

County of Santa Clara

Department of Planning and Development
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MEMORANDUM

Date: November 30, 2010

To: **President Ken Yeager and Members of the Board of Supervisors**

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

From: Gary Rudholm, Senior Planner, Planning Office *GR*
Michael M. Lopez, Planning Manager, Planning Office *ML*

Re: **Responses to comments made during the Public Comment portion of the Board of Supervisors Meeting on November 23, 2010, related to Lehigh Southwest Cement Plant and the Permanente Quarry**

During the Public Comment portion of the November 23, 2010, meeting of the Board of Supervisors three speakers made statements to the Board regarding the Lehigh Southwest Cement Plant and the reclamation plan amendments currently under review by the Planning Office for the adjacent Permanente Quarry. The speakers included Rod Sinks, Phillip Flagger, and Cupertino Councilmember Barry Chang. Below are responses from staff, which were prepared to provide the Board and the County Executive with clear and accurate information related to the issues raised by these speakers.

SPEAKER ONE: Rod Sinks:

"Good morning. I'm a 30 year resident of the County, a scout master of a troop of 120 in Los Altos--my name is Rod Sinks. I hold two engineering degrees from Stanford, and helped build two successful high tech. companies. Lehigh cement plan concerns me because in 2006 citizens pleaded with the County to quit dumping in the EMSA, however, dumping in EMSA continues to this day despite two notices of violation but without any financial penalty. And the County is poised now to consider granting vested rights for this use as well as allowing creation of a new 200-acre open pit mine. In March 2010, the EPA notified Lehigh that its in violation of the Clean Air Act and further has new regulations for mercury and other toxic emissions that could save lives, however, Lehigh as well as other plant operators as filed suit to block the regulations. The actions you take in the next few months will put you on record. Let it be on the side of public health. Thank you."

Response:

Stockpiling in the EMSA:

The speaker's comments regarding "dumping in [the] EMSA" relate to a Notice of Violation (NOV) issued by the County on June 20, 2008 related to the unapproved use of an area referred to as the East Materials Storage Area (EMSA) of the Permanente Quarry.

The original complaint made to the County was that petroleum coke was being stored in this location. Following a field inspection the County determined the material that was suspected to be petroleum coke was actually overburden excavated from the mine pit. The NOV provided the operator with two options for addressing the violation: (1) remove the material, or (2) apply for and obtain an amendment to the existing approved reclamation plan for Permanente Quarry. An approved amended reclamation plan would authorize retaining the material in the EMSA and provide for reclamation consistent with state and County mine reclamation standards. The mine operator chose to apply for the reclamation plan amendment and this application is under review.

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

Vested Rights

A public hearing was tentatively scheduled to take place before the Board of Supervisors in late November, to determine whether and to what extent there is a legal non-conforming use for quarrying on approximately 89 acres located on the northeastern portion of the quarry referred to as the East Materials Storage Area (EMSA). The hearing was not put on the Board's agenda, however, and the hearing was postponed to allow staff additional time necessary to complete a thorough and detailed analysis, to provide adequate time for public comment of the analysis, and to avoid scheduling the hearing during the holiday season. Staff anticipates this item will be re-noticed and scheduled for a hearing before the Board of Supervisors in January or February 2011.

It is important to note that the purpose of the hearing, when rescheduled, will be to determine whether and to what extent, a legal non-conforming use(s) (also known as a "vested right") for surface mining exists on the parcels of land in question. This determination would not be a land use authorization. For any areas where legal non-conforming use(s) are determined by the Board to not exist, a Use Permit would be required. If a Use Permit is required the property owner must file and staff will process a Use Permit application simultaneously with pending proposals for amendments to the Reclamation Plan of the Permanente Quarry. Two Reclamation Plan amendments are pending: one for the East Materials Storage Area portion of the site to be followed by a second comprehensive Reclamation Plan amendment for the entire site. Both amendments are subject to CEQA and the preparation of

Environmental Impact Reports. When and if Reclamation Plan amendments, and Use Permits if required, are approved, the operator would then have all lawful approvals to extend/expand the operation on the site.

EPA Notice of Violation

As noted in previous memos dated August 26, and September 16, 2010, the U.S. EPA issued a Notice of Violation and Finding of Violation (NOV/FOV) to Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants. As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify Prevention of Significant Deterioration requirements in its application submitted to the BAAQMD after installing the modifications. According to the EPA Air Enforcement Office negotiations with Lehigh remain on-going regarding the necessary follow up to abate the violation.

