



## CITY MANAGER'S OFFICE

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Dear Mr. Eastwood,

The County of Santa Clara issued a Notice of Violation to Lehigh Southwest Cement Company (Lehigh) on August 17, 2018 for illegal grading of a haul road outside the boundaries of the 2012 Reclamation Plan Amendment approved for Lehigh's Permanente Quarry. The haul road followed an existing utility access road allowed Lehigh to ship aggregate mined on its property to the neighboring Stevens Creek Quarry (SCQ) for processing and sale. The County required that Lehigh halt further grading and use of the haul road, a portion of which falls within the jurisdictional boundaries of the City.<sup>1</sup>

Since the Notice of Violation,<sup>2</sup> Lehigh has continued to haul material to SCQ, now via City of Cupertino streets. An estimated twenty to twenty-seven trucks circulate continuously between the quarries each work day. This dramatic change in the volume and composition of traffic on Stevens Creek and Foothill Boulevards causes hazardous conditions for pedestrians, bicyclists, and drivers, as well as significant backups, idling, and associated noise and emissions. The loaded quarry trucks have also dropped quantities of sediment and debris on City streets, resulting in runoff of potentially contaminated material to the City's storm drain system, which discharges to nearby creeks.

The recent expansion in operations at both SCQ and Lehigh, and the associated hauling through City streets, are unacceptable and illegal. The two quarries appear to have struck a deal that allows Lehigh to ship its aggregate offsite for processing at a facility subject to less stringent

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<sup>1</sup> As a portion of the illegal grading occurred within the jurisdictional boundary of the City, the City has been waiting to coordinate with the County to take enforcement action against Lehigh as provided by the City and County ordinance.

<sup>2</sup> Available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250\\_NOV\\_20180817.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_NOV_20180817.pdf).

environmental controls and SCQ to extend the life of its aggregate business as its own deposits run out. But SCQ is neither authorized nor entitled to process aggregate or overburden mined offsite. It is required to comply with the conditions of approval established by its 1996 Use Permit for Parcel A (Conditions of Approval) and the Mediated Conditions governing Parcel B (Mediated Conditions).<sup>3</sup> These conditions provide for SCQ to process and export aggregate mined on its property. They also prohibit SCQ from trucking material in from Permanente Quarry, either over the boundary it shares with Lehigh or using City streets not identified in its designated, mandatory haul routes.

Likewise, Lehigh cannot ship (potentially contaminated) aggregate for processing and sale offsite without first obtaining a use permit from the County and undergoing environmental review.

Accordingly, the County's Notice of Violation and enforcement against Lehigh do not address the primary violations of County law, which continue to this date. The County must order SCQ to cease and desist processing aggregate hauled in from offsite, and Lehigh to cease and desist shipping its aggregate to offsite locations for processing and sale. Such action will moot Lehigh's pending Reclamation Plan Minor Amendment for Rock Plant Haul Road Reclamation and Boundary Adjustment, dated November 2018 (Proposed RPA) and its application for the same dated November 9, 2018 (Application).<sup>4</sup>

Lehigh's grading and road improvements are illegal. But neither new steps to permit that road nor Lehigh's Proposed RPA can provide Lehigh and SCQ a compliant means for SCQ to process Lehigh's aggregate. Their current use of City streets only exacerbates their violations by violating additional conditions of approval, endangering Cupertino's residents, and creating nuisance conditions. The County must therefore reject Lehigh's Proposed RPA and immediately halt SCQ's and Lehigh's illegal expansion of their respective operations.

#### **I. Stevens Creek Quarry's processing and sale of imported aggregate violates applicable permits, conditions, and County law.**

The Stevens Creek Quarry consists of two areas commonly referred to as Parcels A and B. Parcel A contains offices, scales, and a concrete recycling facility, and Parcel B contains a quarry pit, rock crusher, and material stockpiles. Parcel A is governed by a use permit originally issued in 1984 and renewed with conditions of approval in 1996. Parcel B is subject to a set of Mediated Conditions—the result of mediation between SCQ and a group of neighbors—with

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<sup>3</sup> Conditions of Approval available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253\\_SCQ\\_UsePermit\\_ParcelA\\_COA.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253_SCQ_UsePermit_ParcelA_COA.pdf); Mediated Conditions available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253\\_SCQ\\_Agreement\\_ParcelB\\_COA.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253_SCQ_Agreement_ParcelB_COA.pdf).

