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Dear Mr. Salisbury,

This letter responds to the County's November 8, 2019 determination that the reclamation plan amendment application (File No. PLN19-0106, "Major RPA") submitted by Lehigh Southwest Cement Company ("Lehigh") is complete. It also responds to the County's August 29, 2019 determination that a previous reclamation plan amendment application filed by Lehigh (File No. PLN19-0067, "Utility Road RPA") is complete. The City has identified several serious concerns related to both of Lehigh's application, including in prior correspondence dated January 31, July 3, and October 24, 2019. Those concerns remain. I write now to address concerns regarding the relationship and interaction between the two proposed amendments and to clarify the status of additional, discretionary, non-reclamation approvals that Lehigh's applications would require.

I. Lehigh's separate applications for two reclamation plan amendments covering overlapping geographic areas cause inconsistent and unstable project descriptions for both proposed projects.

As the County noted in its July 22, 2019 letter that found Lehigh's initial application for the Major RPA incomplete, the two proposed amendments overlap geographically and interact with each other. They should thus be addressed in a single, complete, and internally consistent application and environmental analysis. The current, fragmented approach has resulted in inconsistent descriptions of the project(s) and characterization of the baseline conditions they will address and thus scope of reclamation activities. Specifically, both amendments encompass the PG&E road that Lehigh illegally graded and used last year to haul aggregate from its property to the adjacent Stevens Creek Quarry.¹ The Utility Road RPA states that it will adjust the

¹ See Permanente Quarry Application: Project Description and Supplemental Environmental Information ("Major RPA Project Description") at 8-9 (May 2019), available at

existing reclamation plan boundary to include the PG&E road. The Major RPA, however, proposes to reinstate Lehigh's aggregate hauling operation on the PG&E road, adding it to Lehigh's operations. It describes plans for "customer access" to export waste material from the Lehigh property "by one of two off-road haul routes," including the PG&E road, and then also includes those routes in its reclamation plan. Major RPA Project Description at 8-9.

These two proposals have resulted in various and inconsistent versions of the project description, especially for the Major RPA. For example, the County's November 8, 2019 letter listed reclamation of "Plan[t] Quarry Road and adjacent areas" in its project description, while noting that "[t]his aspect of the projects is currently proposed under a separate Utility Road Reclamation Plan Amendment Application." Likewise, the County's July 22, 2019 incomplete letter included use of the PG&E road in its description of the Major RPA and also attributing it to the Utility Road RPA. Reclamation of the PG&E road is a component of both proposals. *See* Major RPA Project Description at 8-9; Major RPA at 7.² Such unstable and inconsistent project descriptions deprive the County and the public of the information necessary to assess impacts and constitute clear violations of CEQA. *See, e.g., County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 198 (unstable project description violates CEQA); *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277, 287 (same).

II. Lehigh's stated plans for the PG&E road and changed circumstances preclude reliance on past environmental review.

The separation of Lehigh's proposals into two proposed projects causes additional inconsistencies between Lehigh's applications and its characterization of its plans for purposes of environmental review. In particular, Lehigh seeks to rely on the 2012 Environmental Impact Report for its previous Reclamation Plan Amendment to provide the necessary environmental analysis and mitigation measures for the Utility Road RPA. Lehigh can rely on an addendum to the previous analysis only if the new project constitutes minor technical changes or additions to the 2012 Reclamation Plan and if there have been no substantial changes in the circumstances under which the project is undertaken or information showing additional impacts since the 2012 approval. 14 C.C.R. §§ 15162, 15164. That is not the case here. The baseline and permitted conditions at the time of the 2012 Reclamation Plan Amendment included a minimally improved, approximately 12-foot wide track used by PG&E. That area was not included in Lehigh's reclamation plan or the 2012 Reclamation Plan Amendment because it did not include mining-related disturbance. *Compare* Utility Road RPA, Figure 2, *with* 2012 RPA at 7,

https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_2019RPA_ProjectDescription_EnvironmentallInfo.pdf; Permanente Quarry Reclamation Plan Minor Amendment for the Utility Road Reclamation and Boundary Adjustment ("Utility Road RPA") at 1 (March 2019), available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/PLN19_0067_RPA_UtilityRoad_Plans.pdf.

