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11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

13 **SIERRA CLUB,**

14 Plaintiff,

15 v.

16 **LEHIGH SOUTHWEST CEMENT**
17 **COMPANY, HANSON PERMANENTE**
18 **CEMENT, INC. and**
19 **HEIDELBERGCEMENT, INC.**

20 Defendants.

Civil No.:

CV 11-06392

HRL

COMPLAINT

21
22 **I. JURISDICTION, STATEMENT OF THE CASE, AND VENUE**

23 1. Jurisdiction. This court has subject matter jurisdiction over the claims set forth in
24 this complaint pursuant to 33 U.S.C. §1365(a)(1)(A) (citizen suit provision of the Clean Water
25 Act) and 28 U.S.C. §1331 (federal question statute). The relief requested is authorized pursuant to
26 28 U.S.C. §§2201 and 2202 (declaratory judgment), and 33 U.S.C. §§1319 and 1365 (Clean Water
27 Act).

1 2. Intradistrict Assignment. Pursuant to Civil L.R. 3-2(c), this case should be
2 assigned to the San Jose Division because the properties that are the subject of this action, the
3 waters and environment of Permanente Creek and defendants' Permanente Facility, are located in
4 Santa Clara County.

5 3. Venue. Venue in the Northern District of California is proper pursuant to
6 33 U.S.C. §1365(c)(1) (Clean Water Act citizen suit provision) because defendants' water
7 pollution discharge violations are located in this District. Venue also lies in the Northern District
8 of California, pursuant to 28 U.S.C. §1391(b) and (e), because the property that is the subject of
9 this action is in Santa Clara County, California, and because defendants' Permanente Facility is
10 located in Santa Clara County, California.

11 4. This is a federal Clean Water Act citizen suit enforcement action brought by
12 plaintiff Sierra Club against defendants Lehigh Southwest Cement Company, Hanson Permanente
13 Cement, Inc., and HeidelbergCement, Inc. (collectively, "Lehigh") to enjoin and penalize
14 significant and ongoing violations of the Clean Water Act ("CWA") at Lehigh's Permanente
15 quarry and cement plant in Santa Clara County, California ("Permanente Facility"). This
16 complaint seeks declaratory and injunctive relief and the imposition of civil penalties (payable to
17 the federal Treasury) under the federal Clean Water Act, 33 U.S.C. §§1319(d) and 1365(a).

18 5. In compliance with Section 505(b)(1)(A) of the CWA, 33 U.S.C. §1365(b)(1)(A),
19 on August 24, 2011 and October 18, 2011, Sierra Club notified the Administrator of the
20 Environmental Protection Agency ("EPA"), the State Water Resources Control Board ("State
21 Water Board"), the San Francisco Bay Regional Water Quality Control Board ("San Francisco
22 Bay Water Board") and Lehigh of the violations alleged herein, and plaintiff's intent to sue. A
23 true and accurate copy of Sierra Club's October 18, 2011 notice letter, that repeats and enlarges
24 upon the claims set forth in Sierra Club's August 24, 2011 letter, is attached hereto as **Exhibit A**.

25 6. At least sixty days have passed since Sierra Club's notice letters were mailed to
26 Lehigh and the other recipients. Lehigh continues to be in violation of the CWA. Neither EPA,
27 the State Water Board, nor the San Francisco Bay Water Board has commenced and diligently
28 prosecuted a court action to redress the violations alleged in Sierra Club's notice letters.

1 Moreover, neither EPA, the State Water Board, nor the San Francisco Bay Water Board has
2 commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C.
3 §1319(g), or comparable state law to penalize the violations alleged in Sierra Club's notice letters.

4 II. PARTIES

5 7. Plaintiff Sierra Club is a non-profit corporation incorporated in California. Sierra
6 Club has over 600,000 members nation-wide, with over 140,000 members in California. The
7 Sierra Club brings this action on behalf of its adversely affected members.

8 8. Sierra Club is a "person" within the meaning of Section 502(5) of the Clean Water
9 Act, 33 U.S.C. §1362(5).

10 9. The Sierra Club represents its members' interests in exploring, enjoying, and
11 protecting the wild places of the Earth; to practicing and promoting the responsible use of the
12 Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the
13 quality of the natural and human environment; and to using all lawful means to carryout those
14 objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of
15 surface and sub-surface waters in California.

16 10. Members of Sierra Club reside near Permanente Creek and regularly visit and
17 recreate near Permanente Creek. Sierra Club members use the water and riparian habitats that are
18 harmed by Lehigh's illegal discharges of pollutants into Permanente Creek. Lehigh's failure to
19 comply with the Clean Water Act has injured the past, present and future interests of Sierra Club's
20 members in using Permanente Creek for recreation including use as a hiking and biking corridor,
21 for viewing the water and natural scenery along Permanente Creek, and for protecting the wildlife
22 that relies on Permanente Creek.

23 11. Lehigh's unlawful discharges of selenium and other toxic and conventional
24 compounds into Permanente Creek pollute Permanente Creek to such an extent that its water is
25 lethal to some forms of aquatic life, and is harmful to the development, reproduction and long-
26 term survival of many other forms of aquatic life. Permanente Creek is unable to meet water
27 quality standards (also called "objectives") necessary to sustain a diverse and healthy assemblage
28 of aquatic life. As a consequence, pursuant to CWA Section 303(d), 33 U.S.C. §1313(d),

1 Permanente Creek is listed by EPA and the State Water Board as impaired due to excessive and
2 harmful concentrations of selenium and chronic toxicity.

3 12. Sierra Club members suffer injuries to their aesthetic, recreational, environmental,
4 and/or economic interests as a result of Permanente's status as a polluted stream, and Lehigh's
5 unlawful pollutant discharges into Permanente Creek that cause or contribute to that status.

6 13. The water in Permanente Creek does not meet water quality standards necessary to
7 protect the health of aquatic species and therefore represents an unhealthy environment for such
8 species. Sierra Club members hike near, observe wildlife in, photograph, and otherwise use the
9 waters of Permanente Creek that are being polluted by Lehigh's unlawful discharges. Sierra Club
10 members refrain from these activities or enjoy them less because of Lehigh's unlawful pollutant
11 discharges.

12 14. The aesthetic, recreational, environmental, economic, and health-related interests of
13 Sierra Club's members have been and continue to be injured by Lehigh's violations complained of
14 herein. The interests of plaintiff's members that are directly injured by Lehigh's violations
15 include but are not limited to, enjoying the benefits of Permanente Creek unsullied by the
16 pollution being discharged into that creek by Lehigh.

17 15. If Lehigh's unlawful discharges were enjoined, and the pollution to Permanente
18 Creek therefore reduced, the harm to the interests of Sierra Club's members would be at least in
19 part redressed. The assessment of civil penalties against Lehigh would also redress Sierra Club
20 member injuries by preventing and/or deterring Lehigh and others from illegally discharging
21 pollutants into Permanente Creek.

22 16. Defendant Lehigh Southwest Cement Company operates the Permanente Quarry.
23 Lehigh Southwest Cement Company is a California corporation doing business in California.
24 Lehigh Southwest Cement Company is a subsidiary of Lehigh Cement Company, a Pennsylvania
25 corporation. Lehigh Cement Company is a wholly-owned subsidiary of HeidelbergCement, Inc.

26 17. Defendant Hanson Permanente Cement, Inc. is the owner of the Permanente
27 Quarry. Hanson Permanente Cement, Inc. is an Arizona corporation doing business in California.
28 Hanson Permanente Cement, Inc. is a wholly-owned subsidiary of HeidelbergCement, Inc.

1 18. Defendant HeidelbergCement, Inc. (including other appendages such as “AG” and
2 “Group”) owns Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc.
3 HeidelbergCement, Inc. is also listed by the Santa Clara County Assessor’s Office as the owner of
4 the real property that comprises the Permanente Facility.

5 19. Defendant Lehigh Southwest Cement Company is a person within the meaning of
6 Section 502(5) of the Clean Water Act, 33 U.S.C. §1362(5). Defendant Hanson Permanente
7 Cement, Inc. is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C.
8 §1362(5). HeidelbergCement, Inc. is a person within the meaning of Section 502(5) of the Clean
9 Water Act, 33 U.S.C. §1362(5).

10 III. LEGAL BACKGROUND

11 20. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the “discharge of any
12 pollutant by any person” into waters of the United States except in compliance with the terms of a
13 permit, such as a National Pollutant Discharge Elimination System (“NPDES”) permit issued by
14 EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. §1342.

15 21. Citizens may enforce violations of CWA Section 301 through the citizen suit
16 provision in Sections 505(a) and (f) of the CWA, 33 U.S.C. §1365(a) and (f).

17 22. The term “discharge of a pollutant” is defined at CWA Section 502(12), 33 U.S.C.
18 §1362(12), as “(A) any addition of any pollutant to navigable waters from any point source . . .”

19 23. The term “pollutant” is defined at CWA Section 502(6), 33 U.S.C. §1362(6), as
20 “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions,
21 chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded
22 equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into
23 water.”

24 24. The term “navigable waters” is defined at CWA Section 502(7), 33 U.S.C.
25 §1362(7), as “the waters of the United States, including the territorial seas.”

26 25. The term “point source” is defined at CWA 502(14), 33 U.S.C. §1362(14), as “any
27 discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,
28 channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal

1 feeding operation, or vessel or other floating craft, for which pollutants are or may be discharged.
2 This term does not include agricultural stormwater discharges and return flows from irrigated
3 agriculture.”

4 26. An NPDES permit may only lawfully be issued if it contains effluent limits
5 sufficient to ensure compliance with all applicable in-stream water quality standards, technology-
6 based effluent standards, and water quality-based effluent standards. 33 U.S.C. §§1311, 1312,
7 1316, 1317 and 1342.

8 27. EPA regulations at 40 C.F.R. §122.28 allow EPA or an authorized state to issue
9 general NPDES permits to categories or subcategories of dischargers. To receive coverage under
10 a general permit, a discharger must submit a Notice of Intent (“NOI”) and agree to abide by the
11 terms of the general permit and any EPA or state notice of permit coverage.