<sup>4</sup> Proposed RPA available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250\\_HaulRoad\\_RPA.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_HaulRoad_RPA.pdf); Application available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250\\_HaulRoad\\_AppForms.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_HaulRoad_AppForms.pdf).

which SCQ is required to comply pursuant to its 2009 reclamation plan amendment. In May 2018, the County and SCQ entered into a Compliance Agreement and Stipulation to Comply (Compliance Agreement), in which SCQ acknowledged that it has violated County and State law and agreed to steps to bring SCQ into compliance with both, including that SCQ “shall submit an application for a Use Permit and Reclamation Plan Amendment for Parcels A and B.”<sup>5</sup> Accordingly, SCQ is currently operating under a combination of a use permit and the associated Conditions of Approval, Mediated Conditions, reclamation plan, and Compliance Agreement.<sup>6</sup>

Rather than bringing its operations into long-overdue compliance as it committed to do only eight months ago, SCQ has intensified and expanded its nonconforming use during the very period in which it has been subject to the Compliance Agreement. All of SCQ’s approvals anticipate—and allow—an export mining operation. But as SCQ exhausts its own raw materials, it has developed a new line of business to extend the life of its aggregate processing operation.<sup>7</sup> The County should immediately halt SCQ’s latest attempt to flout State, County, and local law and prohibit any import of aggregate from offsite until SCQ has applied for, performed environmental review of, and obtained a use permit and reclamation plan amendment.

The Conditions of Approval and Mediated Conditions both specify practices for trucks loading material at SCQ and hauling it elsewhere for delivery. Neither set of conditions refers to or contemplates deliveries to or unloading associated with the aggregate operation. For example, Condition of Approval 44 requires SCQ to “supply [the County with] monthly totals of vehicular (truck) traffic serviced by the quarry operations.” Mediated Condition 20(a) limits hours of operation so that “[b]eginning at 6:00 a.m., trucks shall be able to stack, *load* and haul.” Mediated Condition 14 requires “[t]ruck *loading* practices to be such as to eliminate spillage on public roads” and 15 mandates that “[a]ll truck parking, queuing and *loading*, shall be carried out on the property.” *See also* Mediated Condition 12(a) (dust control for areas where “haulage vehicles” are “used” or “*loaded*”), 12(b) (“Dozing, digging, scraping, and *loading* of excavated materials shall be done in a manner which reduces to the minimum level possible the raising of dust.”), 20(b) (“Plant operation does not include material *loading* and hauling, because it is covered in the use permit for parcel “A”), 24 (SCQ “shall maintain control over . . . hauling and *loading* hours”). And Mediated Condition 13 limits the “[h]aul route being approved [to] Stevens

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<sup>5</sup> Compliance Agreement at 9, available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253\\_2018\\_ComplianceAgreement\\_StipulatedOrdertoComply.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253_2018_ComplianceAgreement_StipulatedOrdertoComply.pdf).

<sup>6</sup> In November 2018, the Regional Water Quality Control Board also issued a Technical Report Order requiring SCQ to update its Stormwater Pollution Prevention Plan and to collect data on specific water quality parameters including metals such as selenium due in part to concerns that aggregate imported from Permanente Quarry could introduce new contaminants to the site, which lacks specialized water quality treatment facilities. *See* Technical Report Order Per Water Code Section 13267, Stevens Creek Quarry, Inc., Santa Clara County (Nov. 8, 2018), available at <https://www.cupertino.org/home/showdocument?id=23484>.

<sup>7</sup> SCQ’s entire mining area, including both its quarry pit and all buildings and facilities, encompasses approximately 123 acres, of which 13 are depleted and now undergoing reclamation. *See* Surface Mining Inspection Report at 5 (Sept. 14, 2018), available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253\\_2018\\_MRRC.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253_2018_MRRC.pdf).

Canyon Road-Foothill Boulevard to Highway 280 and Foothill Expressway. No other route to be used.” (Emphasis added.) Thus, SCQ’s approvals describe operations exclusively as trucks loading at and leaving the quarry, not delivering to it or travelling on Stevens Creek Boulevard west of Foothill Boulevard.

