frequently asked questions document, are posted on EPA's website approximately every two weeks at <http://epa.gov/region09/air/schools-monitor/index.html>.

C. Federal Clean Water Act

Under the federal Clean Water Act, the San Francisco Bay Regional Water Quality Control Board ("SFB RWQCB") issued a National Pollutant Discharge Elimination System ("NPDES") permit for the Plant which requires implementation of best management practices to control pollutants in stormwater runoff from the site. The Plant has filed a notice of intent for coverage under that permit, which was processed by SFB RWQCB on April 23, 1992 and is still active. Pursuant to this permit, the Plant is required to report the effectiveness of its practices to SFB RWQCB on July 1st of each year.

¹ An action level is a level of air pollution emissions at which action must be taken to protect public health and safety.

Also under the federal Clean Water Act, SFB RWQCB issued a Mercury Total Maximum Daily Load requirement on February 12, 2008. According to SFB RWQCB, the Plant is one of the significant local sources which result in a high mercury level in the Bay.

In 1999, SFB RWQCB issued the Plant a Cleanup and Abatement Order (“CAO 99-018”) to address unauthorized construction of in-stream ponds, instability of creek banks, and the need for a long-term creek restoration plan. The Plant’s predecessor, Hanson, complied with the remedial and long term measures specified in the CAO 99-018. Further, SFB RWQCB has been working with the Plant on a long-term creek restoration plan to be implemented upon the closure of the Plant.

On March 26, 2010, SFB RWQCB issued the Plant a Notice of Violation for failure to comply with stormwater protection requirements. The Notice of Violation provided that by March 15, 2010, the Plant was supposed to complete a water balance survey for all existing plumbing and drainage at the Plant to cover stormwater, process water, and waste water. Pursuant to the Notice of Violation, the Plant is required to update its site maps to clearly identify all structural control measures that affect stormwater discharges, authorized non-stormwater discharges, and run-on (which is stormwater coming from surrounding areas). Additionally, by April 15, 2010, the Plant must implement and thereafter maintain best management practices to: (1) eliminate discharge of pollutants from Ponds 9 and 17 into Permanente Creek; (2) reduce sediment discharge into Pond 9; (3) prevent discharge of sediments from slope erosion; (4) minimize exposure of pollutants to stormwater at a vehicle and equipment shop and washing area; (5) eliminate prohibited non-stormwater discharges relating to vehicles and equipment; (6) minimize exposure of pollutants to stormwater at a concrete maintenance pad located at the Plant; and (7) prevent discharge of sediments from the unstabilized Upper Quarry Road and areas around it.

D. California Porter-Cologne Water Quality Act

Under the California Porter-Cologne Water Quality Act, the Plant is also subject to water reclamation requirements issued by SFB RWQCB in 1994. These requirements regulate treatment and disinfection of sewage for reuse. Accordingly, the Plant is required to submit quarterly self-monitoring reports to SFB RWQCB. In addition to reviewing such reports, SFB RWQCB plans to inspect the facility under this permit by the end of June 2010.

E. California Vehicle Code – Truck Operations

Because the City does not have its own police force, it contracts with the County Sheriff’s Department for law enforcement services. As the City’s contract police force, the Sheriff’s Department enforces Vehicle Code provisions in Cupertino except as to state highways, which are patrolled by the California Highway Patrol (“CHP”). Together, the Sheriff’s Department and the CHP are responsible for enforcement of the Vehicle Code on Foothill Boulevard, Stevens Canyon Road, and the other roadways

which serve the Plant. CHP usually relies on the Sheriff's Department to do enforcement in this area.

Residents have expressed concern over rocks or gravel falling out of the trucks and causing damage to their vehicles. The Sheriff's Department enforces the provisions of the Vehicle Code on trucks with loads that exceed the limits provided for each roadway. It understands the concerns of Cupertino residents and works to correct any observed violations. It also provides enforcement throughout the City when the trucks use other routes to reach their destination.

Vehicle Code § 24002 states:

(a) It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard.

(b) It is unlawful to operate any vehicle or combination of vehicles which is not equipped as provided in this code.

Other Vehicle Code provisions pertinent to the Plant cover registration, safety and inspections, reckless driving, weight, length, tires, exhaust, and noise. If residents wish to report what they believe to be current, in-progress Vehicle Code violations to the Sheriff's Department, they should call (408) 299-2311, which is a non-emergency contact number that reaches the dispatch center. Further, if residents wish to report damage, such as from falling rocks, they should call the Sheriff's Department at (408) 868-6600 during regular business hours, Monday through Friday. Residents should be aware that the Plant contracts with various truck companies and so does not necessarily control the trucks. Therefore, if residents wish to report an incident with a truck, they should write down the license plate number and the name of the truck company, if stated on the truck.

