

Permanente Quarry and Lehigh Southwest Cement Plant

FREQUENTLY ASKED QUESTIONS

Cement Plant and Quarry - What land use approvals do they have?

The Lehigh Cement Plant operation is an authorized use operating under a Use Permit. The use permit (County File No. 173.023) for the cement plant was first issued on May 8, 1939. The use permit was modified in June 1950 and May 1955 to add rotary kilns to the operations. The County approved a use permit modification associated with modernization of the cement plant on December 5, 1977.

The Permanente Quarry is a limestone and aggregate mining operation in the Santa Clara County foothills, located along a sinuous, roughly east-west trending ridge within the Santa Cruz Mountains, west of the City of Cupertino's jurisdictional limits. The mine has a single, very large pit where limestone and aggregate are quarried. West of the mine pit is an overburden stockpile area known as "Area A" or the West Materials Storage Area, and the area to the east where overburden is currently being placed is identified as the East Materials Storage Area.

In 1975 the State of California adopted the Surface Mine and Reclamation Act, which mandates that all active surface mines have reclamation plans approved by the local agency. The County of Santa Clara approved the reclamation plan for the Permanente Quarry on March 7, 1985.

What is Legal Non-Conforming Use or Vested Rights?

The County must ensure that the quarrying operations on the unincorporated lands comply with the County's zoning regulations. In accordance with the zoning regulations, quarrying generally requires a Use Permit; however, no Use Permit is required if quarrying is a legal nonconforming use (sometimes referred to as a "vested right") on the property.

The term "vested right" is a legal term that means someone has a lawful right to engage in a particular land use. To have a vested right in a land use, the use must have been commenced in compliance with all legal requirements at the time the use was begun (which may have meant no legal requirements at all, depending upon when the use was begun), and not subsequently abandoned. A vested land use may become a "legal nonconforming use" if the regulatory landscape has changed and the land use would either not be allowed in that particular location today, or could only be undertaken after obtaining certain permits or other regulatory approvals. Today, the County regulations require a Use Permit before quarrying may take place.

Does the Quarry Have Vested Rights?

The County has not made a determination regarding whether and to what extent a legal nonconforming use (also referred to as a "vested right") for surface mining on the Permanente Quarry parcels. It is important to note and understand that this determination would not be a land use authorization. For any parcels of land where the Board of Supervisors finds a legal non-conforming use(s) does not exist, the mine operator would be required to file for and obtain a Use Permit for mining related operations. If a Use Permit is required the property owner must file for, and staff will process, a Use Permit application simultaneously with pending proposals for amendments to the existing Reclamation Plan for the Permanente Quarry.

Two Reclamation Plan amendment proposals are pending, one for the East Materials Storage Area portion of the site, and a second Comprehensive Reclamation Plan amendment, which would encompass the entire site and includes a proposed new pit for mineral extraction. Both amendments are subject to review and analysis as set forth in the California Environmental Quality Act (CEQA) and the preparation of Environmental Impact Reports. When and if Reclamation Plan amendments and any required Use Permits are approved, the operator would then have lawful land use entitlements to extend/expand the operation on the site.

The Board of Supervisors is scheduled to conduct a “Vested Rights” hearing on February 8, 2011, to determine whether and to what extent there is a legal nonconforming use or “vested right” for surface mining on the Permanente Quarry parcels. County staff is researching historic information and conducting a detailed analysis of the historical facts and ordinances for a hearing on the Permanente Quarry, which will be published in a staff report and submitted to the County Board of Supervisors. When published, these documents will be available at the Santa Clara County Planning Office and will be posted on the Planning Office website www.sccplanning.org.

The purpose of the hearing will be to determine whether and to what extent, a legal non-conforming use(s) (also known as a “vested right”) for surface mining (such as the existing Permanente Quarry) exists on the parcels of land in question. This would not be a land use authorization. For any areas where the Board determines a legal non-conforming use does not exist, a Use Permit would be required. If a Use Permit is required the property owner must file and staff will process a Use Permit application simultaneously with pending proposals for amendments to the Reclamation Plan of the Permanente Quarry.