SCQ was already years out of compliance with its reclamation plan prior to adding its new import business, with numerous and persistent violations that culminated in the Compliance Agreement. Nonetheless, its expanded aggregate processing activities further violate its reclamation plan by causing a “change or expansion to a surface mining operation that substantially affects the completion of the previously approved reclamation plan,” including by “exten[ding] the termination date of the mining operation.” 14 C.C.R. § 3502(d). Washing and crushing Lehigh’s aggregate without the rigorous water quality protections required at the Permanente Quarry could also “substantially affect the approved end use of the site” or cause inconsistency with “previously adopted environmental determinations,” as the Regional Water Quality Control Board has recently indicated in requiring data specifically targeted at contaminants of concern imported with the Lehigh aggregate.<sup>8</sup>

The County should not allow SCQ to expand its operations and worsen its violations while nominally following the steps identified in the Compliance Agreement. Instead, the County should require that SCQ immediately halt all imports of aggregate while it works to achieve compliance for even its existing operations.

## **II. Lehigh does not have a vested right to construct a “customer access” road for processing aggregate offsite.**

Lehigh claims that the new haul road in its Proposed RPA falls within the vested rights that the County recognized in 2011 and thus requires no permit beyond the Proposed RPA. It is wrong. The County found that “[q]uarry surface mining operations on Vested Parcels” specified by the County “are a legal non-conforming use, and do not require a County use permit for *continued surface mining operations within the geographic area bounded by the Vested Parcels.*”<sup>9</sup> The County also found “that vested rights do not exist over” other parcels within the Permanente Quarry property. *Id.*

By Lehigh’s own admission, the proposed haul road “will not expand the area in which mineral deposits are harvested.”<sup>10</sup> Its sole purpose is to allow Lehigh to ship aggregate offsite for

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<sup>8</sup> See Technical Report Order Per Water Code Section 13267, Stevens Creek Quarry, Inc., Santa Clara County (Nov. 8, 2018), available at <https://www.cupertino.org/home/showdocument?id=23484>.

<sup>9</sup> Santa Clara County Board of Supervisors Resolution 2011-85 ¶ 4 (emphasis added), available at <http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=3038&highlightTerms=2011-85>.

<sup>10</sup> Proposed RPA at 1; Application at 1.

processing and sale on the neighboring property.<sup>11</sup> Shipping material offsite is not part of Lehigh’s historical—and thus vested—use of the Permanente Quarry property. To the contrary, Lehigh processed its own aggregate onsite until 2011.<sup>12</sup> Lehigh refused to even consider shipping overburden offsite in its environmental impact report for the 2012 Reclamation Plan Amendment because “[t]oo little is . . . known about the range of possible destinations, distances, . . . and about whether some marketable or other use could be made of the materials.”<sup>13</sup> Thus, neither the road nor the activities that it would facilitate is a “continued surface mining operation[.]” Resolution 2011-85 ¶ 4. Nor would the processing (and half the hauling) take place “within the geographic area bounded by the Vested Parcels.” *Ibid.* Accordingly, the proposed offsite haul road and aggregate processing are not vested. As a result, they require, at a minimum, use and grading permits and environmental review. Santa Clara County Zoning Ordinance § 4.10.370(I)(D), Code of Ordinances § C12-406.

More generally, a determination of vested rights is limited to “uses normally incidental and auxiliary to the nonconforming use” (*Hansen Bros. Enters. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 565), which courts interpret narrowly (*County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687). Shipping aggregate offsite for processing and sale, after decades of processing and selling that same material onsite, falls well outside of Lehigh’s vested rights. Addressing analogous facts, the court in *Paramount Rock Company v. County of San Diego* held that a ready-mix concrete business exceeded the scope of its vested right when it switched from importing gravel and crushed rock as of the vesting date to use of an onsite rock crushing plant to produce that material. (1960) 180 Cal.App.2d 217, 221-22, 233. Lehigh—also a concrete business—has clearly done the same by switching from onsite rock crushing to exporting aggregate for processing at a nearby facility with less stringent environmental controls.