12 28. The state of California is authorized by EPA to administer an NPDES program for
13 regulating the discharge of pollutants into the waters of the United States.

14 29. On April 17, 1997, the State Water Board issued Water Quality Order 97-03-DWQ
15 that sets forth the most recent version of a general permit for storm water discharges from
16 industrial activities (“General Storm Water Permit”).

17 30. On May 1, 2008, the State Water Board issued Water Quality Order R2-2008-0011
18 that sets forth the most recent version of a general permit for Discharges of Process Wastewaters
19 from Aggregate Mining, Sand Washing, and Sand Offloading Facilities to Surface Waters
20 (“General Sand and Gravel Permit”).

21 **IV. FACTUAL BACKGROUND**

22 31. The Permanente Facility is located on approximately 3,500 acres of land in Santa
23 Clara County that is owned, operated and otherwise controlled by Lehigh. Lehigh claims the
24 Permanente Facility provides over 50 percent of the concrete used in the Bay Area.

25 32. Kaiser Cement Corporation constructed the original cement plant next to
26 Permanente Creek in Santa Clara County in 1939. At that same time, the Kaiser subsidiary
27 Permanente Corporation (later named Permanente Cement Company) purchased the current quarry
28 lands that would supply the limestone for the cement plant.

1 33. Sometime in 1986-87, Hanson PLC purchased 100% of the stock of Kaiser
2 Cement. Hanson Permanente Cement, Inc., a subsidiary of Hanson PLC, owned and operated the
3 Permanente Facility from sometime in 1986-87 until 2007 when HeidelbergCement Inc. acquired
4 100% of the stock of Hanson PLC. Hanson Permanente Cement, Inc., now owned by
5 HeidelbergCement, Inc., has remained the owner of the Permanente Facility for the last 25 years.

6 34. In 2007, HeidelbergCement, Inc., also the owner of the Lehigh group of cement
7 companies located elsewhere in California and in other states, created Lehigh Southwest Cement
8 Company to operate the Permanente Facility.

9 35. Permanente Creek runs from its headwaters in the Coast Range east through the
10 middle of the quarry property, then north through the cities of Cupertino, Los Altos and Mountain
11 View before draining into the San Francisco Bay.

12 36. Lehigh discharges pollutants generated by its quarry mining, processing and
13 cement manufacturing operations directly into Permanente Creek.

14 Lehigh's Quarry Pit Wastewater Discharges

15 37. Lehigh's quarry mining and processing operations have exposed pollutants to rain
16 water, ground water and toxic wastewater. As these waters flow and comingle over and through
17 Lehigh's disturbed soils, rock, cement, settled sediments, and other quarry process wastes,
18 pollutants such as selenium, arsenic, molybdenum, nickel, chromium, manganese, residual
19 blasting agent (ammonium nitrate/fuel oil or "ANFO"), dust suppressants, coagulants, waste filter
20 cake and other toxic elements and compounds, are transported with, and otherwise are picked up
21 by the water and are collected at the bottom of the quarry pit ("quarry pit wastewater").

22 38. Lehigh then pumps the quarry pit wastewater on a regular basis through a pipe into
23 a waste pond (Pond 4) and thence through a pipe into Permanente Creek. Permanente Creek flows
24 into the San Francisco Bay.

25 39. Lehigh has discharged, and continues to discharge, selenium and other toxic
26 substances into Permanente Creek at levels in excess of applicable water quality standards.
27 Lehigh does not employ pollution control measures to reduce or eliminate selenium and other
28 toxic substances in its quarry pit wastewater to levels below all applicable water quality standards.

1 40. Lehigh's quarry dewatering process routes water to Pond 4, where it then
2 discharges to Permanente Creek, almost continuously or regularly depending on the time of year.
3 Lehigh's regular dewatering process is interrupted only when maintenance or repair of the
4 pumping system or other aspects of the storm water management system is performed.

5 41. The location of the quarry pit, Pond 4, and the pipe that discharges selenium and
6 other toxic pollutants from the pit and Pond 4 into Permanente Creek is accurately portrayed on
7 the map attached hereto as **Exhibit B**.

8 42. The average daily flow of quarry pit wastewater that Lehigh pumps into Pond 4
9 ranges from 250,000 to 2,500,000 gallons.

10 43. According to Lehigh's March 17, 2010 Report of Potential Exceedance of Water
11 Quality Standards, developed by Geosyntec Consultants: "The results of the metals analyses
12 indicate that water being collected in the quarry may contain concentrations of selenium that
13 exceed water quality standards, and, when discharged through the quarry dewatering system
14 pursuant to the SWPPP [Storm Water Pollution Prevention Plan], could be contributing to
15 exceedances of the water quality standards for selenium in Permanente Creek."

16 44. Selenium is listed as both a toxic and a priority water pollutant. 33 U.S.C.
17 §1317(a)(1); 40 C.F.R. §401.15; 40 C.F.R. Part 423, Appendix A. Selenium impacts the
18 reproductive cycle of many aquatic species, can impair the development and survival of fish, and
19 can damage gills or other organs of aquatic organisms.

20 45. Pollutants in Lehigh's quarry pit wastewater flow downstream through Lehigh's
21 property, through public parks and neighborhoods, and finally into San Francisco Bay. Pollutants
22 in Lehigh's quarry pit wastewater are taken up by animal and plant life in and along Permanente
23 Creek, and also percolate into underground aquifers.

24 46. Lehigh has no NPDES permit issued pursuant to CWA Section 402, 33 U.S.C.
25 §1342, or any other CWA permit, which authorizes the continuous discharge of quarry pit
26 wastewater into Permanente Creek.

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1 Lehigh's Stream Fill Discharges

2 47. Lehigh has used, and continues to use, the banks and bed of Permanente Creek as a
3 disposal area for quarry mine tailings, overburden, and other mining and cement manufacturing
4 wastes ("mine wastes"). Lehigh is responsible for dumping with trucks, bulldozers and other
5 heavy equipment, and continues to dump with such equipment and/or allow landslides, gullies,
6 channeled debris flows, and other types of mass wasting and slope failure to dump, mine wastes
7 into Permanente Creek.

8 48. Mine wastes from the Permanente Facility exist on debris slopes at or beyond the
9 angle of repose. These debris slopes often extend to and into Permanente Creek. Mine wastes
10 initially deposited by Lehigh at the top of the debris slopes have been conveyed downhill into
11 Permanente Creek by mechanisms including soil creep and sheet wash. Lehigh's mine wastes
12 pose a continuous and substantial risk of discharging into Permanente Creek in the future.

13 49. The locations where Lehigh has dumped mine wastes into Permanente Creek, and
14 on or near the banks of the Creek, include, but are not limited to, those shown on **Exhibit C**.

15 50. The mine wastes dumped into Permanente Creek continuously discharge, release
16 and otherwise add their pollutants into the stream's waters much like coffee grounds in a
17 percolator. As the waters of Permanente Creek flow over and through the mine wastes dumped
18 into the Creek, and/or as rainwater and storm water runoff falls upon or flows over the mine
19 wastes placed within the Creek and on or near the banks of the Creek, pollutants such as selenium,
20 arsenic, molybdenum, nickel, chromium, manganese, ANFO, and other toxic elements and
21 compounds, are dissolved into, suspended in and are otherwise added to the water ("water-borne
22 mining wastes").

23 51. The water-borne mining wastes flow downstream through Lehigh's property,
24 through public parks and neighborhoods, and finally into San Francisco Bay. Lehigh's water-
25 borne mining wastes are taken up by animal and plant life in and along Permanente Creek, and
26 also percolate into underground aquifers.

27 52. Lehigh has discharged, and continues to discharge, water-borne mining wastes into
28 Permanente Creek at levels in excess of applicable water quality standards. Lehigh does not

1 employ pollution control measures to reduce or eliminate the pollutants in its water-borne mining
2 wastes to levels below all applicable water quality standards.

3 53. The average concentration of dissolved pollutants in Permanente Creek increases
4 significantly as the stream flows through Lehigh's mining wastes. Lehigh water sampling and
5 testing has shown that the water in Permanente Creek downstream of most of Lehigh's pollutant
6 discharges contains from three to over 100 times the dissolved concentrations of arsenic, selenium,
7 nickel, manganese and molybdenum compared to the water upstream of most of Lehigh's
8 pollutant discharges.

9 54. Lehigh has no NPDES permit issued pursuant to CWA Section 402, 33 U.S.C.
10 §1342, or any other CWA permit, which authorizes the continuous discharge of water-borne
11 mining wastes from the mining wastes dumped into Permanente Creek described above.

12 55. Lehigh has no "dredge and fill" permit issued pursuant to CWA Section 404, 33
13 U.S.C. §1344, or an NPDES permit issued pursuant to CWA Section 402, 33 U.S.C. §1342, or any
14 other CWA permit for the mining wastes described above that were discharged into Permanente
15 Creek since the passage of the CWA in 1972 to the present, or that continue to be discharged into
16 Permanente Creek and/or pose a significant risk of being discharged into the Creek, or that
17 currently and continuously pollute the water and clog the bed, banks and wetlands of Permanente
18 Creek.

19 The General Storm Water Permit

20 56. In 1997, Kaiser Cement Corporation obtained limited coverage for storm water
21 discharges from the Permanente Facility under the General Storm Water Permit by filing a notice
22 of intent ("NOI"). Lehigh has not filed a similar NOI.

23 57. As its name suggests, the General Storm Water Permit does not authorize Lehigh to
24 discharge non-storm water. Lehigh's quarry pit wastewater is not storm water. The General
25 Storm Water Permit does not authorize Lehigh's discharges of quarry pit wastewater, water-borne
26 mining wastes, and mine waste fill described above.

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1 58. The General Storm Water Permit only authorizes certain storm water runoff
2 discharges, and certain non-storm water discharges from the Permanente Facility into Permanente
3 Creek, and only under certain conditions.