Because vehicles necessarily move through more than one jurisdiction, the rules that apply to vehicles, other than road-specific weight limits, are generally found in State, rather than local, law. Any local regulation must be expressly authorized by the Vehicle Code. While Vehicle Code § 21100 grants the City limited authority to regulate traffic flow with traffic control officers (as in white glove service when signals are out of order) and via traffic control devices (such as traffic signals and stop signs), the City has no broader authority over commercial vehicles to protect residents from the noise and traffic they generate.

Vehicle Code § 35701 authorizes cities to prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit, provided there is an alternative route to serve each property affected by the prohibition. While the need to maintain an alternative route to the Plant makes it difficult to impose weight limits on Foothill Boulevard and Stevens Creek Boulevard, § 35701 can be used to impose weight limits on smaller residential streets to prevent trucks from cutting through residential neighborhoods. Generally, weight limits can be problematic to enforce

because a scale is required to identify overweight vehicles. However, if the City limits the weight to a few thousand pounds on certain residential streets, cement and gravel trucks can be identified and cited for exceeding the weight limit without a scale. Alternatively, to avoid enforcement problems, the City can prohibit all commercial vehicles on certain residential streets. It should be noted, however, that any such restrictions will apply to all heavy or commercial vehicles and not only to truck traffic to and from the Plant.

Some residents have also inquired whether the City can prohibit truck traffic during nighttime hours based on safety or noise concerns. Some cities have relied on § 35701 to introduce a time schedule for commercial vehicles on certain streets. However, for Cupertino to prohibit truck traffic on certain streets during nighttime hours there must be an alternative non-regulated route to the Plant during such hours. Given the location of the Plant, it may be difficult to identify an alternative route that fully protects Cupertino residents from truck traffic to and from the Plant.

The City is also limited by Vehicle Code § 9400.8 which states in relevant part:

[N]o local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989.

Cupertino had no road impact fee prior to June 1, 1989 and, therefore, cannot adopt one now. Some mention has been made that Atherton imposes such a fee. In fact, while Atherton did adopt a vehicle impact fee several years ago, it has since rescinded that fee. Moreover, Atherton's fee was based on its power to regulate land use in its boundaries with respect to the construction truck traffic generated by the development of those new land uses. Because, the Plant is in unincorporated territory, land use impact fees must be imposed by the County rather than by the City. However, the City and its residents can and should argue for road impact mitigations during the public comment periods of the County's EIR processes. To support its request for road impact mitigations, the City can retain a consultant to estimate the City's expenses in maintaining its roads to mitigate the impacts from truck traffic to and from the Plant, as opposed to impacts from other trucks and heavy vehicles, such as gasoline tanker trucks.

F. Other Regulations Relating to the Truck Operations

While the City may not regulate traffic beyond the areas specified in the Vehicle Code, the trucks that serve the Plant are subject to the City's noise ordinance, which provides that a truck may not remain in one location on a public right-of-way, with the engine running for more than 3 minutes in an hour, if it produces noise above the level specified for the property zoned as follows:

Land Use at Point of Origin	Maximum Noise Level at Complaint Site of Receiving Property	
	Nighttime	Daytime
Residential	50 dBA ²	60 dBA
Nonresidential	55 dBA	65 dBA

Because this provision relates to standing, rather than moving, trucks, it would likely not be found a regulation of traffic, which as discussed above is reserved for State legislation. The City's noise ordinance can be found in Chapter 10.48 of the Cupertino Municipal Code at:

[www.amlegal.com/nxt/gateway.dll/California/cupertino/cityofcupertinocalifornia/municipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:cupertino_ca](http://www.amlegal.com/nxt/gateway.dll/California/cupertino/cityofcupertinocalifornia/municipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:cupertino_ca).

Additionally, the County's noise ordinance provides that a motor vehicle, with a gross vehicle weight of more than 10,000 pounds or with any auxiliary equipment (*i.e.*, trailers) attached, may not operate while the vehicle is stationary for more than 15 minutes in any hour, for reasons other than traffic congestion, on a public right-of-way or public space within 150 feet of a residential area between 10:00 p.m. and 7:00 a.m. The County's noise ordinance can be found at:

http://library.municode.com/HTML/13790/level3/TB_DB11_CVIII.html.