In fact, the new business arrangement between SCQ and Lehigh appears to be a mutually beneficial end run around the rigorous water quality controls under which Lehigh operates and the diminishing material available to SCQ on its own property. The conditions of approval for Lehigh’s 2012 reclamation plan amendment require, among other things, a demanding Verification and Water Quality Monitoring Program that began 90 days after approval of that amendment and must continue for at least five years following completion of reclamation of the Permanente Quarry. Final Conditions of Approval (June 26, 2012), Condition 76.<sup>14</sup> This requirement expressly targets metals including selenium and provides that reclamation will not

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<sup>11</sup> See Letter from E. Guerra to J. Onciano and R. Lee (Jan. 9, 2019) (“To be clear, Lehigh did not and does not believe that an RPA is necessary for a road that is used for customer access to Lehigh’s quarry.”), available at <https://www.cupertino.org/home/showdocument?id=23408>.

<sup>12</sup> See Draft Environmental Impact Report for Lehigh Permanente Quarry Reclamation Plan Amendment (DEIR) at 2-11 to 2-12 (Dec. 2011) (describing Rock Plant facilities), available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh\\_DEIR\\_201112.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh_DEIR_201112.pdf); Workplan for Characterization of Eastern and Western Materials Storage Areas, Permanente Quarry at 3, available at [https://www.waterboards.ca.gov/rwqcb2/water\\_issues/hot\\_topics/Lehigh/04-13-13/Pond\\_Workplan.pdf](https://www.waterboards.ca.gov/rwqcb2/water_issues/hot_topics/Lehigh/04-13-13/Pond_Workplan.pdf).

<sup>13</sup> DEIR at 3-17.

<sup>14</sup> Available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh\\_20120607\\_COA\\_Final.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh_20120607_COA_Final.pdf).

be complete until five years of data show that runoff and point source discharges from the Permanente Quarry comply with applicable water quality standards. *Id.*, Condition 77. Another condition requires the design and implementation of a specialized facility to treat water discharged to Permanente Creek to bring concentrations of selenium within the water quality objective set in the applicable basin plan. *Id.*, Condition 82. Several additional conditions require that Lehigh design, implement, and monitor stringent controls of water and water quality. *E.g.*, *Id.*, Conditions 74-84. And while these conditions attach to the reclamation plan, many require Lehigh to act within 30 to 90 days of approval of the 2012 amendment. Accordingly, operations at Permanente Quarry are subject to exceptionally rigorous water quality controls and constant monitoring that ensures that those operations do not allow contaminants, especially metals such as selenium, to enter the watershed. These controls are expensive and unusual. Lehigh has a rock plant onsite that processed its aggregate for sale until 2011. Its decision to ship the same materials, which implicate the same water quality concerns, to a neighboring business that operates without such essential protections constitutes improper evasion of these requirements, as well as an impermissible expansion and extension of both quarries' operations.

### **III. Stevens Creek Quarry and Lehigh are prohibited from hauling aggregate from the Permanente Quarry to Stevens Creek Quarry.**

Even if Lehigh was allowed to outsource its aggregate and SCQ was allowed to process it, they are prohibited from hauling the material from the Permanente Quarry to SCQ. SCQ operates under express limits on its ingress and egress locations, and a designated, mandatory haul route. As recognized by the County in its Notice of Violation, Lehigh's current reclamation plan does not extend to the property line that it shares with SCQ. Thus, the businesses may not haul aggregate between their properties either on private or public roads.

#### **A. A new haul road between the Permanente Quarry and Stevens Creek Quarry properties would be illegal.**

SCQ'S Conditions of Approval for both Parcels A and B prohibit access over the ridge between it and the Permanent Quarry: "Ingress and egress locations [to Parcel B] to be limited to three (3) existing driveways onto Stevens Canyon Road." Mediated Condition 8, Condition of Approval 13. Likewise, Lehigh is prohibited from conducting mining activity—which the haul road purports to be—outside the boundaries of an approved reclamation plan.<sup>15</sup> Thus, under their current approvals, neither SCQ nor Lehigh can build a haul road between the two properties.

SCQ's conditions of approval also expressly limit its haul truck traffic to "Stevens Canyon Road-Foothill Boulevard to Highway 280 and Foothill Expressway. *No other route to be used.*" Mediated Condition 13, Condition of Approval 17 (emphasis added). The County Standards for Surface Mining Operations (Santa Clara County Zoning Ordinance § 4.10.370(II)(A)(4)(c), (d)) require that quarries in the County specify haul roads to be used and the number and location of access points in permit conditions. Accordingly, Lehigh would be

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<sup>15</sup> *E.g.*, Notice of Violation at 2.

bound by similar limits on haul routes and access if it obtained a use permit to allow export of its aggregate.