4 59. The General Storm Water Permit prohibits the unpermitted discharge of pollutants
5 into waters of the United States.

6 60. Part A of the General Storm Water Permit states: “Except as allowed in Special
7 Conditions (D.1.) of this General Permit, materials other than storm water (non-storm water
8 discharges) that discharge directly or indirectly to waters of the United States are prohibited.
9 Prohibited non-storm water discharges must either be eliminated or permitted by a separate
10 NPDES permit.”

11 61. Special Conditions Section D.1.a. in the General Storm Water Permit authorizes
12 several narrow, environmentally-benign “non-storm water discharges.”

13 62. The General Storm Water Permit does not cover Lehigh’s discharges of quarry pit
14 wastewater into Permanente Creek because they are not storm water discharges and they are not
15 authorized non-storm water discharges.

16 63. On October 24, 2011, Lehigh submitted to the San Francisco Bay Water Board an
17 NOI for a General Sand and Gravel Permit to authorize discharges of quarry pit wastewater into
18 Permanente Creek.

19 64. To the extent a General Sand and Gravel Permit is applicable to Lehigh’s quarry pit
20 wastewater discharges, it does not cover Lehigh’s discharges of any pollutants for which no
21 effluent limits are expressly set forth in that permit, including but not limited to selenium, arsenic,
22 molybdenum, nickel, chromium, manganese, ANFO, dust suppressants, coagulants, waste filter
23 cake and chronic toxicity.

24 65. Plaintiff incorporates by reference and realleges the allegations contained in
25 paragraphs 1 through 64 for the causes of action set forth below.

26 **FIRST CAUSE OF ACTION – Unpermitted Pit Wastewater Discharges**

27 66. The Clean Water Act at Section 301(a), 33 U.S.C. § 1311(a), prohibits the
28 “discharge of any pollutant by any person” into waters of the United States except in compliance

1 with the terms of a permit such as an NPDES permit issued pursuant to Section 402 of the CWA,
2 33 U.S.C. §1342.

3 67. Each of the defendants is a “person” within the meaning of Section 502(5) of the
4 CWA, 33 U.S.C. §1362(5).

5 68. Permanente Creek is a water of the United States within the meaning of CWA
6 Section 502(7), 33 U.S.C. §1362(7).

7 69. The substances in Lehigh’s quarry pit wastewater, including selenium, arsenic,
8 molybdenum, nickel, chromium, manganese, ANFO, dust suppressants, coagulants, waste filter
9 cake and sediment, are each “pollutants” within the meaning of CWA Section 502(6), 33 U.S.C.
10 §1362(6).

11 70. Any substances that alone or in combination cause or contribute to the exceedance
12 of California’s water quality standard or objective for chronic toxicity are pollutants.

13 71. The pipe through which quarry pit wastewater flows from Lehigh’s Pond 4 into
14 Permanente Creek is a “point source” within the meaning of CWA Section 502(14), 33 U.S.C.
15 §1362(14).

16 72. Lehigh adds its quarry pit wastewater pollutants into Permanente Creek on a
17 continuous basis.

18 73. Lehigh has no NPDES permit, or any other CWA permit, authorizing its
19 continuous discharge of quarry pit wastewater into Permanente Creek.

20 74. The General Storm Water Permit does not cover Lehigh’s discharges of quarry pit
21 wastewater into Permanente Creek because they are not storm water discharges and they are not
22 authorized non-storm water discharges.

23 75. The General Storm Water Permit also does not cover Lehigh’s discharges of quarry
24 pit wastewater because Lehigh has not filed an NOI for a General Storm Water Permit and the
25 Kaiser General Storm Water Permit NOI is non-transferable.

26 76. A General Sand and Gravel Permit does not cover Lehigh’s discharges of quarry pit
27 wastewater because it does not authorize discharges of pollutants for which no effluent limits are
28 expressly set forth in that permit, including but not limited to selenium, arsenic, molybdenum,

1 nickel, chromium, manganese, ANFO, dust suppressants, coagulants, waste filter cake and chronic
2 toxicity.

3 77. Lehigh's continuous discharges of quarry pit wastewater into Permanente Creek
4 have violated CWA Section 301(a), 33 U.S.C. § 1311(a), every day for at least the last five years,
5 and continue to violate CWA Section 301(a), 33 U.S.C. § 1311(a), because Lehigh has no NPDES
6 permit authorizing this continuous discharge.

7 78. Unless enjoined, Lehigh will remain in continuing violation of the CWA.

8 79. Pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), Lehigh is liable for
9 civil penalties of up to \$37,500 per day for its violations of Section 301 of the CWA, 33 U.S.C.
10 §1311.

11 **SECOND CAUSE OF ACTION -- Pit Wastewater Discharges in Violation of General**
12 **Storm Water Permit**

13 80. Plaintiff incorporates by reference and realleges the allegations contained in
14 paragraphs 1 through 79.

15 81. Lehigh's continuous discharges of quarry pit wastewater into Permanente Creek
16 have violated the "Discharge Prohibitions" in Part A.1. of the General Storm Water Permit every
17 day for at least the last five years, and continue to violate the "Discharge Prohibitions" in Part A.1.
18 of the General Storm Water Permit.

19 82. Lehigh's quarry pit wastewater discharges are not permitted storm water discharges
20 because, *inter alia*, they are not solely the result of storm water runoff, snow melt runoff, and
21 surface runoff and drainage, they contain toxic wastes, and because they take place year-round and
22 not just during storm events. Lehigh's quarry pit wastewater discharges also are not authorized
23 non-storm water discharges as described in Special Conditions Part D.1. of the General Storm
24 Water Permit because, *inter alia*, they are not identified as such in that permit or in Lehigh's
25 annual reports, they contain significant quantities of pollutants, and they are causing or
26 contributing to the violation of water quality standards for selenium and toxicity in Permanente
27 Creek.

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1 83. Lehigh’s continuous discharges of quarry pit wastewater into Permanente Creek
2 have also violated the General Storm Water Permit every day for at least the last five years, and
3 continue to violate the General Storm Water Permit because they are causing or threatening to
4 cause pollution, contamination, nuisance, and are causing or contributing to the violation of water
5 quality standards for selenium and toxicity in Permanente Creek. Standard Provisions at C.17;
6 Discharge Prohibitions at A.2, C.1 and C.2.

7 84. Lehigh’s continuous discharges of quarry pit wastewater into Permanente Creek
8 have also violated the General Storm Water Permit every day for at least the last five years, and
9 continue to violate the General Storm Water Permit because Lehigh has failed: (1) sufficiently to
10 identify, and to control with Best Available Technology (“BAT”), such discharges consistent with
11 Effluent Limitations Part B.3., (2) to follow the Storm Water Pollution Prevention Plan
12 (“SWPPP”) requirements in Section A, including the requirement to disclose such discharges
13 pursuant to Section A.6. and to revise the SWPPP pursuant to Section A.9., and (3) to sample,
14 analyze and report such discharges consistent with Section B, including sampling for pollutants
15 including selenium and toxicity as required by Section B, 5.c.ii.

16 85. Unless enjoined, Lehigh will remain in continuing violation of the CWA.

17 86. Pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), Lehigh is liable for
18 civil penalties of up to \$37,500 per day for its violations of Section 301 of the CWA, 33 U.S.C.
19 §1311.

20 **THIRD CAUSE OF ACTION – Unpermitted Stream Fill Discharges**

21 87. Plaintiff incorporates by reference and realleges the allegations contained in
22 paragraphs 1 through 86.

23 88. The water-borne mining wastes described above are “pollutants” within the
24 meaning of CWA Section 502(6), 33 U.S.C. §1362(6).

25 89. Each mining waste site shown on **Exhibit C** is a “point source” within the meaning
26 of CWA Section 502(14), 33 U.S.C. §1362(14).

27 90. Each mining waste site adds water-borne mining wastes into Permanente Creek on
28 a continuous basis.

1 91. Lehigh has no NPDES permit, or any other CWA permit, authorizing the
2 continuous discharge of water-borne mining wastes into Permanente Creek.

3 92. The General Storm Water Permit does not cover Lehigh's discharges of water-
4 borne mining wastes into Permanente Creek.

5 93. Lehigh has violated for at least the last five years, and continues to violate, CWA
6 Section 301(a), 33 U.S.C. §1311(a), and the General Storm Water Permit Discharge Prohibitions
7 at A.1 and A.2, by discharging without an NPDES permit water-borne mining wastes from the
8 mining wastes it has dumped into Permanente Creek.

9 94. Unless enjoined, Lehigh will remain in continuing violation of the CWA.

10 95. Pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), Lehigh is liable for
11 civil penalties of up to \$37,500 per day for its violations of Section 301 of the CWA, 33 U.S.C.
12 §1311.

13 **FOURTH CAUSE OF ACTION – Unpermitted Stream Fill**

14 96. Plaintiff incorporates by reference and realleges the allegations contained in
15 paragraphs 1 through 95.

16 97. The mining wastes described above are "pollutants" within the meaning of CWA
17 Section 502(6), 33 U.S.C. §1362(6).

18 98. Each piece of heavy equipment that Lehigh used to dump mining waste into
19 Permanente Creek is a "point source" within the meaning of CWA Section 502(14), 33 U.S.C.
20 §1362(14).

21 99. Lehigh has no CWA Section 404, 33 U.S.C. §1344 "dredge and fill" permit that
22 authorized the mine waste fill that Lehigh has dumped into Permanente Creek, or any other CWA
23 permit that authorizes the dumping of mine waste fill into Permanente Creek.

24 100. Lehigh has violated, and continues to violate CWA Section 301(a), 33 U.S.C.
25 §1311(a), and the General Storm Water Permit, Discharge Prohibitions at A.1 and A.2, by
26 discharging unpermitted mine waste fill into Permanente Creek, by allowing unpermitted mine
27 waste fill to remain in Permanente Creek, and by failing to remove and/or obtain a permit for the
28 unpermitted mine waste fill that it has dumped into Permanente Creek.

1 101. Unless enjoined, Lehigh will remain in continuing violation of the CWA.

