



California Regional Water Quality Control Board

San Francisco Bay Region



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Edmund G. Brown, Jr.
Governor

Date: February 18, 2011
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Distributed by e-mail

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

SUBJECT: Notice of Violations and Requirement to Obtain Coverage for Discharges to Waters of the U.S. under Different Permit

Dear Mr. Wesseling:

Over the past two years, the San Francisco Bay Water Board has received a number of citizen complaints regarding the operation of the Lehigh Permanente Quarry and Cement Plant (the Facility) and requests that we investigate the status of compliance with water quality requirements. These complaints and requests have come from other environmental regulatory agencies, local governments, non-profit organizations, and private individuals. In response, we have evaluated the status of the Facility's compliance with applicable laws and regulations, including the Federal Clean Water Act (CWA), the California Water Code (Water Code), and the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan). Our evaluation necessarily included an assessment of the Facility's compliance with its current permit, Order No. 97-03-DWQ (the Industrial Storm Water General Permit).

This letter sets forth the results of our evaluation and the bases for our conclusion that the Facility is not and cannot be appropriately regulated under the Industrial Storm Water Permit. Herein we describe options for Lehigh to obtain coverage under a different permit and provide notice of outstanding violations.

I. Lehigh needs coverage under an individual NPDES permit because it is in violation of the Industrial Storm Water General Permit and is discharging non-stormwater without permit coverage

Lehigh's substantial and ongoing non-storm water discharges are unpermitted and prohibited by the Industrial Storm Water General Permit.

The Industrial Storm Water General Permit conditionally allows the discharge of storm water and a very specific list of non-storm water discharges (see Special Condition D.1 in Table 2,

below). All other non-storm water discharges are strictly prohibited (see Discharge Prohibition 1 in Table 2, below). Because discharging quarry bottom water, wash-down water, and dust suppression water is not specifically authorized by Special Condition D.1, these types of discharges are prohibited. Quarry bottom water and dust suppression water may originate as storm water and/or ground water, but as soon as clean water comes into contact with quarry equipment, facility operations, or mine materials, that water is considered process water. The same is true for dust suppression and wash-down water.

Lehigh must immediately cease and desist any and all discharges of quarry bottom water, dust suppression water, and wash down water because those discharges violate the CWA and the Water Code. If Lehigh continues its unpermitted discharge of non-storm water, including but not limited to, quarry bottom water, dust suppression water, and wash down water, it is subject to administrative civil liabilities under Water Code section 13385 of up to \$10,000 per day for each violation and \$10 per gallon of wastes discharged. If we decide this is an appropriate matter to refer to the California Attorney General to pursue civil liabilities in Superior Court, Lehigh would be subject to civil liabilities of up to \$25,000 per day for each violation and \$25 per gallon of wastes discharged.

Lehigh is in violation of the Industrial Storm Water General Permit Effluent Limitation 3 due to inadequate erosion and sediment controls.

After reviewing Lehigh's SWPPP and twice inspecting the Facility, we conclude that Lehigh is far short of achieving the required Best Available Technology/Best Conventional Technology (BAT/BCT) standard for erosion and sediment controls. While we are focused here on Lehigh's failure to meet the required BAT/BCT standards for erosion and sediment controls, Lehigh has additional effluent limitation violations, which are detailed in the attachments to this letter.

In our first inspection report, we documented several violations, including:

- Muddy water flowing into Permanente Creek from the Facility;
- Sedimentation ponds and sediment traps overwhelmed with sediment in the middle of what was a normal-to-low rainfall year; and
- Over-reliance on sediment management practices and insufficient use of erosion control.

We communicated these violations to Lehigh in our Notice of Violation letter dated March 26, 2010. In its April 15, 2010, response letter, Lehigh argued with and attempted to refute our observations, rather than attempting to correct the violations we had noted. Our second inspection confirmed that Lehigh has not corrected the violations noted in the first inspection.

This provides Lehigh with further formal notice that failure to correct the noted violations may result in the imposition of administrative civil liabilities under Water Code section 13385 of up to \$10,000 per day for each violation and \$10 per gallon of wastes discharged. As noted above, higher civil liabilities could be sought judicially.

Lehigh needs coverage under an individual NPDES permit.

Consistent with our authority, as explained in the Fact Sheet of the Industrial Storm Water General Permit, we are requiring Lehigh to obtain coverage for its discharges under a different permit. This requirement for Lehigh to obtain a different permit is based on our determination that potential water quality impacts are not being appropriately addressed by Lehigh under the Industrial Storm Water General Permit. We have further determined that, in light of Lehigh's compliance history, the Industrial Storm Water General Permit is not an appropriate permit for the Facility. Lehigh discharges hundreds of thousands to millions of gallons per day of unpermitted non storm water, which is expressly prohibited under the Industrial Storm Water General Permit. Furthermore, we find that Permanente Creek is not being adequately protected under the existing permit.