Nonetheless, Lehigh blithely proposes a new haul road to directly link the Permanente Quarry and SCQ properties, without acknowledging that such a route would violate SCQ's mandatory operating conditions. Even if Lehigh's Proposed RPA was complete, both the operation and proposed haul route would remain illegal.

**B. Lehigh's proposed reclamation plan amendment is inadequate and incomplete.**

Lehigh responded to the County's Notice of Violation by applying to amend its reclamation plan, ignoring other constraints that preclude the new business arrangement. Lehigh's proposed reclamation plan is cursory and insufficient. It asserts that the new haul road is encompassed by its vested right to mine, and thus not subject to environmental review. Then it states that it will leave the road in place as a permanent improvement, without providing any explanation of how a steep, private haul road constructed specifically for heavy trucks will be consistent with the long-term use of the Permanente Quarry as open space following reclamation. Finally, Lehigh simply states that because "the project is a reclamation plan boundary adjustment. . . no impacts would occur."<sup>16</sup> This is incorrect.

As an initial matter, and as discussed above, Lehigh's proposed haul road is not encompassed by its vested right to conduct surface mining on designated parcels. That road thus requires discretionary use and grading permits, and environmental review.

Even if Lehigh did not require a permit for the portion of the proposed road located on its property, the road and the aggregate processing that it would enable extend onto the SCQ property, for which Lehigh does not even allege vested status. Under this analysis, the proposed road would also be subject to the California Environmental Quality Act, Public Resources Code §21000 et seq (CEQA). *See Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 276 (full environmental review required of both reclamation plan and new proposed mining activity, even though the mining activity was located on federal land and subject to federal, rather than county, approval). Lehigh is improperly piecemealing the project by characterizing the project as only the Proposed RPA, excluding both the road that admittedly gave rise to the amendment, located both on and off Lehigh's property, and the aggregate processing for which the road and Proposed RPA are proposed. *See Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223 ("[T]here may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action."); *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonoma* (2007) 155 Cal.App.4th 1214, 1231 (environmental review improperly excluded road when "project cannot be completed and opened legally without the completion of the road realignment").

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<sup>16</sup> Application at 10.

Even considering the Proposed RPA in isolation, as Lehigh would have the County do, reclamation plans and their amendments are subject to CEQA. *See City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47, 54, fn. 4 (“We reject [the] argument that CEQA is entirely inapplicable [to a reclamation plan] . . . [A] reclamation plan is an ‘entitlement for use’ inasmuch as the SMARA prohibits surface mining operations unless a reclamation plan has been submitted and approved. Thus, a reclamation plan is a ‘project’ under CEQA.”); *see also El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1596 (affirming reliance on negative declaration to approve reclamation plan). Lehigh’s application illustrates why. It provides minimal information on the baseline conditions where the road will be built, although other documents show that the road essentially traces the route of the Berrocal fault.<sup>17</sup> The limited information about construction of the road describes a 36-foot wide road engineered for 45-ton trucks that climbs over a steep hillside, requiring at least 100,000 to 150,000 cubic yards of cut and fill and a significant retaining wall.<sup>18</sup> Yet Lehigh challenges the need even to submit a reclamation plan amendment, much less environmental review to, for example, consider alternatives or identify mitigation.<sup>19</sup> Even if the County were to accept Lehigh’s premise that construction of the new road falls within its vested rights, Lehigh provides no explanation of why the purportedly mining-related road should remain in place once the property is reclaimed. Such a bald omission is particularly inappropriate when Lehigh’s own analysis notes the likely occurrence of erosion and need for maintenance associated with the steep design.<sup>20</sup> Nor does Lehigh’s application consider how to reclaim this proposed infrastructure. CEQA is designed to force disclosure and consideration of such information at the outset, before an agency approves a project.

Lehigh fails to support its assertion that the Proposed RPA falls within CEQA’s categorical exemptions for minor alteration of existing facilities (Class 1); minor alterations to land, water, or vegetation which do not involve removal of healthy, mature, scenic trees (Class 4); or the “common sense” exemption “where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment” (14 C.C.R. § 15061(b)(3)). Because exempt projects require no CEQA review, courts construe the exemptions narrowly “to afford the fullest possible environmental protection.” *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1193-94.