The Bay Area Air Quality Management District (BAAQMD) regulates emissions from the facility through implementation of a Title V Permit. The BAAQMD was processing renewal of the Lehigh Title V permit, but withdrew the permit from consideration to allow the EPA to finish preparation of new standards regarding various emissions. The intent of the BAAQMD is to include the new, stricter standards in the Title V renewal process, and ultimately in a new permit for Lehigh.

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

Several lawsuits have been filed by industry groups, environmental groups, and individual companies regarding different parts of this rule, according to an article published by The Bureau of National Affairs, Inc. (Washington D.C.), a copy of which is attached. Also attached is a letter from Jeff Brummert, Vice President Materials, Lehigh Hanson Region West, regarding this suit.

The lawsuits described above and in the attached documents are not expected to affect the Title V Permit process administered by the BAAQMD. Staff from the BAAQMD indicated that, under the EPA rule, Lehigh has until 2013 to implement the new standard. The BAAQMD is incorporating the new NESHAP requirements into a revised Title V Permit for Lehigh and they expect to release it for public review in December 2010. If the permit is issued, and if the lawsuits change the requirements covered by the permit, the BAAQMD could revise the permit where required.

SPEAKER TWO: Phillip Flagger:

"My name's Phillip Flagger. I'm a long time resident of the Santa Clara Valley. I'm here to voice my opposition to the new open pit mine proposed by Lehigh cement. The existing open pit mine was constructed at a time when the valley was a very low population. How the valley has grown and the new open pit mine will adversely affect the health of the citizens of this valley. Thank you."

Response:

The speaker is correct, the existing open mine pit was constructed at a time when the valley had a comparatively low population. The mine operation began operation in the early 20th century. As of 1900, the total population of Santa Clara County was 60,216. The population of the County was 100,676 in 1920, 174,949 in 1940, 642,315 in 1960, 1,295,071 in 1980, and 1,682,585 in 2010, according to U.S. Census figures. The State of California Department of Finance estimated that as of January 1, 2010, the total population for Santa Clara County was 1,880,876.

Two Reclamation Plan amendments are pending related to the Permanente Quarry: one for the East Materials Storage Area, which is a portion of the site, to be followed by a second comprehensive Reclamation Plan amendment for the entire site, including a proposed second pit. Both amendments are subject to CEQA and the preparation of Environmental Impact Reports. These reports are being prepared and will identify potential environmental impacts and associated mitigation measures to reduce or eliminate impacts, many of which relate to the health and welfare of the residents, as well as the surrounding natural environment.

Based on the current status of preparing the CEQA documents, a public hearings are estimated to take place regarding the Draft Environmental Impact Report (EIR) in April 2011, the Final EIR and proposed EMSA Reclamation Plan Amendment (RPA) in July 2011. We also currently estimate that public hearings regarding the Draft EIR of the proposed Comprehensive RPA and Use Permit will take place in the Fall 2011, and public hearings regarding the Final EIR and the RPA/Use Permit in the Spring or Summer 2012. Please note that until and unless the Comprehensive Reclamation Plan Amendment and Use Permit are approved the operator may not expand the quarry to a new pit.

SPEAKER THREE – Barry Chang:

“President Yeager and honorable Board of Supervisors. It’s me again. This is my ninth time here to request you to put the Lehigh Southwest Cement Plant Notice of Violation on the agenda. One-hundred thirty-five days has past and you have not taken any action yet. You can ignore me, but you cannot ignore the fact. I just want to let you know that , and, also, I want to quote you last Thursday at the Town of Los Altos Hills Council meeting, the mayor of Town of Los Altos Hills, Mr. Breene Kerr, questioned the Lehigh Southwest Cement Plant, Plant Manger, Henrik Wessling, and in quote, unquote. In this country I don’t think you have a right to poison people whether you have a grandfathered in conditioned use permit or not. Quote, unquote. So, this is a serious issue, public health issue. Please take care of it. Take a strong stand. Thank you..”

Response:

Whether any of the land encompassed by the mine operation is legal non-conforming (vested, and sometimes referred to as “grandfathered”) or not, the mine operator is required to comply with all federal and state regulations that govern emissions. Emissions from the facility are regulated by the Bay Area Air Quality Management District (BAAQMD), which implements that standards established by the California Air Resources Board (CARB), and the U.S. Environmental Protection Agency (EPA). The BAAQMD administers and enforces the Title V Permit issued to Lehigh. The company has a valid Title V Permit, however, a renewal is being processed by BAAQMD, one that is expected to incorporate new, stricter standards adopted by the EPA. While the new permit is processed, the previously issued permit

remains in effect. The BAAQMD advised that their inspectors issued three NOVs during 2010 for visible emissions; however Lehigh currently has no violations and is operating in compliance with their permit.

