

# **Findings and Recommendations Regarding the Issuance of Federal Fish and Wildlife Permit (ESPER004426) to Lehigh Southwest Cement Company to Allow Incidental Take of the California Red-legged Frog as a Result of the Low-Effect Habitat Conservation Plan for the Permanente Site Operation and Maintenance Project in Santa Clara County, California**

## **I. DESCRIPTION OF THE PROPOSAL**

### **Proposed Action**

The U.S. Fish and Wildlife Service (Service) proposes to issue an incidental take permit (Permit) to Lehigh Southwest Cement Company (Lehigh) (Applicant), in Santa Clara County, California, under the authority of section 10(a)(1)(B) and section 10(a)(2) of the Endangered Species Act of 1973, as amended (Act) for a period of 20 years. The Applicant requested incidental take coverage under the Act for one species, the California red-legged frog (*Rana draytonii*) (Covered Species). Assurances provided under the “No Surprises” rule at 50 CFR 17.3, 17.22(b)(5), and 17.32(b)(5) would extend to the California red-legged frog.

Under the Permit, the Applicant would receive authorization to take California red-legged frogs incidental to activities associated with the Permanente Site Operation and Maintenance Project at the Lehigh Permanente Quarry west of the City of Cupertino, Santa Clara County, California. The Habitat Conservation Plan (HCP) submitted by the Applicant, as part of their Permit application, describes the project in detail, together with the conservation measures that would be implemented to avoid, minimize, and mitigate incidental take of the Covered Species.

In addition, and consistent with the U.S. Department of the Interior's "No Surprises" regulation [50 *Code of Federal Regulations* (CFR) 17.32(b)(5)], the Applicant is seeking assurances of no further mitigation requirements for the California red-legged frog for this project while the permit is in effect.

Documents used in the preparation of these findings and recommendations include: (1) the Applicant’s permit application; (2) the May 2022 Final Low-Effect Habitat Conservation Plan (HCP) Permanente Site Operation and Maintenance (GEI Consultants, Inc. [GEI] 2022); (3) the Intra-Service Biological Opinion on Issuance of a Section 10(a)(1)(B) Incidental Take Permit for activities associated with the Lehigh Southwest Cement Company’s Permanente Site Operation and Maintenance Project Low-Effect Habitat Conservation Plan for California Red-legged Frog, Santa Clara County, California (Service 2022); and (4) the Screening Form for Low-Effect HCP Determinations and Environmental Action Statement (EAS) (Service 2021a). These documents are hereby incorporated by reference, as described in 40 CFR 1502.21.

### **Description of the Proposed Project**

The proposed project involves ongoing routine operation and maintenance of existing facilities within the 10.2-acre permit area (Figure 1) at Lehigh’s Permanente Quarry, a cement and



Figure 1. Permit area (copied from Figure 2 in GEI (2021)).

limestone/aggregate mining operation west of the City of Cupertino in Santa Clara County, California. Covered Activities are associated with ongoing operation and maintenance of existing Permanente facilities near Permanente Creek and associated habitat, which largely includes areas near the entrance of the facility, the Cement Plant, the Rock Pile Area, the area downstream of in-stream Pond 13 (Reach 12 of Permanente Creek), and lower elevation storm water capture basins (Figure 1). The Covered Activities are summarized below.

#### *Storm Water Capture/Sedimentation Basin Operation and Maintenance*

Storm water capture/sedimentation basins (also known as “ponds” onsite) provide storm water detention and sediment control for the Permanente site. These ponds are maintained according to the Stormwater Pollution Prevention Plan (SWPPP) and National Pollutant Discharge Elimination System (NPDES) permits applicable to the site. Storm water runoff collects in a series of swales and is conveyed to the sedimentation basins, before being released either to the Cement Plant Reclaimed System for treatment (e.g., Pond 30) or to Permanente Creek (e.g., Pond 13B).

Storm water capture/sedimentation basins are located throughout the site. Several basins are parallel to and immediately adjacent to Permanente Creek. Storm water capture/sedimentation basins range in size from 8,000 to 40,000 square feet (0.184 to 0.918 acre).

The storm water capture/sedimentation basins are monitored before and after every storm event during the wet season and monthly during the dry months, by visual observation and field investigation. Conditions are inspected to evaluate the need for sediment removal and best management practices (BMPs) under the SWPPP. The conditions and any need for maintenance are recorded, and the appropriate maintenance activities and BMPs are identified and implemented.

Sediment removal and other maintenance activities have only been conducted at Ponds 13B, 17, 30, 31A, and 31B. These activities are required approximately every 1–2 years, depending on location. Maintenance at each location is typically completed within 3–4 days by two to four workers. Equipment typically includes an excavator, dozer, pumps, vactor, and haul truck. Excavated material is stored in existing on-site material storage areas, in accordance with BMPs in the site SWPPP, for later use during site reclamation. Sediment removal and other maintenance activities also will be conducted at the Yeager Yard catchment basin, which was constructed in 2020. Sediment removal and other maintenance activities have not previously been conducted at Pond 4A but may be required during the permit term. Both of these basins are lined.

In addition to conducting ongoing sediment removal, Covered Activities may include permanent lining of ponds (initially considered for Pond 30). Pond lining activities are anticipated to require equipment such as an excavator, a trencher, vactors, haul trucks, pumps, and other specialized equipment, as needed. If initiated, pond lining is expected to be completed in approximately one month.

### *Erosion Control*

Erosion control measures (e.g., silt fence, berms, water bars, check dams, etc.) are monitored before and after every storm event during the wet season and monthly during the dry months, by visual observation and field investigation. Soil and slope conditions are inspected to identify significant new erosion, including rills and soil loss. The conditions and any need for maintenance are recorded, and the appropriate maintenance activities are identified and implemented.