² Permanente Quarry Amended Reclamation Plan ("Major RPA") (May 2019), available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_2019RPA_Plan.pdf.

Figure 1.0-6.³ Since then, however, Lehigh has graded, built, and more than doubled the width of that road to allow heavy mining trucks to illegally transport aggregate to Stevens Creek Quarry. It seeks approval in its Major RPA to restart such activity, although it has not applied for the required use permit, as discussed below. Yet the Utility Road RPA ignores this proposed use in a bid to minimize environmental review and rely on the 2012 EIR. These changed conditions preclude reliance on the prior EIR.

III. Separation of the two reclamation plan amendments into two projects constitutes illegal segmentation.

Lehigh cannot separate approvals for mining-related activity and reclamation of the area affected by that activity for purposes of environmental review. It proposes to illegally segment or piecemeal the project by asking the County to consider its Utility Road RPA as it applies to the PG&E road in isolation from Lehigh's concurrent proposal to allow an unspecified number of trips on that same road every day to facilitate a major expansion of operations. Lehigh cannot have it both ways and obtain approval for its Utility Road RPA based on consistency with past activities but also propose different, more intensive activities using the same road in its Major RPA.

Lehigh states clearly in its Major RPA that it intends to resume export of aggregate to Stevens Creek Quarry via the PG&E road or an adjacent alternative route that would climb higher over the ridgeline in order to avoid the City's jurisdiction. Major RPA at 7. It also claims that "[p]roviding for reclamation requirements does not require that the haul road be constructed. Improvement and use of either route will depend on final determinations by the County and City of Cupertino regarding the construction and the capability for Stevens Creek Quarry to accept such materials." *Id.* Such professed uncertainty is insufficient to split up an expressly integrated project for purposes of environmental review. Courts have rejected this precise approach, finding that review of a reclamation plan without the associated mining operations constituted illegal piecemealing absent a vested right for those operations. *See Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 269; *see also, Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1230 ("[T]he possibility that two acts could be taken independently of each other is not as important as whether they actually will be implemented independently of each other" for purposes of piecemealing analysis.), 14 C.C.R. § 15378(c) ("The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies.").

As set forth in the City's January 31, 2019 letter to the County and below, Lehigh has no vested right to export aggregate for offsite processing and sale. Accordingly, Lehigh requires a use permit to export aggregate over either the PG&E or alternative haul road and a reclamation plan amendment to provide for restoration of that route. It cannot strategically divorce these components of its proposal in order to obtain streamlined environmental review of the reclamation plan for the PG&E road, without acknowledging

³ Reclamation Plan Amendment for Permanente Quarry ("2012 RPA") (Dec. 11, 2011), available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh_RPA_20111213_AmendedMainDoc.pdf.

the reasonably foreseeable and closely related impacts of its concurrent proposal to vastly increase the use of that same road.

IV. Use of the PG&E road to export aggregate to Stevens Creek Quarry requires Lehigh to apply for a use permit in addition to a reclamation plan amendment.

Finally, Lehigh includes use of the PG&E road to export aggregate to Stevens Creek Quarry for processing in its Major RPA. A reclamation plan amendment to cover this new area of proposed mining activity is clearly necessary for Lehigh and Stevens Creek Quarry to develop this new line of business, but it is not sufficient. Export of aggregate for processing offsite is not part of Lehigh's vested right and requires a use permit.

As the County stated in its February 20, 2019 draft letter finding Lehigh's first reclamation plan amendment for the PG&E road (File No. PLN18-2250) incomplete, the County's 2011 determination of Lehigh's vested rights "did not then consider whether these proposed uses—the construction and use of haul roads to export greenstone from the Quarry—would fall within the substantive scope of Lehigh's vested rights." Accordingly, the County must—by its own account—"determine whether these proposed uses fall within the scope of Lehigh's recognized vested rights. Should the County determine that the proposed uses fall outside the scope of Lehigh's vested rights, Lehigh would be required to submit and obtain a Use Permit to undertake these mining-related activities." *Id.*; see also Santa Clara County Zoning Ordinance § 4.10.370(II)(B)(1) ("Any proposed expansion of any existing surface mining operation that constitutes a substantial change in such operation by exceeding the terms and conditions of a previously granted use permit for the operation, or by exceeding the extent of a vested right to such use, shall be subject to the provisions of Chapter 5.65 and a use permit and reclamation plan shall be required for such activity."). The County's February 20 draft letter went on to specify information that Lehigh must provide for the County to assess Lehigh's assertion of vested rights, including an attached Vested Rights Consistency Evaluation Form, although that form was not included in versions of the February 20 letter sent to the City or available online. The City is not aware of any such submission by Lehigh. As a prerequisite element of Lehigh's proposed Major RPA, any such materials provided to the County should be shared with the City as a responsible agency that has jurisdiction over a portion of the PG&E road and should be posted to the County's website along with other information related to Lehigh's two applications.