Two Reclamation Plan amendments are currently pending: one for the East Materials Storage Area portion of the site to be followed by a second Comprehensive Reclamation Plan Amendment for the entire site. Both amendments are subject to CEQA and the preparation of Environmental Impact Reports. When and if Reclamation Plan amendments, and Use Permits if required, are approved, the operator would then have all lawful land use approvals to extend/expand the operation on the site.

Why was the Vested Rights Hearing Delayed in November 2010?

When the County prepared for a public hearing regarding vested rights for November 2010 the focus was on the EMSA. Staff found that the amount of research necessary for the B/S to make a determination was extensive and required a more significant amount of staff resources to complete. For this reason, the public hearing was postponed. As research continued it became apparent that the research required for a determination regarding the EMSA amendment proposal also affects the Comprehensive RPA. Rather than report on only the EMSA, and subsequently prepare for and conduct a second hearing regarding the CRPA, staff expanded the focus of the research and report writing to include all the property within the unincorporated area that would be subject to the reclamation plan amendment process. This will allow for one hearing to take place and make a vested right determination that will affect both reclamation plan amendment applications.

What are the violations issued by the County Dept. of Planning & Development to Lehigh?

2006 Notice of Violation

In October 2006, the County of Santa Clara issued the Notice of Violation and Order to Comply (NOV/OTC) to the mine operator of Permanente Quarry for mining activities located outside the

boundary of the Permanente Quarry Reclamation Plan, which the County approved in 1985. In January 2007, the mine operator submitted an application to amend the 1985 Reclamation Plan in accordance with the NOV/OTC. The County had determined that extensive geological analysis was necessary to address slope stability issues in the existing pit. In December 2007 the mine operator requested, and was given, 24 months to complete the geological analysis. The analysis was completed and the analysis determined that major modifications to the application were required due to geological issues. Lehigh, current mine operator, submitted a revised application on May 28, 2010 and the application was deemed complete on September 24, 2010. This project is subject to the California Environmental Quality Act (CEQA). An Environmental Impact Report is in preparation.

2008 Notice of Violation

The County of Santa Clara issued a second 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 is running out of room. 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, if necessary.

Why is there no fine or penalty imposed by the County for the Notices of Violation?

The County is the lead agency implementing the Surface Mining and Reclamation Act (SMARA) for the local jurisdiction. The State regulations under the SMARA provide the County authority to require a violation be “cured” or abated by filing for and obtaining a reclamation plan amendment. Under the regulations, the County cannot immediately impose a fine unless the mine operator fails to cooperate or proceed to comply with the requirements of an order to comply. Moreover, under the regulations, a rigorous process must be implemented that includes a hearing, with appeal rights available to the operator to appeal a fine to the State Mines and Geology Board.

Because the County issued an NOV and entered into an agreement with the mine operator providing that, as long as the mine operator timely filed and obtained an amendment to the Reclamation Plan, which would “cure” the violation, the mine operator could continue to use the EMSA. Fines may still be imposed by the County if for some reason, the mine operator fails to

cooperate with the County to correct the violation(s). Thus far, the mine operator has taken actions to correct the 2006 and 2008 Notices of Violations. Therefore, it would not be appropriate to impose fines at this time.

Why is Lehigh allowed to use the East Materials Storage Area if it has not been approved for Reclamation yet?

The East Materials Storage Area is needed for mine operations, and without the ability to use the EMSA the operator could not properly harvest minerals from the mine pit. Therefore, the County agreed to allow the mine operator to use the EMSA subject to compliance with very strict conditions. Non-compliance with those conditions will trigger the County imposing fines against the operator. The County and Lehigh signed an agreement on April 14, 2009, that required the operator submit an application for an amendment to the reclamation plan addressing the EMSA by April 20, 2009. Lehigh submitted the application by the required deadline and has met all subsequent deadlines established by the agreement. For this reason, no fines have been assessed to date.