The San Francisco Bay Water Board has already adopted a general permit that is more appropriate for regulating Lehigh and the type of discharges at the Facility: Order No.R2-2008-0011, General Waste Discharge Requirements for Discharges of Process Wastewaters from Aggregate Mining, Sand Washing, and Sand Offloading Facilities to Surface Waters (the Sand and Gravel Permit). Therefore, pursuant to our authority under Section F.1.b. of the Industrial Storm Water General Permit, we hereby require Lehigh to obtain coverage for its discharges under Order No. R2-2008-0011.

Because Lehigh is discharging industrial process water (quarry bottom water, wash down water, and dust suppression water), which is prohibited under the Industrial Storm Water General Permit, Lehigh is currently discharging without a permit. Water Code section 13260(a)(1) requires all dischargers to submit a Report of Waste Discharge before commencing their discharge. Filing a Notice of Intent to obtain coverage under Order No. R2-2008-0011 would be equivalent, in Lehigh's case, to submitting a Report of Waste Discharge for the non-storm water flows it is currently discharging at the Facility.

II. Additional requirements for Lehigh, including obtaining coverage under Order No. R2-2008-0011 and collecting and submitting new data

Enrolling under Order No. R2-2008-0011:

Lehigh must obtain coverage under Order No. R2-2008-0011 by one of the following two methods:

1. No later than April 30, 2011, Lehigh must
 - a. Submit a Notice of Intent to obtain coverage under Order No.R2-2008-0011, General Waste Discharge Requirements for Discharges of Process Wastewaters from Aggregate Mining, Sand Washing, and Sand Offloading Facilities to Surface Waters; and
 - b. Submit a Notice of Termination of the Industrial Storm Water General Permit.

OR

2. The San Francisco Bay Water Board will hold a publicly noticed hearing, and prosecution staff will recommend that the Water Board impose coverage under Order No. R2-2008-0011 on the Lehigh Facility.

As we have stated on prior occasions, and as will remain the case in either of the above scenarios, in-stream treatment ponds are not allowed to be used for sediment removal or any other water quality treatment. Under Order No. R2-2008-0011, Lehigh will be required to monitor at all discharge points to the Creek and compliance will be evaluated at the inflow points to any in-stream ponds, not downstream of the in-stream ponds.

Lehigh must collect and submit additional data characterizing non-storm water flows on/from the Facility.

The proposal Lehigh submitted to us in response to our Water Code section 13267 Order to provide a technical report is unacceptable. Accordingly, Lehigh is subject to administrative civil liabilities of up to \$1,000 per day until the time at which an acceptable technical report is provided. A detailed explanation of what Lehigh is required to do is provided in Attachment 7 of this letter. Our staff will visit the Facility to determine the exact locations where samples must be collected.

III. Our determinations are based on inspections, “paper review”, and documented non-storm water discharges.

In the following tables, we set forth the bases for our determinations. The first table explains the contents of each attachment to this letter, noting which entity (Water Board or Lehigh) wrote the document, the nature of the document, notes regarding the document, and the date it was first mailed. Please note that many of the attachments are being sent for the first time with this letter.

The second table contains the sections of the Industrial Storm Water General Permit and the Water Code to which we have referred in this letter.

Table 1 - Attachments

#	From	Document Title or Description	Notes	Date First Distributed
1	Water Board	Notice of Violation and Report, February 2010 Inspection	Documents several effluent limitation violations	March 26, 2010
2	Water Board	May 2010 Inspection Report	Documents that effluent violations noted in February have not been corrected. Documents discharge prohibition violations	<i>Distributed for first time with this letter</i>

#	From	Document Title or Description	Notes	Date First Distributed
3	Lehigh	Response to the March 26, 2010, Notice of Violation	Demonstrates Lehigh's recalcitrance and non-responsiveness to the Notice of Violation	April 19, 2010
4	Water Board	"13267 Order for technical report regarding non-storm water discharges	Requires technical report that explains the nature of the discharge observed in Permanente Creek on September 15, 2010	November 29, 2010
5	Lehigh	Response to the 13267 Order	Establishes that Lehigh discharges hundreds of thousands to millions of gallons per day of prohibited non-storm water discharges. However, also demonstrates Lehigh's misinterpretation of what is allowed (or not allowed) under the Industrial Storm Water Permit	December 13, 2010
6	Water Board	Staff's response to Lehigh's Response to the 13267 Order	Explains that Lehigh's proposed monitoring plan is not acceptable and outlines what Lehigh must do. Contains deadlines.	<i>Distributed for first time with this letter</i>
-	<i>Lehigh</i>	<i>Current Storm Water Pollution Prevention Plan (SWPPP)</i>	<i>This is a document that all dischargers covered by the Industrial Storm Water Permit are required to create and use to protect water quality on/leaving a Facility.</i>	<i>March 4, 2010 *We refer to this document but do not attach it to this letter because it is a large file. It is available at our office upon request.</i>
7	Lehigh	Selenium Exceedance Report	As the Industrial Storm Water Permit requires, Lehigh prepared this document because it was likely to exceed receiving water limitations for selenium. This report is a general overview of what might be done to control concentrations of selenium in storm water at a quarry with high naturally occurring selenium. Lehigh fails to demonstrate the specific actions it will take to control selenium in its discharges. Lehigh has failed to show compliance with the Basin Plan's Selenium criteria and the Industrial Storm Water Permit's Receiving Water Limitation C.2, which prohibits the Facility's discharges from causing or contributing to an exceedance of any water quality standards contained in the Basin Plan.	March 18, 2010