The Class 1 categorical exemption applies only to operation of “existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.” 14 C.C.R. § 15301. In this instance, there is no existing facility, nor will there be at the time of the lead

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<sup>17</sup> *See* Stevens Creek Quarry Reclamation Plan Amendment, Appx. D (Slope Stability Report), fig. 6, 12, available at [https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253\\_SCQ\\_RPA.pdf](https://www.sccgov.org/sites/dpd/DocsForms/Documents/1253_SCQ_RPA.pdf).

<sup>18</sup> Proposed RPA at 4.

<sup>19</sup> Letter from E. Guerra to J. Onciano and R. Lee (Jan. 9, 2019), available at <https://www.cupertino.org/home/showdocument?id=23408>.

<sup>20</sup> Application, Appx. B at 6.



agency's determination regarding the Proposed RPA. In addition, the Proposed RPA is proposed for the sole reason of expanding use of the larger property to allow offsite processing of Lehigh's aggregate. For both reasons, the Class 1 exemption does not apply.

The Class 4 categorical exemption applies to "minor . . . alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees." 14 C.C.R. § 15304. Examples include "[g]rading on land with a slope of less than 10 percent." *Id.* § 15304(d). Lehigh's reliance on this exemption is ironic considering its initial, wholly unpermitted improvement of the PG&E road, which involved bulldozing an estimated 35 trees.<sup>21</sup> For purposes of the Proposed RPA, Lehigh simply attributes all tree removal to the purportedly vested road construction.<sup>22</sup> Even limiting consideration solely to the Proposed RPA, Lehigh's own documents show that the proposed road will have an average grade of over 14 percent and be as steep as 20 percent. Presumably the surrounding slopes are comparably steep, if not steeper. This is precisely the information that CEQA would disclose and allow the County to consider and address through alternatives or mitigation measures.

Nor can Lehigh or the County say "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." 14 C.C.R. § 15061(b)(3). Even setting aside the flaws discussed above, Lehigh has provided scant information—far from the substantial evidence required—to support its assertion that reclamation of the haul road will have no significant impact on the steeply sloped and wooded hills through which the haul road is proposed to cut.

**C. The quarries' interim solution of hauling aggregate on Cupertino City Streets is also illegal.**

The County's Notice of Violation preventing Lehigh from using the haul road that it improved illegally along the route of an existing PG&E access easement did not stop Lehigh from shipping its aggregate to SCQ for processing. Instead, the businesses began hauling aggregate on City streets, using heavy trucks to haul Lehigh's aggregate east on Stevens Creek Boulevard into Cupertino and then south on Foothill Boulevard, with empty trucks making the reverse trip. In addition to causing hazardous conditions described in Section IV below, the quarries' new haul route through the largely residential streets violates SCQ's express restriction to hauling from "Stevens Canyon Road-Foothill Boulevard to Highway 280 and Foothill Expressway. *No other route to be used.*" Mediated Condition 13, Condition of Approval 17 (emphasis added). Accordingly, the County should again enforce against the illegal expansion of both quarries' operations and violation of SCQ's Mediated Conditions to protect Cupertino residents.

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<sup>21</sup> Memo to E. Guerra and T. Jackson at 3 (Oct. 12, 2018), available at <https://www.cupertino.org/home/showdocument?id=23406>.

<sup>22</sup> Application, Addendum at 3.

#### **IV. The quarries' illegal operations are creating hazardous conditions in the City of Cupertino that create a public nuisance.**

The quarries' decision to route haul trucks through the City's residential streets is endangering pedestrians, cyclists, and cars; imposing increased noise and emissions on surrounding homes; and dropping significant quantities of dirt and rock on City streets and in City storm drains. Use of these streets as a regular haul route violates the permit conditions described above. Those conditions reflect local infrastructure that cannot safely—and should not have to—accommodate high volumes of heavy commercial traffic on routes that were not designed to accommodate such traffic. The quarries' recent hauling creates nuisance conditions against which the City must consider legal action if the County does not enforce the existing legal restrictions.