2 102. Pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), Lehigh is liable for
3 civil penalties of up to \$37,500 per day for its violations of Section 301 of the CWA, 33 U.S.C.
4 §1311.

5 **V. RELIEF REQUESTED**

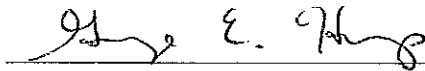
6 WHEREFORE, plaintiff respectfully requests the Court enter an Order:

- 7 A. Declaring Lehigh has violated, and continues to violate the Clean Water Act by
8 discharging pollutants into Permanente Creek without a permit as alleged above;
- 9 B. Enjoining Lehigh from discharging any pollutants into Permanente Creek without a permit;
- 10 C. Ordering Lehigh to obtain an individual NPDES permit or permits from the San Francisco
11 Bay Water Board to discharge pollutants into Permanente Creek prior to any modification
12 of the injunction above;
- 13 D. Order Lehigh to prepare and submit to the Court and to plaintiff a comprehensive plan,
14 including interim and final deadlines, that describes how Lehigh proposes to achieve full
15 and continuing compliance with the Clean Water Act at its Permanente Facility in the most
16 expeditious and effective manner possible. The plan shall include, *inter alia*, all necessary
17 measures to attain and maintain all water quality standards for Permanente Creek, and the
18 restoration of Permanente Creek to its former, natural condition. After allowing plaintiff
19 time to respond to Lehigh's plan, Order Lehigh to:
- 20 1. Perform all work necessary to achieve prompt, strict and continuous compliance
21 with the provisions of the Clean Water Act, including the restoration of Permanente Creek
22 and the attainment and maintenance of all water quality standards throughout all reaches of
23 Permanente Creek within or affected by Lehigh's Permanente Facility;
- 24 2. Set aside sufficient funds available to the Court to ensure prompt, continuous,
25 consistent and long-term compliance with the Court's order;
- 26 E. ORDER Lehigh to pay to the federal Treasury a civil penalty of \$37,500 per day for each
27 of its violations of the Clean Water Act. CWA Section 309(d), 33 U.S.C. §1319(d).
- 28

- 1 F. ORDER Lehigh to pay plaintiff its costs of litigation, including but not limited to
2 reasonable attorney and expert witness fees, as authorized by CWA Section 505(d), 33
3 U.S.C. §1365(d);
4 G. Retain jurisdiction over this matter for purposes of enforcing and effectuating the Court's
5 order;
6
7 H. GRANT such other relief as the Court deems necessary and proper.

8 DATED this 19th day of December 2011.
9
10

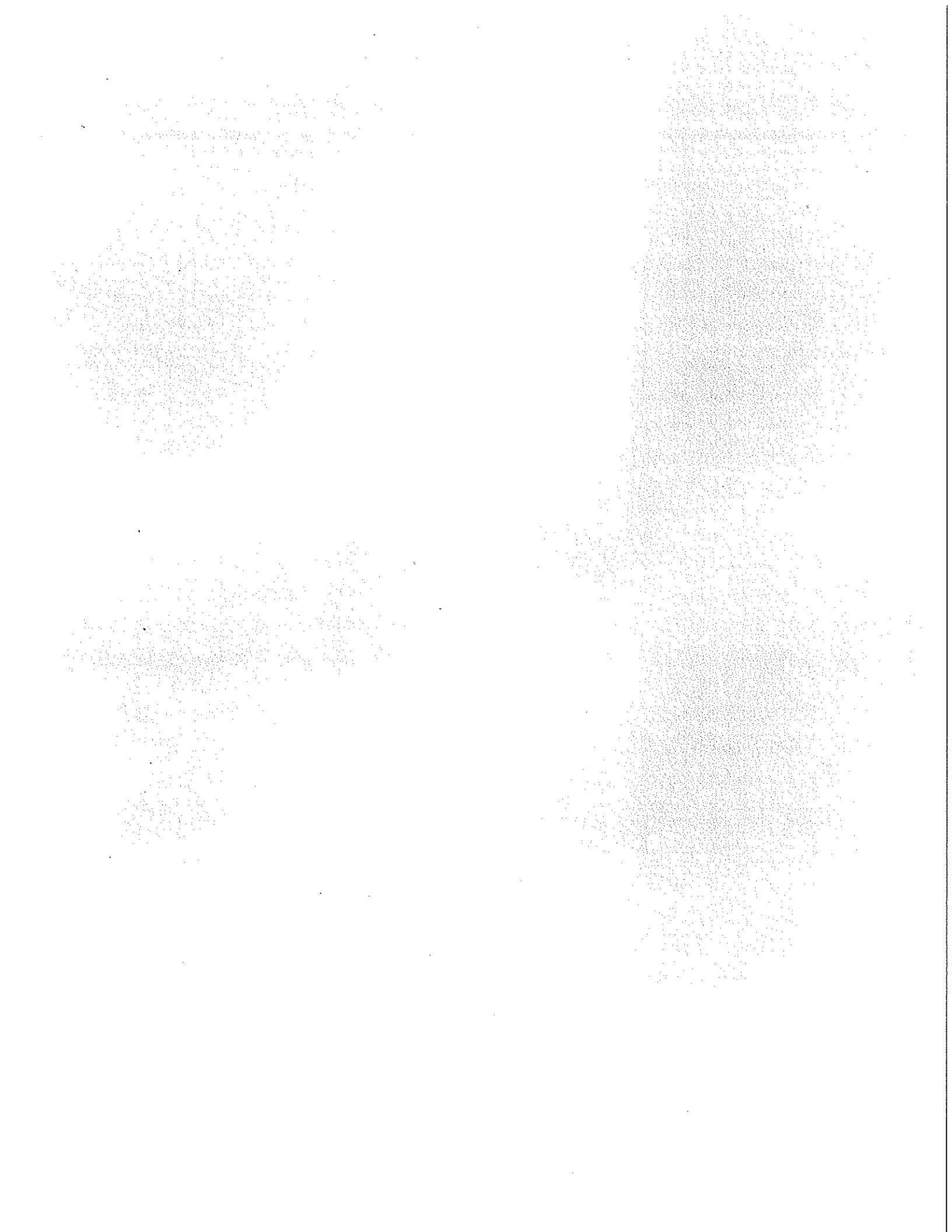
11 SIERRA CLUB, Plaintiff

12 

13 _____
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15 Attorney at Law
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18 Office: 415-566-5414
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26 Attorneys for Plaintiff
27 Sierra Club
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San Francisco, California 94105



Reed Zars

Attorney at Law

910 Kearney Street, Laramie, WY 82070
307-745-7979

October 18, 2011

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Mr. Henrik Wesseling, Plant Manager
Lehigh Southwest Cement Company
Hanson Permanente Cement, Inc.
Permanente Plant
24001 Stevens Creek Boulevard
Cupertino, CA 95014

Dr. Bernd Scheifele, Chairman
HeidelbergCement
Berliner Strasse 6
69120 Heidelberg
Germany

RE: Supplemental Notice of Intent to Sue for Violations of the Clean Water Act at Lehigh's Permanente Plant in Santa Clara County, California.

Dear Mr. Wesseling and Dr. Scheifele,

We are writing on behalf of Sierra Club to supplement its letter to you of August 21, 2011, and to further notify you of its intent to file suit against Lehigh Southwest Cement Company, Hanson Permanente Cement, Inc., Lehigh Hanson, Inc., and HeidelbergCement Group (collectively, "Lehigh") to enjoin and penalize significant and ongoing violations of the Clean Water Act ("CWA") at your Permanente quarry and cement plant in Santa Clara County, California ("Permanente Facility"). Lehigh is liable for the continuous, unpermitted discharge into Permanente Creek of millions of gallons of polluted quarry water, containing elevated levels of selenium and other toxic pollutants, and sediment and other conventional pollutants, for at least the last five years. Lehigh is also liable for the continuous, unpermitted discharge of pollutants into Permanente Creek from tons of mine tailings and waste that have been dumped into Permanente Creek. These wastes act similar to coffee grounds, clogging Permanente Creek and continuously discharging a brew of harmful chemicals such as selenium and other toxic and conventional pollutants into its waters.

Each of the continuous, unpermitted discharges described above have caused and/or contributed to significant exceedances of water quality standards for selenium and toxicity in Permanente Creek, have caused and/or contributed to Permanente Creek's state and federal listing as an impaired water body due to the presence of such pollutants, and have substantially diminished the creek's ability to sustain aquatic life including but not limited to steelhead trout and the California red-legged frog, both of which are federally listed as threatened species. Each of the continuous, unpermitted discharges described above violate CWA Sections 301, 402

and 404, 33 U.S.C. §§ 1311, 1342 and 1344. Additionally, each of the discharges described above violate Parts A.1. and A.2., and Standard Provisions Section C, in the California State Water Resources Control Board's General Permit for Discharges of Storm Water Associated with Industrial Activity, Order No. 97-03-DWQ ("the General Storm Water Permit"), to the extent it applies to Lehigh, because they are unauthorized, non-storm water discharges. Alternatively, even if any of the discharges described above are storm water discharges, (1) they violate the CWA because Lehigh lacks legitimate authorization under any NPDES permit to discharge storm water to waters of the United States, or (2) they violate the General Storm Water Permit, because, among other reasons, they are causing or contributing to exceedances of water quality standards for selenium and toxicity in Permanente Creek.

Pollutants illegally discharged by Lehigh into Permanente Creek also enter Santa Clara County's underground drinking water supply as they flow across the unconfined areas of the Santa Clara Subbasin aquifer. The Santa Clara Subbasin aquifer is the primary reservoir of drinking water for San Jose and surrounding cities.