The County's actions to date are consistent with SMARA and in consultation with staff at San Francisco Bay Regional Water Quality Control Board, the BAAQMD, CARB, and EPA. The County is scientifically reviewing the factual information and preparing the reports that are required before taking an action on a proposal where the County has jurisdiction. Facts raised that relate to pollution are being considered and evaluated, and enforcement actions are pursued by other agencies, including the EPA as noted above, where those agencies have jurisdiction.

ATTACHMENTS:

- Childers, Andrew. "19 Lawsuits Filed to Challenge EPA's Air Toxics Rule for Cement Kilns" November 2010 (Daily Envirowire; Air & Waste Management Association). Last accessed 11/30/10.
- Letter from Jeffrey L. Brummert, Lehigh Hanson, Region West, dated November 29, 2010.

cc:

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Gustavo Caraveo, District Two
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Daily Envirowire

19 Lawsuits Filed to Challenge EPA's Air Toxics Rule for Cement Kilns

By Andrew Childers

Cement manufacturers and environmental groups filed 19 lawsuits Nov. 5 and 8 challenging an Environmental Protection Agency rule requiring cement kilns to control emissions of hazardous air pollutants (Portland Cement Association v. EPA, D.C. Cir., No. 10-1358, 11/5/10 ; Portland Cement Association v. EPA, D.C. Cir., 10-1359, 11/5/10).

The lawsuits filed in the U.S. Court of Appeals for the District of Columbia Circuit challenge EPA's new source performance standards and national emissions standards for hazardous air pollutants (NESHAP) for the cement industry.

The Portland Cement Association petitioned EPA Nov. 5 to reconsider portions of the rule, arguing that the emissions limits are too stringent and that some of the rule's provisions were never subject to a comment period.

Andrew O'Hare, vice president of regulatory affairs for the Portland Cement Association, told BNA the trade group is likely to raise additional issues with the standards as the lawsuit progresses.

"We still have other issues with the mercury standard and other issues that don't fit into" the petition for reconsideration, he said. "There's likely to be other issues."

Ash Grove Cement Co. also challenged EPA's emissions limits, particularly for mercury, as being unobtainable. The rule violates the Clean Air Act's requirements that the emissions standards be based on available controls, Curtis Lesslie, Ash Grove's vice president for environmental affairs, said in a statement.

A Sierra Club official told BNA Nov. 9 that the group intends to argue that EPA is required to set new source performance standards for carbon dioxide emissions from cement kilns as a result of the agency's endangerment finding on carbon dioxide's role in global warming.

'Affirmative Defense' Challenged

James Pew, an Earthjustice attorney representing the Sierra Club and other environmental groups, said EPA got "a lot of things about this rule right."

However, the environmental groups are challenging a provision that would exempt cement kilns from civil penalties if they can demonstrate that they exceeded the

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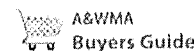
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emissions limits as a result of malfunctioning equipment. The provision, known as an "affirmative defense," would effectively remove the courts from determinations of civil penalties, Pew said.

The D.C. Circuit in 2008 struck down an exemption that allowed industrial facilities to exceed the air toxics emissions limits during periods of startup, shutdown, or equipment malfunction. The majority ruled that EPA's exemption "belies the text, history, and structure of Section 112" of the Clean Air Act (*Sierra Club v. EPA*, D.C. Cir., No. 02-1135, 12/19/08).

Attorneys for the other parties challenging the rule either could not comment on the lawsuits or could not be reached for comment Nov. 9.

Rule Requires Toxic Emissions Controls

EPA's rule, published in the Federal Register Sept. 9, set national emissions standards for hazardous air pollutants and new source performance standards for the portland cement industry at 40 C.F.R. Parts 60 and 63 (75 Fed. Reg. 54,970).

The rule requires cement kilns to control emissions of mercury, total hydrocarbons, and particulate matter for both major-source cement kilns and the smaller area-source kilns. Under the rule, measurement of particulate matter is used as a surrogate for toxic metals, including arsenic, cadmium, beryllium, and lead. Total hydrocarbons are used as a surrogate for polycyclic organic matter (POM) and polychlorinated biphenyls (PCBs).

The rule also establishes an emissions limit for hydrochloric acid for kilns that are major sources of that pollutant.