As such, the City and County noise ordinances provide remedies for residents who are disturbed by nighttime truck traffic if such traffic produces excessive noise while idling for longer than the specified periods. To report a violation of the City's noise ordinance, residents may contact the Sheriff's Department at (408) 299-2311 or Cupertino Code Enforcement at (408) 777-3182. Violations of the County's noise ordinance can be reported to the County Environmental Health Staff at (408) 918-3400.

Residents have also requested that the City considers placing speed bumps along the truck traffic route. When the City alters the design of its roads, it exposes itself to liability for dangerous condition of public property. Traffic accidents are common, as are lawsuits arising from traffic accidents and as "deep pockets" cities are frequent targets of suits claiming that a roadway was in an unreasonably dangerous condition, contributing to the accident. Accordingly, it is never advisable to make a change in a public right of way unless that change can be defended against such claims and the best defense to such claims is based on what is called "design immunity." If speed bumps are installed on the basis of a design prepared by a licensed professional, design immunity will attach. Thus, speed bumps should only be installed if a registered traffic engineer or other licensed

² dBA refers to an A-weighted decibel, a noise-measuring system which emphasizes noises at frequencies perceptible to humans.

professional concludes that doing so is safe and consistent with the standards of his or her profession.

Accordingly, Chapter 11.34 of the Cupertino Municipal Code provides that the City Manager or his designee may authorize installation of speed bumps if all of the following are true: (1) the (local or collector) street is a neighborhood residential street as defined by the Vehicle Code or by City Council actions; (2) the street is not wider than 40 feet from curb to curb or from edge of pavement to edge of pavement; (3) the street is limited to one lane in each direction; (4) a speed limit of 25 miles per hour has been established in conformance with State law; (5) **the street is not a truck route** or a transit bus route; (6) the street has an average annual daily traffic volume of fewer than four thousand vehicles; (7) the street has a grade of five percent or less for any segment between intersections; (8) the minimum distance from an intersection or curve to the road bump is 150 feet; (9) the spacing between road bumps is between 400 and 500 feet; (10) the road is visible for a distance of 150 feet; and (11) the result of a traffic and engineering survey indicate a minimum 85% approach speed of 32 miles per hour. It further authorizes the Director of Public Works to adjust these requirements if he finds, in his professional opinion, that such adjustments are necessary for the installation to fit the specific conditions of the residential street where it is to be installed. Accordingly, installation of speed bumps would not be feasible because, among other things, N. Foothill Boulevard and Stevens Creek Boulevard are used as truck routes, have more than one lane in each direction, and have speed limits exceeding 25 miles per hour.

While the City can amend its Municipal Code, it cannot change engineering standards which prevail in the profession of registered traffic engineers and others who design roadways. We understand that the Municipal Code provision cited above reflects those professional standards. Accordingly, speed bumps cannot be constructed to slow trucks serving the Plant without exposing the City to essentially unlimited liability – the City will be responsible for every traffic accident in the vicinity of the speed bumps if it installs them contrary to professional design standards.

G. Public and Private Nuisance Law

Another alternative to control the Plant's operation is to bring a claim alleging that the Plant's operations constitute a public or private nuisance. Under Civil Code § 3479, a nuisance is defined as anything injurious to health, interfering with the comfortable enjoyment of life or property, or unlawfully obstructing the customary use of any navigable lake, river, bay, stream, canal, basin, public park, square, street, or highway. If a nuisance affects an entire community or neighborhood, or any considerable number of persons it is considered a public nuisance. Otherwise, it is considered a private nuisance.

Under Civil Code § 3482, anything done or maintained under the express authority of a statute is deemed not to be a nuisance. Therefore, if the Plant complies with the regulations discussed in this memorandum and obtains all the permits required

for its operations, that will be very persuasive evidence that the Plant's operation does not constitute a nuisance.

III. SUMMARY

In sum, these are the procedures by which the City and its residents may address the following concerns regarding the Plant's operation:

Air Quality and Fugitive Dust: Air quality impacts, including fugitive dust from operations at the Plant site and from truck traffic to and from the Plant, can be addressed in the two EIRs discussed above. In addition, state and federal air quality laws, enforced by BAAQMD, provide a means to control these impacts. Opportunities for public input in the County's EIR processes and BAAQMD's regulatory process are described above. If dust is especially problematic for a particular property owner, a private or public nuisance action might be possible.