The Clean Water Act at Section 505, 33 U.S.C. § 1365(a)(1), authorizes citizens to bring suit to enjoin violations of an effluent standard or limitation and to seek civil penalties for such violations. The definition of effluent standard or limitation includes the discharge of pollutants into waters of the United States without a permit. 33 U.S.C. § 1365(f); Committee to Save Mokelumne River v. East Bay Utility Dist., 1993 U.S. Dist. LEXIS 8364, 11, n. 7 (E.D. Cal. 1993); *aff'd*, 13 F.3d 305, 309 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 198 (1994). Violators of the CWA are also subject to an assessment of civil penalties of up to \$32,500 per day per violation for all violations occurring through January 12, 2009, and up to \$37,500 per day per violation for all violations occurring after January 12, 2009, for each violation, pursuant to Sections 309(d) and 505(a) of the CWA. 33 U.S.C. §§ 1319(d), 1365(a) and 40 C.F.R. §§ 19.1 - 19.4.

To the extent required by the Clean Water Act at 33 U.S.C. § 1365(a)(1), we are writing to notify you that Sierra Club intends to file suit in the applicable federal district court anytime 60 days after the postmark date of this supplemental notice letter to enjoin and penalize the violations described below.

I. Background

The Permanente Facility is located on approximately 3,500 acres of land in Santa Clara County that is owned, operated and otherwise controlled by Lehigh. Lehigh claims the Permanente Facility provides over 50 percent of the concrete used in the Bay Area.

Kaiser Cement Corporation constructed the original cement plant next to Permanente Creek in Santa Clara County in 1939. At that same time, the Kaiser

subsidiary Permanente Corporation (later named Permanente Cement Company) purchased the current quarry lands that would supply the limestone for the cement plant. In 1986-87, Hanson PLC purchased 100% of the stock of Kaiser Cement. Hanson Permanente Cement, Inc., a subsidiary of Hanson PLC, owned and operated the Permanente Facility from 1986-87 until 2007 when HeidelbergCement acquired 100% of the stock of Hanson. Hanson Permanente Cement, Inc., now owned by HeidelbergCement, has remained the owner of the Permanente Facility for the last 25 years. In 2007, HeidelbergCement, also the owner of the Lehigh group of cement companies located elsewhere in California and in other states, created Lehigh Southwest Cement Company to operate the Permanente Facility.

Permanente Creek runs from its headwaters in the Coast Range east through the middle of the quarry property, then north through the cities of Cupertino, Los Altos and Mountain View before draining into the San Francisco Bay.



From <http://www.lehighpermanente.com/#/virtual-tour/4537662984>.

II. The Violations

A. Unpermitted Quarry Discharges

The federal Clean Water Act at Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into waters of the United States, except in compliance with provisions of the Act. See also, 33 U.S.C. § 1362(6), (7), (12) and (14). Of particular importance here, CWA Section 301(a) prohibits the discharge of pollutants into waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit that, in turn, requires compliance with in-stream water quality standards, technology-based effluent standards, and water quality-based effluent standards. 33 U.S.C. §§ 1311, 1312, 1316, 1317 and 1342.

In 1997, Kaiser Cement Corporation obtained limited coverage for storm water discharges from the Permanente Facility under the General Storm Water Permit by filing a notice of intent ("NOI"). **Attachment 1.** Lehigh has not filed a similar NOI. Nevertheless, to the extent the General Storm Water Permit applies to Lehigh by virtue of the Kaiser NOI, and in accordance with CWA Section 301(a), the General Storm Water Permit also prohibits the unpermitted discharge of pollutants into waters of the United States. In particular, the General Storm Water Permit prohibits all pollutant discharges into Permanente Creek from point sources at the Permanente Facility unless such discharges are identified and regulated as storm water discharges, are separately permitted, or are expressly identified and excluded from regulation as authorized non-storm water discharges. The General Stormwater Permit provides as follows:

A. DISCHARGE PROHIBITIONS

1. Except as allowed in Special Conditions (D.1.) of this General Permit, materials other than storm water (non-storm water discharges) that discharge either directly or indirectly to waters of the United States are prohibited. Prohibited non-storm water discharges must be either eliminated or permitted by a separate NPDES permit.
2. Storm water discharges and authorized non-storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance.

General Storm Water Permit, pp. 5-6, **Attachment 1.**

The narrow "non-storm water discharges" exceptions that are authorized by the General Storm Water Permit are limited to the following exclusive list of environmentally-neutral or benign discharges:

D. SPECIAL CONDITIONS

1. Non-Storm Water Discharges

- a. The following non-storm water discharges are authorized by this General Permit provided that they satisfy the conditions specified in Paragraph b. below: fire hydrant flushing; potable water sources, including potable water related to the operation, maintenance, or testing of potable water systems; drinking fountain water; atmospheric condensates including refrigeration, air conditioning, and compressor condensate; irrigation drainage; landscape watering; springs; ground water; foundation or footing drainage; and sea water infiltration where the sea waters are discharged back into the sea water source.

b. The non-storm water discharges as provided in Paragraph a. above are authorized by this General Permit if all the following conditions are met:

- i. The non-storm water discharges are in compliance with Regional Water Board requirements.
- ii. The non-storm water discharges are in compliance with local agency ordinances and/or requirements.
- iii. BMPs [Best Management Practices] are specifically included in the SWPPP [Storm Water Pollution Prevention Plan] to (1) prevent or reduce the contact of non-storm water discharges with significant materials or equipment and (2) minimize, to the extent practicable, the flow or volume of non-storm water discharges.
- iv. The non-storm water discharges do not contain significant quantities of pollutants.
- v. The monitoring program includes quarterly visual observations of each non-storm water discharge and its sources to ensure that BMPs are being implemented and are effective.
- vi. The non-storm water discharges are reported and described annually as part of the annual report.

According to Lehigh's own statements, Lehigh has been discharging without a proper permit, and continues to discharge without a proper permit, pollutants generated by its quarry mining, processing and cement manufacturing operations directly into Permanente Creek, a water of the United States. In particular, Lehigh's quarry mining and processing operations have exposed pollutants to rain water, ground water and process wastewater. As these waters flow and come together and through Lehigh's disturbed soils, rock, cement, settled sediments, and other quarry process wastes, pollutants such as selenium, arsenic, molybdenum, nickel and manganese, residual blasting agent (ANFO), dust suppressants, coagulants, waste filter cake and other toxic elements and compounds, are transported with, and otherwise are picked up by the water and are collected at the bottom of the quarry pit ("quarry pit wastewater").

Lehigh then pumps the quarry pit wastewater on a regular basis through a pipe into a waste pond (Pond 4) and thence through a pipe into Permanente Creek. Permanente Creek flows into the San Francisco Bay. Lehigh employs no pollution control measures to reduce or eliminate selenium and other toxic substances that are dissolved and suspended in its quarry pit wastewater. As Lehigh explained to

the California Regional Water Quality Control Board, San Francisco Bay Region ("Water Board"):

[T]he quarry dewatering process routes water to Pond 4, where it then discharges to Permanente Creek, almost continuously or regularly depending on the time of year, the volume of storm water and groundwater that collects in the quarry bottom. This regular dewatering process is interrupted only when regular maintenance of the pumping system or other aspects of the storm water management system require maintenance.

Lehigh Response to the Water Board, December 13, 2010, at page 6, attached hereto as **Exhibit A**. A map showing the location of the quarry pit, Pond 4, and the pipe that discharges selenium and other toxic pollutants from the pit and Pond 4, is attached hereto as **Exhibit B**.

According to Lehigh in that same response, "[t]he average *daily flow* into Pond 4 can range from 250,000 to 2,500,000 gallons." **Exhibit A** (emphasis added).

Not only that, Lehigh also admits that the quarry pit wastewater it has been discharging into Permanente Creek, and that it continues to discharge into Permanente Creek, is contaminated with selenium¹ in concentrations that greatly exceed water quality standards. Again, according to Lehigh:

The results of the metals analyses indicate that water being collected in the quarry may contain concentrations of selenium that exceed water quality standards, and, when discharged through the quarry dewatering system pursuant to the SWPPP [Storm Water Pollution Prevention Plan], could be contributing to exceedances of the water quality standards for selenium in Permanente Creek.

Exhibit C, Report of Potential Exceedance of Water Quality Standards, Geosyntec Consultants, March 17, 2010, p. 8.

Lehigh's qualification that the quarry pit wastewater it is discharging into Permanente Creek "could" contain concentrations of selenium above water quality

¹ Selenium is listed as both a toxic and a priority water pollutant. *See*, 33 U.S.C. §1317(a)(1); 40 C.F.R. §401.15; 40 C.F.R. Part 423, Appendix A. According to the court in *Ohio Valley Envtl. Coalition, Inc. v. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 900 (S.D. W.Va. 2010), "[S]elenium is a naturally occurring element, common in the environment. It is problematic only in high concentrations, but at certain levels has toxic effects. Selenium impacts the reproductive cycle of many aquatic species, can impair the development and survival of fish, and can even damage gills or other organs of aquatic organisms subjected to prolonged exposure. It can also be toxic to humans, causing kidney and liver damage, and damage to the nervous and circulatory systems."

standards is unnecessary. Although not a necessary element to establish liability under the Clean Water Act, Lehigh's own sampling evidence shows that selenium concentrations in its quarry pit wastewater *are* in excess of water quality standards.

The water quality standards applicable to Permanente Creek are set forth in the 2007 San Francisco Bay Basin Water Quality Control Plan ("Basin Plan") and the California Toxics Rule at 40 C.F.R. §131.38. Both the Basin Plan at Table 3-4 and the California Toxics Rule establish a chronic total selenium standard of 5.0 micrograms per liter in fresh water. **Exhibit D.** The Basin Plan at Section 3.3.18 also requires that "[a]ll waters shall be maintained free of toxic substances in concentrations that are lethal to or that produce other detrimental responses in aquatic organisms." **Exhibit D.** Due to chronically elevated levels of selenium and toxicity immediately downstream from the Permanente facility, EPA recently approved the listing of Permanente Creek as impaired for both selenium and aquatic toxicity. **Exhibit E,** EPA Approval Letter, November 12, 2010; Water Board 2010 Integrated Report, Appendix A, Category 5 List.