What is the East Materials Storage Area (EMSA) Reclamation Plan Amendment and status?

The EMSA is an approximately 89-acre overburden and rock storage area located in the easterly portion of the Quarry. Overburden material is keyed into the existing slopes and rough-graded according to geotechnical design. The reclaimed EMSA slopes will be at a 2H:1V angle interrupted by 25-foot benches every 40 feet (2.5H:1V to 2.6H:1V overall). The EMSA is planned to receive overburden material for five years.

The Draft Environmental Impact Report for the proposed EMSA Reclamation Plan Amendment will be published in Spring 2011 for a 60-day public review and comment period. Subsequently, the County will hold a public hearing to accept verbal and written comments. The Final Environmental Impact Report (EIR) will respond to the comments received and include modifications if necessary. Depending on the level of comments received, staff anticipates the completed Final EIR and proposed EMSA Reclamation Plan Amendment will be heard before the Planning Commission in Summer 2011.

What is the Comprehensive Reclamation Plan Amendment and status?

Lehigh Hanson submitted an application for a reclamation plan amendment and a use permit on May 28, 2010. Staff refers to this proposal as the "Comprehensive Reclamation Plan Amendment." It would provide for reclamation of all the areas of disturbance at the existing Permanente Quarry. It also proposes an expansion, 251 acres, with a second mine-pit in an area where no mining or ground disturbances have taken place. The application does not include the cement plant and associated facilities because these are permitted under a separate and valid Use Permit. Staff deemed the Comprehensive Reclamation Plan Amendment application complete on September 24, 2010 and it is being processed. The project is subject to the California Environmental Quality Act (CEQA). The County will hold two public meetings for the Notice of Preparation to take public comments regarding the proposed Comprehensive Reclamation Plan Amendment. Staff anticipates the CEQA analysis being completed and a public Draft Environmental Impact Report published by Fall 2011.

Can the County Process Two Reclamation Plan Amendments?

Both Planning Office staff and the County Counsel's office have determined that processing the two separate reclamation plans and environmental impact reports does not constitute a piecemeal approach under CEQA. These plans can be processed independently and the environmental impact analysis included in the EIRs for both the EMSA and the comprehensive reclamation plan amendments will evaluate any cumulative environmental impacts associated with both projects.

Under CEQA, the environmental review of a project proposal may not take place by reviewing portions of a project as if they were pieces. The concern is that the review for each piece may find no significant environmental impacts, but when considered as a whole the project could pose such impacts. This will not be the case for the EMSA or Comprehensive Reclamation Plan Amendments because the environmental impact analysis included in both Environmental Impact Reports will evaluate any cumulative environmental impacts associated with both projects. Moreover, the purpose of the EMSA amendment is to rectify an existing violation, and that amendment is not contingent upon approval of the new pit quarry.

Does Lehigh Have a Valid Title V Permit for air emissions from the cement plant?

Lehigh Southwest Cement Company operates under a Title V Permit, which is issued by the Bay Area Air Quality Management District (BAAQMD). The BAAQMD issued a Title V permit for the facility on November 5, 2003. The operator (Lehigh) submitted an application for renewal of the Title V Permit on April 28, 2008. On January 5, 2010, the BAAQMD 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 announced on August 9, 2010, and enacted by the U.S. EPA on September 9, 2010.

The BAAQMD posted a proposed Title V Permit that incorporates the new rules on its web site, and issued a public notice informing the public that it will receive written comments regarding the proposed permit up until March 25, 2011. **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.** According to the BAAQMD, the current Title V permit for Lehigh remains valid until the District takes an action regarding the renewal application.