Stevens Creek and Foothill Boulevard both are almost entirely residential along the current haul route and include designated bike lanes. They provide a single lane for traffic in each direction and limited turn lanes at their intersections that can accommodate a single truck without blocking through traffic. Trucks hauling material from Permanente Quarry to SCQ have routinely been crossing the dividing line of Foothill Boulevard as they turn onto it from Stevens Creek Boulevard. This is due to the geometry of the southwest corner of this intersection, where an existing utility pole and traffic pole limit large vehicles from making the turn without crossing the dividing line and facing oncoming traffic in the wrong lane. Empty trucks traveling from SCQ back to the Permanente Quarry are causing serious congestion issues on Foothill Boulevard as the wait to turn left onto Stevens Creek Boulevard. When more than two trucks wait to make the turn, through traffic on Foothill Boulevard is restricted due the trucks filling up the turn pocket and blocking the through northbound lane of Foothill Boulevard. This issue is especially acute during the morning commute when it is common to have vehicles waiting 15 minutes or more to clear the intersection, resulting in not only delays and traffic hazards but also substantial noise and emissions.

In addition, the quarries' haul trucks are not tarped, as required by local and state law, and residents and City staff have observed regular instances in which they drop dust, dirt, and debris on City streets. *See* Cupertino Municipal Code § 9.18.215(A)(6) (“It is unlawful for any person to drive or move any open vehicle or trailer within the City unless there is a tarp over the contents or the material is constructed and located so as to ensure that all litter is prevented from being blown or deposited upon any street.”); Cal. Veh. Code § 23114(a) (“[A] vehicle shall not be driven or moved on any highway unless the vehicle is so constructed, covered, or loaded as to prevent any of its content or load . . . from dropping, sifting, leaking, blowing, spilling, or otherwise escaping from the vehicle.”).

Significant and consistent disruption of traffic can create a public nuisance when such disruption unlawfully obstructs the free passage or use of a street. *People v. Amdur* (1954) 123 Cal.App.2d Supp. 951, 959. “Any obstruction” that is not temporary and incidental to the primarily intended use of the street or authorized by ordinance “constitutes a public nuisance *per se*.” *Id.* at 959-60. In this case, the haul trucks' presence on residential City streets is neither temporary, given the frequency and duration of their presence, nor incidental to the primarily intended use of the streets for residential purposes. Moreover, the trucks' haul route is not

authorized by ordinance, but rather violates mandatory conditions of operation required by the County.

Likewise, discharge of mining waste, aggregate, dirt, or debris to the City's stormwater system is both a violation of the City's NPDES permit and a public nuisance. Municipal Regional Stormwater NPDES Permit, Order R2-12015-0049, NPDES Permit No. CAS612008 at 5; *see also* Cupertino Municipal Code §§ 9.18.020 (50), 9.18.040(A)-(C), 9.18.215(A)(6), 1.09.180. Moreover, Lehigh's mining waste and soil are known to contain elevated levels of contaminants such as selenium, heightening the City's concern about the material dropped in City streets.<sup>23</sup>

The hazardous conditions resulting from the high volume of haul trucks currently using City streets would not exist if the County enforced existing requirements that limit operations at both SCQ and Permanente Quarry. And even if SCQ was allowed to process Lehigh's aggregate, neither business can use the current route through residential City streets as a haul route. If the County simply enforced existing requirements, many of the nuisance conditions currently affecting the City would be resolved.

The City therefore requests that the County enforce SCQ's Conditions of Approval and Mediated Conditions and prohibit it from both importing aggregate for processing and deviating from its specified haul route. Likewise, the City asks the County to order Lehigh to cease and desist from exporting aggregate and other materials for processing offsite unless and until it obtains a use permit for such activities from the County.

As the current conditions created by the two quarries are not acceptable to the City, we respectfully request that the County acknowledge this letter by February 4, 2019 and have the two quarries cease and desist the exporting and processing of material between the two facilities no later than February 8, 2019. Thank you for your prompt attention to this matter, and please do not hesitate to contact my office with any questions.



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Timm Borden  
Interim City Manager

CC: Supervisor Joseph Simitian

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<sup>23</sup> The Regional Water Quality Control Board has thus far taken the only enforcement action to require characterization of material hauled from Lehigh to SCQ, or at least of water quality affected by that material, by May 2019. As a result, the City will not know until approximately nine months after the quarries started hauling through City streets whether the debris their trucks have dropped on City streets and in City storm drains is dangerously contaminated.