Water quality testing of the quarry pit wastewater performed by Lehigh in January of 2010 found that the concentration of dissolved selenium in Pond 4 was 82 micrograms per liter, well over ten times the applicable 5.0 micrograms per liter water quality standard. (Had Lehigh properly analyzed for total selenium rather than just the dissolved component, this value likely would have been higher. Furthermore, Lehigh has failed altogether to analyze this wastewater for toxicity.) As explained above, Lehigh discharges its quarry pit wastewater in Pond 4 directly into Permanente Creek without employing any measures to reduce selenium concentrations or toxicity. **Exhibit C,** Report of Potential Exceedance, Table 2-1 and Appendix A, page 4 of 16.

In 1997, Kaiser Cement Corporation obtained limited coverage for storm water discharges from the Permanente Facility under the General Storm Water Permit by filing a notice of intent. **Attachment 1.** However, as its name indicates, that permit only applies (to the extent it has any legal application to Lehigh) during specified storm events and not to the on-going, non-storm water discharges from Pond 4 described here. **Attachment 1.** The Water Board emphatically confirmed this fact on February 18, 2011:

Lehigh repeatedly asserts that the Facility's discharges of quarry bottom water, wash-down water, and dust suppression water are in compliance with the Industrial General Storm Water Permit. The Industrial General Storm Water Permit specifically prohibits all three of these self-admitted discharges from the Lehigh facility. *Lehigh is grossly mistaken in its assertion that the Facility is permitted to discharge these three types of non-storm water flows.*

Exhibit F, Water Board staff review and response to Lehigh's letter of December 13, 2010, in response to our "13267" letter of November 29, 2010, p. 1 (emphasis added).

Because Lehigh pumps its quarry pit wastewater into Pond 4 on a continuous or regular basis, and because Pond 4 is the functional equivalent of a full bathtub, the continuous pumping of quarry pit wastewater inexorably results in the continuous discharge of pollutants through a pipe directly into Permanente Creek. Lehigh has no permit authorizing this continuous discharge. As a consequence, Lehigh has violated and continues to violate CWA Section 301(a), 33 U.S.C. § 1311(a), by discharging selenium and other toxic and conventional contaminants in its quarry pit wastewater ("pollutants") through a pipe ("point source") into Permanente Creek ("water of the United States") without an authorizing permit.

Lehigh's continuous discharges of quarry pit wastewater into Permanente Creek have also violated, and continue to violate, the "Discharge Prohibitions" in Part A.1. of the General Storm Water Permit set forth above. These discharges are not permitted storm water discharges because, *inter alia*, they are not solely the result of storm water runoff, snow melt runoff, and surface runoff and drainage, and because they take place year-round and not just during storm events. Moreover, Lehigh's quarry pit wastewater discharges are not authorized non-storm water discharges as described in Special Conditions Part D.1. of the General Storm Water Permit because, *inter alia*, they are not identified as such in that permit or in Lehigh's annual reports, they contain significant quantities of pollutants, and they are causing or contributing to the violation of water quality standards for selenium and toxicity in Permanente Creek.

Alternatively, even assuming Lehigh's continuous discharges of quarry pit wastewater are storm water discharges, they are in violation of the CWA either because: (1) such discharges are not covered by the General Storm Water Permit because Lehigh has not filed an NOI and the Kaiser NOI is non-transferable, or (2) such discharges are in violation of the General Storm Water Permit because they are causing or threatening to cause pollution, contamination, nuisance, and are causing or contributing to the violation of water quality standards for selenium and toxicity in Permanente Creek. Standard Provisions at C.17; Discharge Prohibitions at A.2, C.1 and C.2, **Attachment 1**.

Moreover, Lehigh is in violation of the General Storm Water Permit with respect to its discharges of selenium and other toxic pollutants in its quarry pit wastewater by: (1) failing sufficiently to identify, and to control with Best Available Technology ("BAT"), such discharges consistent with Effluent Limitations Part B.3., (2) failing to follow the Storm Water Pollution Prevention Plan ("SWPPP") requirements in Section A, including the requirement to disclose such discharges pursuant to Section A.6. and to revise the SWPPP pursuant to Section A.9., and (3) failing to sample, analyze and report such discharges consistent with Section B,

including sampling for pollutants including selenium and toxicity as required by Section B, 5.c.ii.

Lehigh's continuous, active and unpermitted discharge of quarry pit wastewater into Permanente Creek has violated CWA Section 301(a), 33 U.S.C. § 1311(a), and the provisions of the General Storm Water Permit cited above, each and every day, for each pollutant in such wastewater, for at least the last five years.

B. Unpermitted Stream Fill Discharges

According to Lehigh's own reports, the company has used, and continues to use, Permanente Creek as a disposal area for quarry mine tailings, overburden, and other mining and cement manufacturing wastes ("mine wastes"). Lehigh is responsible for dumping with trucks, bulldozers and other equipment, and continues to dump with such equipment and/or allow landslides, gullies, channeled debris flows, and other types of mass wasting and slope failure to dump, mine wastes into Permanente Creek. Because a significant amount of Lehigh's mine wastes are on debris slopes at or beyond the angle of repose, and because such debris slopes often extend to and into Permanente Creek, mine wastes initially deposited at the top of the debris slopes regularly discharge, and continuously pose a substantial risk of discharging, down-slope into Permanente Creek.

Lehigh is also responsible through merger, acquisition, consolidation and/or other similar transactions for the dumping of such mine wastes into Permanente Creek by companies that Lehigh purchased *in toto*, at least back to the passage of the CWA in 1972 ("Lehigh Group"). This is because HeidelbergCement accepted all of Hanson's liabilities with respect to the Permanente Facility after it purchased 100 percent of the stock of Hanson in 2007, and Hanson accepted all of Kaiser's Permanente Facility liabilities after Hanson purchased 100 percent of the stock of Kaiser in 1986-87.

Lehigh's March 11, 2011 "Permanente Creek Long-Term Restoration Plan" documents many of these mine wastes stream disposal sites. An annotated stream profile diagram, taken from Figure 2-5 in Lehigh's Restoration Plan and attached hereto as **Exhibit G**, shows the location of some of the more notorious mine wastes disposal sites at the Permanente Facility along the various sections of Permanente Creek.

The locations where the Lehigh Group has dumped mine wastes into Permanente Creek, and on or near the banks of the Creek, include, but are not limited to, those shown on **Exhibit G**. The mine wastes dumped into Permanente Creek continuously discharge, release and otherwise add their toxins into the Creek's waters much like coffee grounds in a percolator. As the waters of Permanente Creek flow over and through the mine wastes dumped into the Creek, and/or as rainwater and storm water runoff falls upon or flows over the mine wastes placed within the Creek and on or near the banks of the Creek, pollutants

such as selenium, arsenic, molybdenum, nickel, manganese, residual blasting agent including ammonium nitrate/fuel oil or "ANFO", and other toxic elements and compounds, are dissolved into, suspended in and are otherwise added to the water ("water-borne mining wastes"). These water-borne mining wastes flow downstream through Lehigh's property, through public parks and neighborhoods, and finally into San Francisco Bay. Lehigh's water-borne mining wastes are also taken up by animal and plant life in and along Permanente Creek, and also percolate into underground aquifers.

The mine wastes that physically remain in the creek bed and adjacent wetlands, or that are carried to various downstream locations during high flow events, and the water-borne mining wastes are all unpermitted pollutants that exist in the water column, banks and wetlands of Permanente Creek.

According to Lehigh's May 2010 Hydrologic Investigation, appended to its Reclamation Plan Amendment submitted to Santa Clara County on May 21, 2010, as revised and resubmitted on July 29, 2011, the average concentration of dissolved pollutants in Permanente Creek increases significantly as the creek flows through Lehigh Group's mining wastes. **Exhibit H.** For example, the water in Permanente Creek at monitoring location SW-2 downstream of most of Lehigh Group's pollutant discharges contains from three to over 100 times the dissolved concentrations of arsenic, selenium, nickel, manganese and molybdenum compared to the water upstream of most of Lehigh Group's discharges at monitoring location SW-1. See **Exhibit H**, Figure 6.2 (monitoring locations); Table 6.6 (average pollutant values for monitoring locations); and Figures 6.13 and 6.14 (bar charts illustrating significant increase in pollution from SW-1 to SW-2).

Lehigh has no NPDES permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342, that authorizes the continuous discharge of water-borne mining wastes from the mining wastes dumped into Permanente Creek described above. Each mining waste site in Permanente Creek is discharging "pollutants" into Permanente Creek and is a "point source."

Lehigh also has no "dredge and fill" permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344, or an NPDES permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342, for the mining wastes described above that were discharged into Permanente Creek from 1972 to the present, or that continue to be discharged into Permanente Creek and/or pose a significant risk of being discharged into the Creek, or that currently and continuously pollute the water and clog the bed, banks and wetlands of Permanente Creek.

As a consequence and as described above, Lehigh has violated and continues to violate CWA Section 301(a), 33 U.S.C. § 1311(a), and the General Storm Water Permit, Discharge Prohibitions at A.1 and A.2, by: (1) discharging without a permit pollutants from the mining wastes dumped into Permanente Creek, (2) discharging unpermitted fill material in the form of mining wastes into Permanente Creek, (3)

allowing this unpermitted fill material to remain in Permanente Creek, and (4) failing to remove and/or obtain a permit for this unpermitted fill material that has been dumped into Permanente Creek.

Each and every day for the last five years Lehigh has violated CWA Section 301(a), 33 U.S.C. § 1311(a), as a result of the continuous, unpermitted discharge of pollutants from the mining wastes dumped into Permanente Creek. Each and every day for the last five years Lehigh has violated CWA Section 301(a), 33 U.S.C. § 1311(a), by discharging unpermitted fill material in the form of mining wastes into Permanente Creek, by allowing this unpermitted fill material to remain in Permanente Creek, and by failing to remove and/or obtain a permit for this unpermitted fill material that has been dumped into Permanente Creek.

III. Offer to review information.

To the extent you have evidence that shows, contrary to the allegations in this letter, that Lehigh is in full compliance with all applicable requirements we urge you to provide it to us so that we may potentially avoid, or at least limit, litigation on these issues.