Mercury

A Health Risk Assessment (HRA) was recently distributed by the BAAQMD in September 2010, which contains information regarding mercury and other facility emissions. An Executive Summary from the HRA includes Table ES-2, which showed the average annual emission rate for mercury by the Lehigh cement plant is 582 pounds per year during 2005, high end of the plant's production, and shows the current rate to be 337 pounds per year, due to reduced production. As noted in the September 16, 2010 Responses, this figure is not the amount of material that is actually emitted into the air. Current technology does not provide a means to measure the actual mercury emissions; however, in the future all cement plants in the country will be required to measure continuous mercury emissions that do reach the air. This requirement will take effect in 2013. Lehigh has installed certain process improvements in anticipation of meeting this new requirement and advises that additional retrofits will be installed before the 2013 deadline.

Sulfur Dioxide (SO₂)

The Bay Area Air Quality Management District (BAAQMD) confirmed that Lehigh Southwest Cement Company operates under a valid Title V permit. The Lehigh Title V Permit limits the SO₂ to a maximum of 2,107 tons per year. BAAQMD reported in September 2010 the SO₂ emissions to be at 420 tons per year, which is in compliance with the requirements of their Title V permit; however, BAAQMD staff have updated this information and report the current SO₂ emissions to be 240 tons per year.

Green House Gas

The Bay Area Air Quality Management District issued a report titled “Source Inventory of Bay Area Green House Gas Emissions.” This inventory includes the Lehigh Southwest cement plant. According to this report, the annual CO₂ emissions from the Lehigh cement plant were 842,475 metric tons in 2007. (Table V from this report, titled “2007 Bay Area Major (Top 200) GHG Emitting Facilities,” is attached for reference.) The BAAQMD report identifies the Metcalf Energy Center, which is located west of Highway 101 in the Coyote Valley area, as the stationary source with the highest level of CO₂ gas emissions for Santa Clara County; the Lehigh cement plant was the second highest emitter.

Cement plants are required to report their emissions of green house gases to the California Air Resources Board (CARB). This requirement took effect January 2009, and CARB periodically posts the data from these reports. The CARB posted a report on its web page titled “Greenhouse Gas Emissions Reported to the California Air Resources Board for 2008.” According to this report the Lehigh cement plant emitted 709,347 metric tons of CO₂ gases in 2008. This figure is lower than that reported in 2007 and noted above.

What is the EPA Violation?

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 (refer to pages 2-3 of the NOV/FOV attached). As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify Prevention of Significant Deterioration (PSD) requirements in its application submitted to the BAAQMD after installing the modifications. The NOV/FOV states that Lehigh violated Title V requirements. It 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.

What is the Notice of Violation from the Regional Water Quality Control Board?

The Regional Water Quality Control Board (RWQCB) conducted a storm water inspection of the Lehigh Southwest Cement Plant on February 10, 2010, and issued an inspection report. The RWQCB issued a Notice of Violation based on this report on March 26, 2010. The inspection report lists eleven violations that require abatement. Ten of these violations were to have corrective actions completed by April 15, 2010; one violation was to have corrective action completed by May 15, 2010. The Notice of Violation warns Lehigh of consequences for not coming into compliance with its storm water protection requirements, which may include fines. According to the RWQCB staff, the violation and subsequent actions taken by Lehigh are under review. The RWQCB staff advised the County it will issue a formal letter addressing the adequacy of Lehigh’s responses to the Notice of Violation in January 2011.

Additional Questions?

Beginning in August 2010 members of the community have made comments and asked questions during the Public Comment portion of the Board of Supervisors meetings related to Lehigh Southwest Cement Plant and the Permanente Quarry. Responses to the comments have been prepared by staff and provided to the Board following each meeting where comments were made. These responses are available for viewing on the “Permanente Quarry (Lehigh/Hanson)” portion of the County Planning Office website at www.sccplanning.org.

How Do I Get On The Mailing List?

Please send your contact information and any questions to the attention of: Marina Rush, Project Planner, County of Santa Clara.

Email: marina.rush@pln.sccgov.org

Phone: (408) 299-5784

Mail: County of Santa Clara Planning Office
Attn: Marina Rush
70 West Hedding Street, East Wing, 7th Floor
San Jose, CA 95110