Reed Zars
Attorney at Law
910 Kearney Street, Laramie, WY 82070
307-745-7979

August 24, 2011

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

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

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

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

Dear Mr. Wesseling and Dr. Scheifele,

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

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

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

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

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

I. Background

Kaiser Cement Company opened the main Permanente quarry and original cement plant in 1939. Hanson Corporation purchased the quarry and cement plant from Kaiser in 1986. Lehigh Southwest Cement Company is the operator of the facility. Today Lehigh claims the quarry and plant provide over 50 percent of the concrete used in the Bay Area.

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

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

II. The Violations

A. Unpermitted Quarry Discharges

According to Lehigh's own statements, the company has been discharging without a proper permit, and continues to discharge without a proper permit, pollutants generated by its quarry mining operations directly into Permanente Creek. Permanente Creek is a water of the United States. In particular, Lehigh's quarry mining operations have exposed pollutants to both rain and ground water. As these waters flow over and through Lehigh's disturbed soils and rock, pollutants such as selenium, arsenic, molybdenum, nickel and manganese, residual blasting agent (ANFO), and other toxic elements and compounds, are picked up by the water and are collected at the bottom of the quarry pit. Lehigh then pumps the contaminated pit water on a regular basis from the quarry pit through a pipe into a waste pond (Pond 4) and thence through a pipe into Permanente Creek. Permanente Creek flows into the San Francisco Bay. Lehigh employs no pollution control measures to reduce or eliminate selenium and other toxic substances that are dissolved and suspended in its wastewater. As Lehigh explained to the Regional Water Quality Control Board, San Francisco Bay Region ("Water Board"):

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

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

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

Not only that, Lehigh also admits that the wastewater it has been discharging into Permanente Creek, and that it continues to discharge into Permanente Creek, is contaminated with selenium[1] in concentrations that greatly exceed water quality standards. Again, according to Lehigh:

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

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

Lehigh's qualification that the water it is discharging into Permanente Creek "could" contain concentrations of selenium above water quality standards is unnecessary. Although not a necessary element to establish liability under the Clean Water Act, Lehigh's own sampling evidence shows that selenium concentrations in its wastewater *are* in excess of water quality standards.

The water quality standards applicable to Permanente Creek are set forth in the 2007 San Francisco Bay Basin Water Quality Control Plan ("Basin Plan") and the California Toxics Rule at 40 C.F.R. §131.38. Both the Basin Plan and the California Toxics Rule establish a chronic total selenium standard of 5.0 micrograms per liter in fresh water. **Exhibit D**. Due to chronically elevated levels of selenium and toxicity immediately downstream from the Permanente facility, EPA recently approve the listing of Permanente Creek as impaired for these pollutants. **Exhibit E**, EPA Approval Letter, November 12, 2010.

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[1] "[S]elenium is a naturally occurring element, common in the environment. It is problematic only in high concentrations, but at certain levels has toxic effects. Selenium impacts the reproductive cycle of many aquatic species, can impair the development and survival of fish, and can even damage gills or other organs of aquatic organisms subjected to prolonged exposure. It can also be toxic to humans, causing kidney and liver damage, and damage to the nervous and circulatory systems." *Ohio Valley Envtl. Coalition, Inc. v. Hobet Mining, LLC,* 723 F. Supp. 2d 886, 900 (S.D. W.Va. 2010).

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

Lehigh has an Industrial General Storm Water Permit issued by the Water Board, but that permit, as its name indicates, only applies during specified storm events and not to the on-going, non-storm water discharges from Pond 4 described here. The Water Board emphatically confirmed this fact on February 18, 2011:

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

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

Because Lehigh pumps the water from its quarry pit into Pond 4 on a continuous or regular basis, and because Pond 4 is the functional equivalent of a full bathtub, the continuous pumping of quarry water contaminated with selenium and other toxic substances inexorably results in the continuous discharge of pollutants through a pipe directly into Permanente Creek. Lehigh has no permit authorizing this continuous discharge. Therefore, Lehigh has violated the Act every day, for each pollutant, for at least the last five years when it has actively pumped and discharged water-borne selenium and other toxic substances from its quarry to Pond 4 and thence to Permanente Creek without a permit.