Water Quality Impacts: Water quality impacts can be addressed in the two EIRs discussed above. In addition, state and federal water quality laws, enforced by the SFB RWQCB, provide a means to control these impacts. Opportunities for public input in the County's EIR processes and the SFB RWQCB's regulatory process are described above. Again, a public or private nuisance action might be possible if the Plant has especially egregious impacts on a particular property.

Noise Impacts: Noise impacts can be addressed in the two EIRs discussed above. In addition, the City and County noise ordinances provide means to control these impacts. Opportunities for public input in the County's EIR processes and the County's and City's processes to enforce their noise ordinances are described above. Again, a public or private nuisance action might be possible if the noise has especially egregious impacts on a particular property.

Truck Traffic: Noise, dust, and traffic impacts of truck travelling to and from the Plant can be addressed in the two EIRs discussed above. In addition, the Sheriff's Department can and does enforce Vehicle Code requirements for truck traffic. Further, the City and County noise ordinances prohibit vehicles to idle for longer than specified periods. Opportunities for public input in the County's EIR processes are described above; traffic complaints can be addressed to the Sheriff's Department.

IV. CONCLUSION

Under the Federal and the State constitutions, the Plant has a vested right to operate and the City or the County cannot force the Plant to close without paying for the value of the operation, which neither has the resources to do. However, the Plant has a duty to exercise its property rights responsibly and in compliance with local, state, and federal land use and environmental quality laws. Although the City has only limited authority to directly regulate the Plant (only as to truck traffic within its borders), it can and will participate in the County's EIR processes and the other regulatory processes described in this memorandum. Cupertino residents and property owners can also participate in those processes and the City encourages them to do so.

Contacts			
Issue	Responsible Agency	Website	Phone number
Dust & Air	Bay Area Air Quality Management District ("BAAQMD")	www.baaqmd.gov	(415) 749-5119 (to request notification of the opening of the Title V permit public comment period)
Water	San Francisco Bay Regional Water Quality Control Board ("SFBRWQCB")	http://www.swrcb.ca.gov/rwqcb2/	(510) 622-2376
Noise	County Department of Environmental Health	http://www.sccgov.org/portal/site/deh/	(408) 918-3400 (to report violations of County noise ordinances)
	County Sheriff's Department	http://www.sccgov.org/portal/site/sheriff/	(408) 299-2311 (to report violations of City noise ordinances)
	Cupertino Code Enforcement	http://www.cupertino.org/index.aspx?page=359	(408) 777-3182 (to report violations of City noise ordinances)
Truck Traffic	County Sheriff's Department	http://www.sccgov.org/portal/site/sheriff/	(408) 299-2311 (to report Vehicle Code violations) 408-868-6600 (call to report damage)
General	County Planning Office	http://www.sccvote.org/portal/site/planning/	(408) 299-5770 (to report complaints regarding Plant operations) (408) 299-5747 (to request notice of EIR public comment period)



Mine Safety & Health Administration

MSHA announces results of November impact inspections

December 22, 2010

Federal inspectors issued 250 citations, orders and safeguards during special impact inspections conducted at 12 coal and 10 metal/nonmetal mine operations last month, MSHA announced.

These inspections, which began in force during April following the explosion at Upper Big Branch Mine in West Virginia, involve mines that merit increased agency attention and enforcement due to their poor compliance history or particular compliance concerns, including high numbers of violations or closure orders; indications of operator tactics, such as advance notification of inspections that prevent inspectors from observing violations; frequent hazard complaints or hotline calls; plan compliance issues; inadequate workplace examinations; a high number of accidents, injuries or illnesses; fatalities; and adverse conditions such as increased methane liberation, faulty roof conditions and inadequate ventilation.

During November's impact inspections, coal mines were issued 114 citations, 11 orders and one safeguard. For metal/nonmetal mines, 113 citations and 11 orders were issued. Since April, MSHA has conducted impact inspections at 182 coal and metal/nonmetal mines.

During an inspection conducted during the week of Nov. 15 at Lehigh Permanente Cement Co. Mine in Santa Clara County, Calif., MSHA issued 30 citations and six orders to the company. Five 104(d) orders were issued, including a violation for a supervisor's failure to de-energize electrically powered equipment prior to removing a guard. Another 104(d) order was issued for unsafe access where inadequately secured steel plates could have fallen on miners or delivery drivers accessing a storage area; this hazard had been reported to mine management two weeks earlier. A 104(b) order was issued for failure-to-abate in a timely manner a fall protection violation, in which miners working at the top of a mill were exposed to an approximate 36-ft. drop to the concrete. Sixty percent of the citations and orders were significant and substantial violations. MSHA inspectors have issued 185 citations and 21 orders at this mine this year.