Table 2 – Relevant Permit and Water Code references

Quoted section of the Industrial Storm Water General Permit or applicable law	Text	Type of requirement or Water Board Authority
Special Condition D.1	<p>Excerpt from the Industrial Storm Water Permit, Special Condition D.1</p> <p>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.</p>	Explains the specific list of types of non-storm water that are allowed to be discharged under the Industrial Storm Water Permit
Discharge Prohibition 1	<p>Excerpt from the Industrial Storm Water General Permit, Discharge Prohibition 1</p> <p>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.</p>	Explains that most non-storm water discharges (any that are not expressly listed in Special Condition D.1) are strictly prohibited under the Industrial Storm Water General Permit.
Effluent Limitation 3	<p>Excerpt from the Industrial Storm Water General Permit, Effluent Limitation 3</p> <p>Facility operators covered by this General Permit must reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges through implementation of BAT for toxic and nonconventional pollutants and BCT for conventional pollutants. Development and implementation of an SWPPP that complies with the requirements in Section A of the General Permit and that includes BMPs that achieve BAT/BCT constitutes compliance with this requirement.</p>	Explains the level of “best management practice” (BMP) implementation that must be achieved in order to comply with the permit.

Quoted section of the Industrial Storm Water General Permit or applicable law	Text	Type of requirement or Water Board Authority
Fact Sheet No. 3, Facilities determined to be ineligible [for coverage under the Industrial Storm Water General Permit] by Regional Water Boards	Regional Water Boards may determine that discharges from a facility or groups of facilities, otherwise eligible for coverage under this General Permit, have potential water quality impacts that may not be appropriately addressed by this General Permit. In such cases, a Regional Water Board may require such discharges to be covered by an individual or general NPDES permit. Interested persons may petition the appropriate Regional Water Board to issue individual NPDES permits. The applicability of this General Permit to such discharges will be terminated upon adoption of an individual NPDES permit or a different general NPDES permit.	This explains that the Water Board has the authority to require Lehigh to be covered under a different permit for its ongoing discharges of storm water and non-storm water.
F.1.b, Regional Water Board Authorities	Following adoption of this General Permit, Regional Water Boards shall issue other NPDES general permits or individual NPDES storm water permits as they deem appropriate to individual facility operators, facility operators of specific categories of industrial activities.... Upon issuance of such NPDES permits by a Regional Water Board, the affected facility operator shall no longer be regulated by this General Permit. Any new NPDES permit issued by the Regional Water Board may contain different requirements than the requirements of this General Permit.	This is further explanation of Water Board authority to require Lehigh to be covered under a different permit.
Water Code § 13260. Reports; fees; exemptions	(a) All of the following persons shall file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board:(1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.	This section of the Water Code requires Lehigh to submit a Report of Waste Discharge (which is an application to discharge waste water).

Quoted section of the Industrial Storm Water General Permit or applicable law	Text	Type of requirement or Water Board Authority
California Water Code § 13385, Civil Liability	§ 13385. Civil liability	This section of the Water Code gives the Water Board the authority to issue monetary penalties for violations of an NPDES Permit or of the Clean Water Act.
California Water Code § 13267. Investigations; inspections	§ 13267. Investigations; inspections	This section of the Water Code gives the Water Board the authority to require technical reports.

If you have any questions, please contact Cris Carrigan at 916-322-3626, or via e-mail at ccarrigan@waterboards.ca.gov, or me directly. Also, we anticipate that you may wish to meet with us to discuss these matters. Please contact us with your available dates.

Sincerely,

Dyan C. Whyte
Assistant Executive Officer

Interested Party Mailing List – see attached.

Lehigh Mailing List

<i>Type of party</i>	<i>Party name</i>	<i>Party contact</i>	<i>E-mail address</i>	<i>Street Address</i>	<i>City, State, Zip</i>
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Organization

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City of Cupertino

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Committee for Green Foothills

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Lehigh Southwest Cement Company

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<i>Type of party</i>	<i>Party name</i>	<i>Party contact</i>	<i>E-mail address</i>	<i>Street Address</i>	<i>City, State, Zip</i>
	<i>QuarryNo</i>	Bill Almon	balmon@pacbell.net		
	<i>Santa Clara Valley Audobon Society</i>	Shani Kleinhaus	shani@scvas.org		
	<i>Stevens and Permanente Creeks Watershed Council</i>	Mondy Lariz, Executive Director	execdir@spcwc.org		
Private Party					
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<i>Type of party</i>	<i>Party name</i>	<i>Party contact</i>	<i>E-mail address</i>	<i>Street Address</i>	<i>City, State, Zip</i>
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