B. Unpermitted Stream Fill Discharges

According to Lehigh's own reports, Permanente Creek has been used, and continues to be used, as a disposal area for quarry mining wastes. Mine tailings, overburden and other wastes have been dumped, and continue to be dumped into Permanente Creek throughout the stream's path within Lehigh's property. Lehigh's March 11, 2011 "Permanente Creek Long-Term Restoration Plan" documents many of these stream disposal sites. An annotated stream profile diagram, taken from Figure 2-5 in Lehigh's Restoration Plan and attached hereto as **Exhibit G**, shows the

location of some of the more notorious mine tailing and overburden waste disposal sites at Lehigh's quarry along the various sections of Permanente Creek.

Mining wastes have been dumped into Permanente Creek by bulldozers, dump trucks and other mining equipment, with the assistance of gravity. The disposal sites in Permanente Creek include, but are not limited to, those shown on **Exhibit G**, attached hereto. The disposal sites continuously discharge, release and otherwise add their toxins into the creek's waters much like coffee grounds in a percolator. As the waters of Permanente Creek flow over and through the mining wastes dumped into the creek, pollutants such as selenium, arsenic, molybdenum, nickel, manganese, residual blasting agent (ANFO), and other toxic elements and compounds, are dissolved into and suspended in the water. These added pollutants flow downstream through Lehigh's property, through public parks and neighborhoods, and finally into San Francisco Bay. The mine tailings and other rock and sediment wastes that physically remain in the creek bed and adjacent wetlands, or that are carried to various downstream locations during higher flow events, are also unpermitted pollutants that exist in the water column, banks and wetlands of Permanente Creek.

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

Lehigh has no permit authorizing the continuous discharge of dissolved and suspended pollutants from mine wastes dumped into Permanente Creek described above. Lehigh has no permit for the mine wastes that continuously clog the bed, banks and wetlands of Permanente Creek described above. Therefore Lehigh has violated the Act every day at each disposal site for at least the last five years as a result of such unpermitted discharges.

III. Offer to review information.

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

IV. Conclusion

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

The address of Sierra Club is 85 Second Street, Second Floor, San Francisco, CA 94105. Sierra Club has individual members who have been, and continue to be, injured by the excessive and unlawful discharges from Lehigh's Permanente facility into Permanente Creek described above. Those injuries are fairly traceable to Lehigh's unlawful discharges, and can be redressed, at least in part, through the cessation of such discharges. If you have any questions regarding the allegations in this notice letter, believe any of the foregoing information to be in error, wish to discuss the exchange of information consistent with the suggestion above, or would otherwise like to discuss a settlement of this matter prior to the initiation of litigation, please contact the attorneys below.

Yours sincerely,

REED ZARS

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
307-745-7979

GEORGE HAYS BY RZ

George Hays
Attorney at Law
236 West Portal Avenue, #110
San Francisco, CA 94127
415-566-5414

pc: by certified mail:

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dorothy Rice, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Eric Holder, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Jared Blumenfeld, Regional Administrator
U.S. EPA – Region 9
75 Hawthorne Street
San Francisco, CA 94105

Bruce Wolfe, Executive Officer
San Francisco Bay
Regional Water Quality Control Board
1515 Clay St., Suite 1400
Oakland, CA 94612

Registered Agent
Lehigh Southwest Cement Company
Corporation Service Company
2730 Gateway Oaks Dr., Suite 100
Sacramento, CA 95833

pc: by regular mail

Santa Clara County Board of Supervisors
70 West Hedding Street
San Jose, CA 95110

Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Stevens & Permanente Creeks Watershed Council
2353 Venndale Avenue
San Jose, CA 95124

Midpeninsula Regional Open Space District
330 Distel Circle
Los Altos, CA 94022-1404

Department of Conservation
Office of Mine Reclamation
801 K Street, MS 09-06
Sacramento, CA 95814-3529

Exhibits Provided in Enclosed CD

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

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

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

Exhibit D: 2007 San Francisco Bay Basin Water Quality Control Plan ("Basin Plan") excerpts, and the California Toxics Rule at 40 C.F.R. §131.38.

Exhibit E: EPA approval letter listing Permanente Creek as impaired for selenium and toxicity, November 12, 2010.

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

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

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