IV. Noticing Party and Attorneys

The address of Sierra Club is 85 Second Street, Second Floor, San Francisco, CA 94105. The telephone number of Sierra Club is 415-977-5500. Sierra Club has individual members who have been, and continue to be, injured by the excessive and unlawful discharges from Lehigh's Permanente facility into Permanente Creek described above. Those injuries are fairly traceable to Lehigh's unlawful discharges, and can be redressed, at least in part, through the cessation of such discharges.

The attorneys representing Sierra Club in this matter are set forth below.

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307-745-7979

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236 West Portal Avenue, #110
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V. Conclusion

Lehigh has been operating, and continues to operate the Permanente facility in violation of the Clean Water Act. We will seek an injunction to end the illegal, unpermitted discharges alleged in this letter, to restore the hydrologic and aquatic integrity of Permanente Creek, and to recover, on behalf of the United States, the maximum civil penalty for Lehigh's Clean Water Act violations for at least the last five years, as allowed by the applicable statute of limitations.

If you have any questions regarding the allegations in this notice letter, believe any of the foregoing information to be in error, wish to discuss the exchange of information consistent with the suggestion above, or would otherwise like to discuss a settlement of this matter prior to the initiation of litigation, please contact the attorneys below.

Yours sincerely,

Reed Zars

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307-745-7979

George Hays *BY/rz*

George Hays
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Exhibits Provided in Enclosed CD

Attachment 1: 2007 Kaiser NOI and 2007 General Storm Water Permit.

Exhibit A: Lehigh Response to the San Francisco Bay Regional Water Quality Control Board, December 13, 2010, page 6.

Exhibit B: Map showing the location of the quarry pit, Pond 4, and the pipe that discharges selenium and other toxic pollutants from the pit and Pond 4.

Exhibit C: Report of Potential Exceedance of Water Quality Standards, Geosyntec Consultants, March 17, 2010, p. 8.

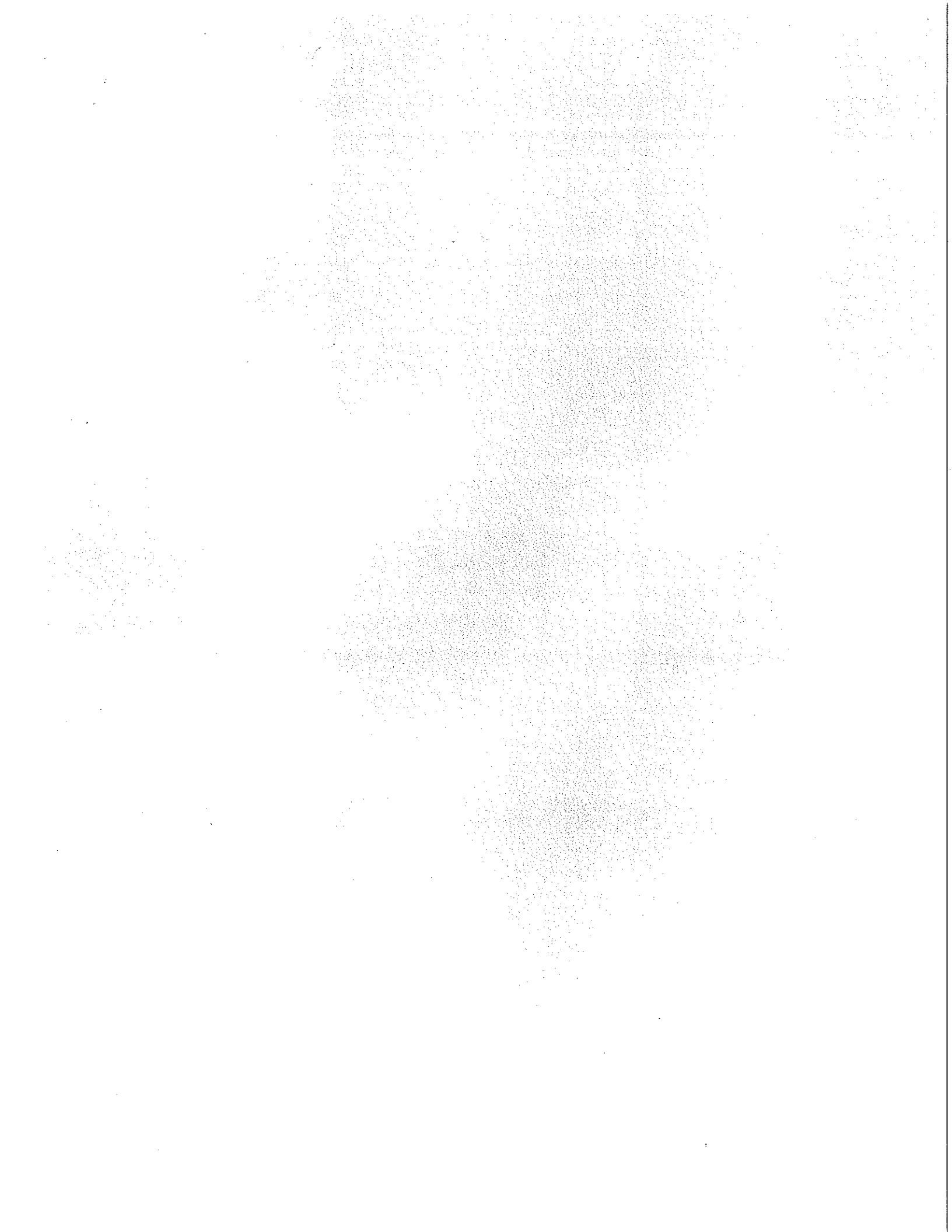
Exhibit D: 2007 San Francisco Bay Basin Water Quality Control Plan ("Basin Plan"), including Chapter 3, Section 3.3.18 (toxicity), and Table 3-4 Numeric Freshwater Water Quality Objectives, and the California Toxics Rule at 40 C.F.R. §131.38.

Exhibit E: EPA approval letter listing Permanente Creek as impaired for selenium and toxicity, November 12, 2010; Water Board 2010 Integrated Report, Appendix A, Category 5 List.

Exhibit F: Water Board staff review and response to Lehigh's letter of December 13, 2010, in response to our "13267" letter of November 29, 2010, p. 1.

Exhibit G: Permanente Creek stream profile diagram showing examples of mine waste dump sites that continuously discharge pollutants into the creek.

Exhibit H: Hydrologic Investigation, Attachment F to Lehigh Reclamation Plan Amendment submitted to Santa Clara County on May 21, 2010 and July 29, 2011, excerpts including Figure 6.2, Table 6.6, and Figures 6.13 and 6.14.



URS Corporation	
Lehigh Southwest Cement Company	
Site Layout Map	
26817600	Figure 2
FEBRUARY 2010	