As the City pointed out in its January 31, 2019 letter to the County in which the City requested enforcement against Lehigh's illegal hauling activities, Lehigh does not have a vested right to ship, or construct a haul road to facilitate shipping of, aggregate offsite for processing and sale. In 2011, 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.*" Santa Clara County Board of Supervisors Resolution 2011-85 ¶ 4 (emphasis added). 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 PG&E road "will not expand the area in which mineral deposits are harvested."⁴ The sole purpose of its expansion is to allow Lehigh to ship aggregate offsite for processing and sale on the neighboring property. In fact, Lehigh itself has argued that the PG&E road does not relate to mining activity in order to dispute whether it required a reclamation plan.⁵ Lehigh once again tries to have it both ways by now asserting that export of aggregate is instead part of its historical mining operations and thus encompassed by its vested right.

Lehigh was right the first time; shipping material offsite is not part of its historical—and thus vested—use of the Permanente Quarry property. To the contrary, Lehigh processed its own aggregate onsite until 2011.⁶ 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."⁷ Thus, neither the PG&E road nor the activity 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." *Id.* 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, even 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*, (1960) 180 Cal.App.2d 217, 221-22, 233, 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

⁴ Permanente Quarry Reclamation Plan Minor Amendment for Rock Plant Haul Road Reclamation and Boundary Adjustment at 1 (Nov. 2018), available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_HaulRoad_RPA.pdf; Application for same at 1, available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_HaulRoad_AppForms.pdf.

⁵ 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>.

⁶ See Draft Environmental Impact Report for Lehigh Permanente Quarry Reclamation Plan Amendment 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_Ch2_ProjectDescription.pdf; Workplan for Characterization of Eastern and Western Materials Storage Areas, Permanente Quarry at 3, available at https://www.waterboards.ca.gov/rwgcb2/water_issues/hot_topics/Lehigh/04-13-13/Pond_Workplan.pdf.

⁷ Draft Environmental Impact Report for Lehigh Permanente Quarry Reclamation Plan Amendment at 3-17 (Dec. 2011), available at https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh_DEIR_201112_Ch3_Alternatives.pdf.

an onsite rock crushing plant to produce that material. 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.

For each of these reasons, the City asks that the County require answers to the questions it identified in its February 20, 2019 draft letter, including whether export of aggregate was incidental or auxiliary to the quarry's surface mining operations as they existed at the 1948 vesting date, whether the proposed export would change the quarry's surface mining operations as they existed in 1948, and whether the proposed export would impermissibly intensify the quarry's mining operations. Lehigh bears the burden to prove that its proposed use was in fact both lawful and ongoing as of the vesting date. *See Hansen Brothers*, 12 Cal.4th at 564. To the City's knowledge, it has not even attempted to do so. To the extent that the County has obtained responses or evidence from Lehigh to support its contentions, the City requests that the County make all such information available to the public to ensure that the public receives every opportunity to participate in any determination of vested rights.

As explained above, this determination of vested status is essential to the County's review of both of Lehigh's proposed reclamation plan amendments. The County must identify the discretionary approvals included in Lehigh's proposed activities to determine the scope of the project(s) proposed and the associated environmental impacts. Without clarity on this point, the County lacks a stable, consistent, and complete project description, which is prerequisite to adequate environmental review under CEQA.

Thank you for your prompt attention to this matter, and please do not hesitate to contact my office with any questions.

Sincerely,



Deborah Feng
City Manager

cc: Heather Minner
Jacqueline Onciano
Kristina Loquist