Major sources of air toxics are those that emit 10 tons a year or more of one hazardous air pollutant or 25 tons or more per year of any combination of hazardous air pollutants. Major sources also are subject to maximum available control technology (MACT) standards.

Area sources are those that emit less than 10 tons per year of any one air toxic and less than 25 tons per year of any combination of hazardous air pollutants.

EPA estimates the rule will result in a 92 percent reduction in mercury emissions from cement kilns, an 83 percent reduction in total hydrocarbons, a 92 percent reduction in particulate matter, a 97 percent reduction in hydrochloric acid, a 78 percent reduction in sulfur dioxide, and a 5 percent reduction in nitrogen oxides.

Installing the needed controls is expected to cost the cement industry between \$926 million and \$950 million annually, according to EPA.

One Rule for Both Standards

Though EPA issued only one rule covering both the hazardous air pollutant standards and new source performance standards, many of the plaintiffs filed separate lawsuits for each part of the rule. All of the lawsuits except those filed by the Portland Cement Association were filed Nov. 8.

Lawsuits challenging the new source performance standards are: Portland Cement Association v. EPA, No. 10-1358; Ash Grove Cement Co. v. EPA, No. 10-1363; Riverside Cement Co. v. EPA, No. 10-1366; CEMEX Inc. v. EPA, No. 10-1367; Eagle Materials Inc. v. EPA, No. 10-1373; and Holcim Inc. v. EPA, No. 10-1374.

Lawsuits challenging the national emissions standards for hazardous air pollutants are: Portland Cement Association v. EPA, No. 10-1359; Ash Grove Cement Co. v. EPA, No. 10-1364; Riverside Cement Co. v. EPA, No. 10-1365; Eagle Materials Inc. v. EPA, No. 10-1372; and Holcim Inc. v. EPA, No. 10-1375.

The lawsuits *Sierra Club v. EPA*, No. 10-1376; *Tile Council of North America v. EPA*, No. 10-1377; *Sierra Club v. EPA*, No. 10-1378; and *Downwinders at Risk v. EPA*, No. 10-1379, challenge both standards.

Details for the lawsuits *CEMEX Inc. v. EPA*, No. 10-1368; *Lafarge v. EPA*, No. 10-1369; *Lafarge v. EPA*, No. 10-1370; and *Natural Resources Defense Council v. EPA*, No. 10-1371, were not available Nov. 9.

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
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November 29, 2010

Jody Hall-Esser
Planning Director
County of Santa Clara
70 West Hedding Street, 7th Floor
San Jose, California 95110

Dear Ms. Hall-Esser:

I wanted to respond to your request for information regarding recent law suits surrounding the EPA's final NESHAP Rule. The law suit does nothing to change our ongoing commitment to reduce emissions at Lehigh Hanson's Permanente Plant in Santa Clara County. As you know, earlier this year we reduced Mercury emissions by 30%. We remain committed to further reducing Mercury emissions in advance of any requirement by the EPA to do so.

On November 5, 2010 the Portland Cement Association (PCA), a trade association that represents 95% of the U.S. cement capacity, filed a Petition for Reconsideration and Administrative Stay with the U.S. EPA regarding the cement industry's Final NESHAP Rule which was published on September 9, 2010. The organization also filed a Petition for Review with the Washington DC Circuit Court. Lehigh Cement Company signed on to the PCA Petition for Reconsideration and also filed its own Petition for Review as well.

The Petition for Reconsideration is a request to EPA to rework some parts of the final rule. The issues raised in this petition are only those that the public and the industry were not given a chance to comment on during the comment period, but made it into the final rule nevertheless. The Administrative Stay asks the EPA to consider stopping the compliance deadline clock until these issues are worked out.

The Petition for Review is a legal challenge to the rule which generally focuses on actions of the rule making process itself. It does not stop the compliance clock.

As a member of PCA, Lehigh endorses the Petition for Reconsideration as we too were not given the opportunity to comment on these types of issues. In addition, Lehigh filed its own Petition for Review. As far as both Petitions, the Reconsideration which went to EPA and the Review, which is the legal challenge that went to the DC Circuit Court, none will effect what we are planning for Perm. We will continue to investigate new technologies and establish new design strategies for Permanente to be able to meet the Final NESHAP emission standard for mercury before the Sept 9, 2013 deadline.

Respectfully,

A handwritten signature in black ink, appearing to read "Jeffrey L. Brummert".

Jeffrey L. Brummert
Vice President Materials, Northern CA
Lehigh Hanson, Region West