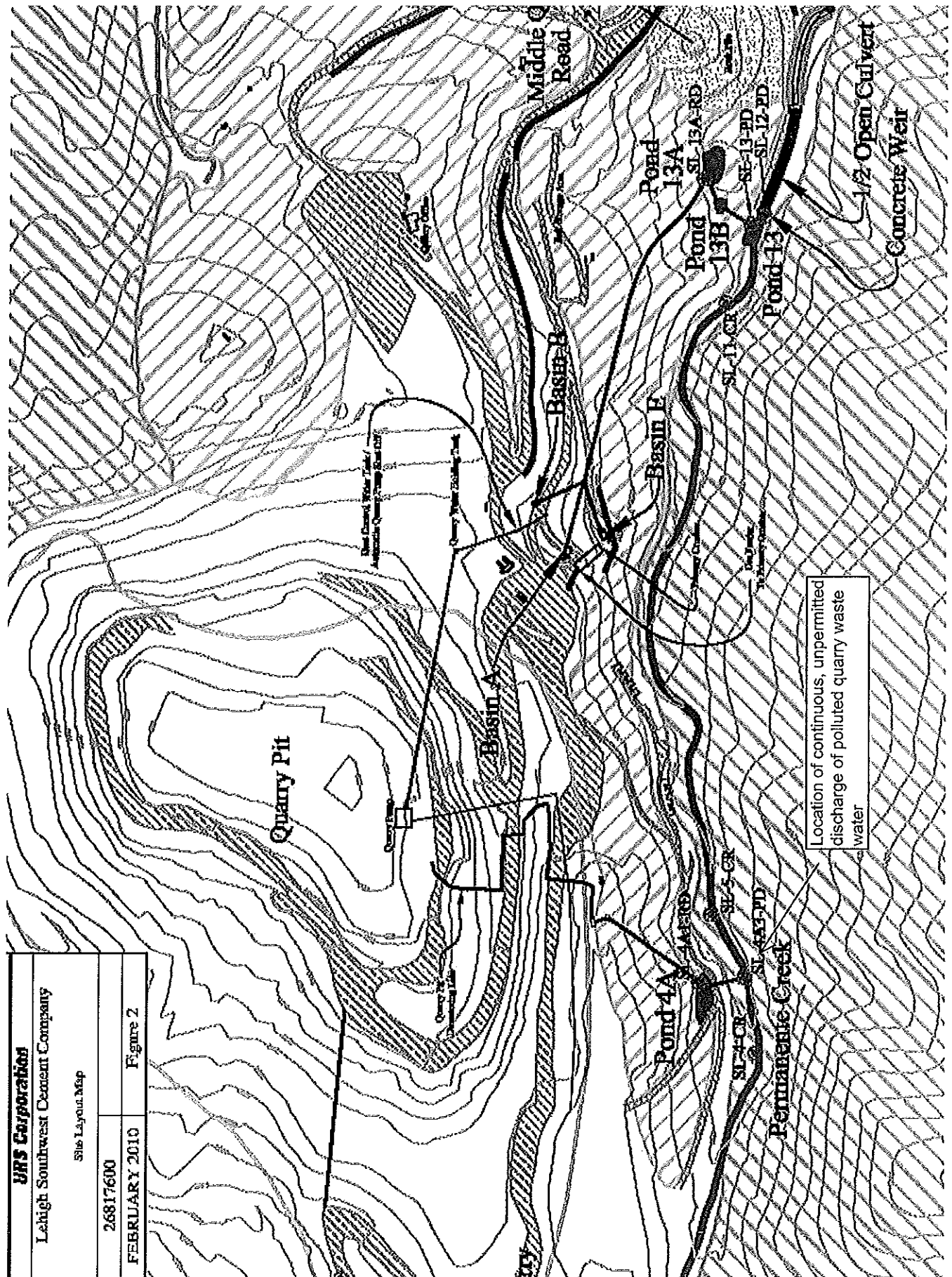
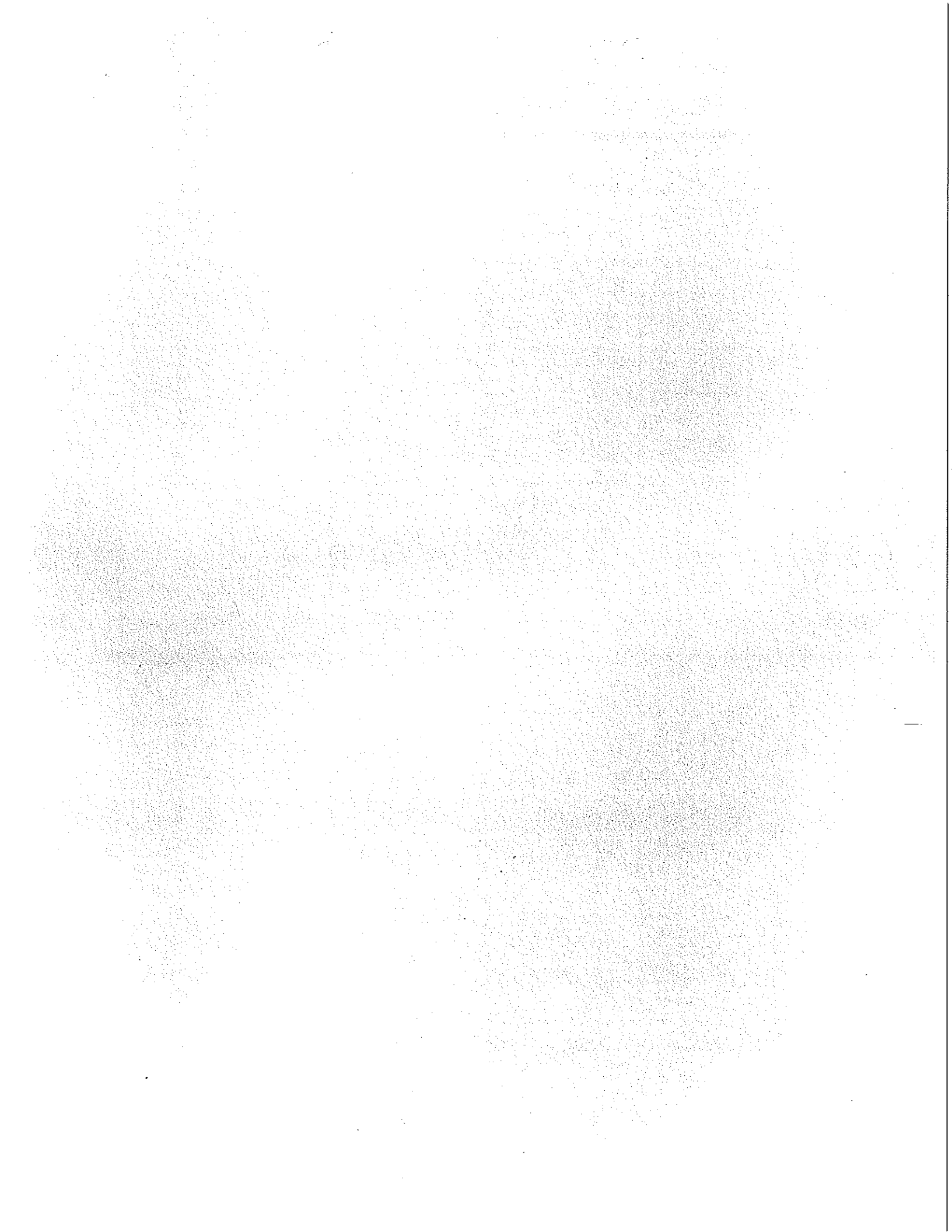
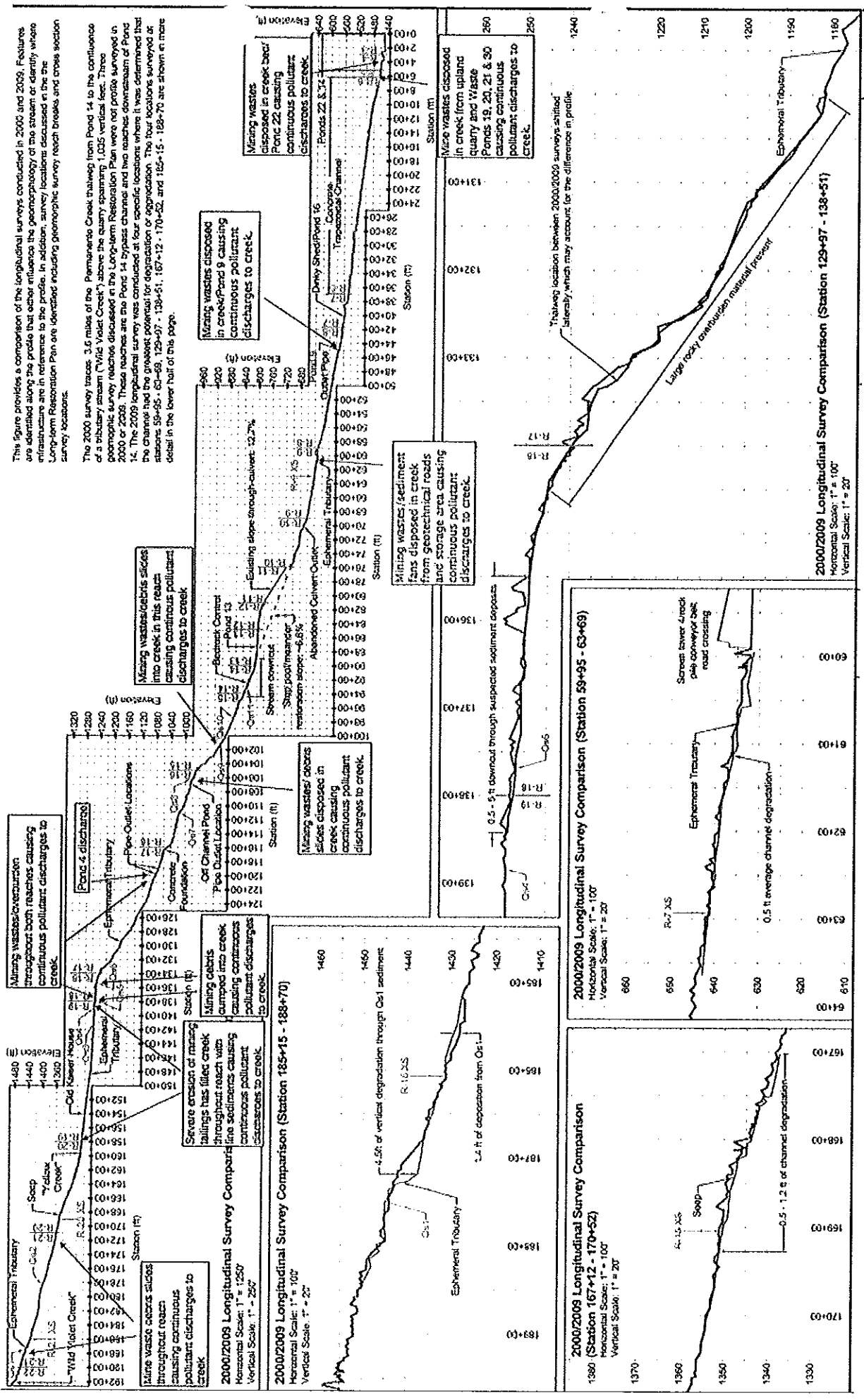


Exhibit B



This figure provides a comparison of the longitudinal surveys conducted in 2000 and 2009. Features are identified along the profile that either influence the geomorphology of the stream or identify where infrastructure are in reference to the profile. In addition, survey locations discussed in the the Long-term Restoration Plan are identified including geomorphic survey reach breaks and cross section survey locations.

The 2000 survey traces 3.6 miles of the Permanente Creek thalweg from Pond 14 to the confluence of a tributary stream ("Wild Violet Creek") above the quarry sparring 1,035 vertical feet. Three geomorphic survey reaches discussed in the Long-term Restoration Plan were not present surveyed in 2000 or 2009. These reaches are the Pond 14 bypass channel and two reaches downstream of Pond 14. The 2009 longitudinal survey was conducted at four specific locations where it was determined that the channel had the greatest potential for degradation or aggradation. The four locations surveyed at stations 59+95 - 63+69, 129+97 - 138+51, 167+12 - 170+52, and 165+15 - 188+70 are shown in more detail in the lower half of this page.



2000/2009 Longitudinal Survey Comparison (Station 129+97 - 138+51)
Horizontal Scale: 1" = 100'
Vertical Scale: 1" = 20'

2000/2009 Longitudinal Survey Comparison (Station 59+95 - 63+69)
Horizontal Scale: 1" = 100'
Vertical Scale: 1" = 20'

2000/2009 Longitudinal Survey Comparison (Station 167+12 - 170+52)
Horizontal Scale: 1" = 100'
Vertical Scale: 1" = 20'

2000/2009 Longitudinal Survey Comparison (Station 185+15 - 188+70)
Horizontal Scale: 1" = 100'
Vertical Scale: 1" = 20'

2000/2009 Longitudinal Survey Comparison (Station 1380 - 1370)
Horizontal Scale: 1" = 100'
Vertical Scale: 1" = 20'