"MSHA's impact inspection program is helping to reduce the number of mines that consider egregious violation records a cost of doing business," said Joseph A. Main, assistant secretary of labor for mine safety and health. "We will continue using this important enforcement tool to protect the nation's miners."

Bookmark it: digg propeller delicio.us technorati yahoo facebook

[Add Comment](#)

From: "Kristina Chu" <kchu@baaqmd.gov>
Subject: **Comment Period for Lehigh Permit Renewal**
Date: January 21, 2011 2:31:58 PM PST
To: "Thu Bui" <TBui@baaqmd.gov>, "Kristina Chu" <kchu@baaqmd.gov>
Cc: "Brian Bateman" <BBateman@baaqmd.gov>, "Barry Young" <BYoung@baaqmd.gov>, "Douglas Hall" <DHall@baaqmd.gov>, "May Leung" <MLEung@baaqmd.gov>, "Lisa Fasano" <LFASANO@baaqmd.gov>, "Ana Sandoval" <ASandoval@baaqmd.gov>, "Jim Smith" <JSmith@baaqmd.gov>, "Sonam Shah" <sshah@baaqmd.gov>
▶ 1 Attachment, 17.6 KB

Interested Parties:

The Bay Area Air Quality Management District (the District) is seeking written comment on the revised draft Title V Permit renewal for **Lehigh Southwest Cement Company in Cupertino, CA.**

Lehigh Southwest Cement Company is a major facility that is required to obtain operating permits under Title V of the 1990 Clean Air Act Amendments, the federal Operating Permit Program and the District's Regulation 2, Rule 6 - Major Facility Review. The Title V Permit is a compilation of all existing applicable local, state and federal air quality requirements including emissions limits and standards, monitoring, record-keeping, and reporting requirements. Title V permits are renewed on a 5-year cycle, and the existing permit remains in effect until permit renewal is completed.

On July 30, 2009, the District issued an initial draft Title V permit renewal for the Lehigh facility. On January 5, 2010, the District withdrew this initial draft Title V permit renewal. This was done because U.S. EPA had indicated that it would soon be adopting significantly more stringent standards for mercury and other toxic air contaminants from cement plants in amendments to 40 CFR 63, Subpart LLL, National Emission Standards for Hazardous Air Pollutants (NESHAP) from the Portland Cement Manufacturing Industry, and the District wanted to incorporate these more

stringent requirements into Lehigh's permit. The NESHAP rule amendments were delayed, but were eventually published on September 9, 2010. EPA also issued further minor amendments to this rule on January 18, 2011. The District has now incorporated these NESHAP amendments into a revised draft Title V permit for the Lehigh facility and made additional revisions to the permit, as follows:

- Added new standards from the amended NESHAP rule
- Added a facility-wide permit Condition #24621 to include the Fugitive Dust Control Plan and source test requirement for small sources
- Added most recent permit applications and conditions for loss of exemption of portable IC engines, mercury and hydrochloric acid reduction
- Addressed EPA's comments and updated the Compliance Assurance Monitoring (CAM) Analysis. CAM Condition #24781 was added to the Title V permit

All revisions are noted and explained in detail in the Statement of Basis for the revised draft Title V Permit renewal.

It should be noted that the District is also in the process of developing a rule for cement manufacturing plants that was identified as a control measure in our 2010 Clean Air Plan. The focus of this new District rule will be on emissions of nitrogen oxides (NOx), an air pollutant that is not addressed by the NESHAP. The new District rule will likely be considered for adoption later this year, and its requirements will be incorporated into Lehigh's Title V permit in a subsequent permit reopening.

Members of the public can provide their input to the District on the revised Title V permit renewal for the Lehigh facility by submitting written comments to **Ms. Thu Bui, BAAQMD, 939 Ellis Street, San Francisco, CA, 94109, or via email at tbui@baaqmd.gov**. The public review and comment period commenced on January 21, 2011, and the District will accept comments on the permit through **March 25, 2011**. Questions about this notice, the revised draft permit, and Statement of Basis, should also be directed to Ms. Bui.

Thank you.

Kristina Chu

Public Information Officer
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
Phone: (415) 749-4758
Fax: (415) 749-5101
www.baaqmd.gov



A0017 Publi...ocx (17.6 KB)