Erosion control activities are typically required before the start of the wet season and on an as-needed basis, depending on rainfall. Erosion control at a given location is typically completed within 1–3 days, by two to four workers. Equipment typically includes an excavator, grader, dozer, and haul truck. If material removal is necessary, excavated material is stored in existing material storage areas for later use during site reclamation; if material import is necessary, it is typically obtained from local outlets.

### *Material Transport and Storage*

Material used for aggregate production is stored in the area known as the “Rock Pile Area,” near Pond 13B. Although Permanente Creek is culverted immediately adjacent to the Rock Pile, the areas upstream and downstream of this location support open water creek habitat. The Rock Pile is accessed to store and/or transport material; thus, vehicle and equipment operation occurs in this area.

### *Vehicle Travel, Equipment Operation, Road and Berm Maintenance*

Activities on the Permanente site generate traffic associated with customer haul trucks, equipment movement, delivery trucks carrying materials and supplies, employee cars and light trucks, and contractor vehicles. Customer haul trucks travel to and from the Cement Plant, Rock Plan, and Rock Pile areas, and other onsite traffic travels to and from various areas of the site. Vehicle travel is limited to the existing road network and other established access routes. One of the primary access routes is parallel to Permanente Creek. In addition to regular traffic, Lehigh conducts road, check dam, and berm maintenance along this route.

### *Vegetation Maintenance*

Vegetation maintenance activities on the site include trimming of trees, removal of dead vegetation and, where necessary, hydroseeding. These activities occur on an as-needed basis at least once per year, consistent with the site’s SWPPP and approved Reclamation Plan. These activities require chain saws and excavation for dead tree removal, if needed. In addition, vegetation trimming and cutting is required along existing roadways to maintain safe visibility conditions for vehicle and equipment travel. Typically, these activities require two to four workers and take 5–7 days, depending on the location.

### *Water Quality Monitoring Activities*

A variety of water quality monitoring activities occur at the facility pursuant to the 2011 Reclamation Plan amendment issued by Santa Clara County and operational plans prepared pursuant to permits issued by the San Francisco Regional Water Quality Control Board, including NPDES Permit No. CA0030210, Order No. R2-2019-0024, and Waste Discharge Requirements Order No. R2-2018-0028 (e.g., Spill Prevention Control Plan, Operations & Maintenance Plan, and SWPPP). This monitoring can include, but is not limited to, visual observations, borings/soil sampling, and sampling of seeps, storm water, storm water capture/sedimentation basins, and Pond 14.

### *Pond 14 Monitoring and Habitat Management Activities*

Habitat conditions at Pond 14 will be monitored annually as part of the HCP to confirm the pond continues to provide suitable breeding habitat for the California red-legged frog (e.g., absence or low numbers of bullfrogs and other invasive predators; suitable hydroperiod; fully functional culverts and weir; sufficient open water habitat with emergent vegetation cover between approximately 20 and 50 percent; sufficient warm, sunny shallow water habitat for tadpole rearing) and to serve as a suitable release site for individuals that require removal from maintenance areas. Monitoring will include surveys for predators such as bullfrog, nonnative fish, and crayfish. If such nonnative predatory species are encountered, efforts will be implemented to remove as many individuals as practicable from the pond, via methods that are safe for the California red-legged frog. Breeding habitat conditions also will be monitored by a qualified California red-legged frog biologist, and obvious changes in the extent of emergent vegetation cover and/or reduction in open water will be noted. If habitat conditions degrade to the extent that suitability of Pond 14 as California red-legged frog breeding habitat becomes threatened, potential remedial measures will be evaluated and implemented, as part of the adaptive management process. Potential adaptive management actions at Pond 14 will be evaluated and appropriate measures identified and implemented, if necessary, based on the best available science. Potential adaptive management actions may include vegetation management/restoration if emergent cover increases or decreases enough to substantially diminish breeding habitat quality, sediment removal or culvert repair if the pond becomes too shallow or flow to the pond becomes sufficiently impeded, and weir/gate repairs if adequate water is not being impounded. If a natural disaster destroys habitat for the California red-legged frog at Pond 14, Lehigh will consult with the Service to determine if the habitat can be feasibly restored, or alternative measures can be included as part of the Covered Activities.

### *Conservation Measures*

The following BMPs and species-specific measures will be implemented to avoid and minimize effects on the California red-legged frog and its habitat to the maximum extent practicable. A bond covering these costs will be provided to the Service as a financial assurance mechanism for these components of the HCP conservation strategy.

1. Movement and parking of vehicles and equipment used for Covered Activities will be confined to existing roads, developed areas, and other previously disturbed areas. Vehicles and equipment will be subject to a speed limit of 20 miles per hour.

2. Erosion control, pollution prevention, and dust control measures will be implemented to minimize impacts from Covered Activities. These measures will include, at a minimum:
  - a. Existing erosion control measures in the permit area will be implemented with materials that do not entangle or block escape or dispersal routes of the California red-legged frog.
  - b. Vehicles and equipment used for Covered Activities will be regularly maintained to prevent leaks of fuels, lubricants, or other fluids, and fueling and maintenance will be conducted at least 100 feet from aquatic habitat, except at established vehicle fueling and maintenance facilities. Precautions will be taken to prevent discharge of pollutants from vehicle or equipment cleaning into any storm drains or aquatic habitat, and all existing Spill Prevention Control Plan and SWPPP requirements will be implemented. Spill containment kits will be maintained onsite at all times during Covered Activities, and personnel will be trained in their appropriate use.
  - c. Dust control measures will be implemented, if necessary, to control dust associated with permitted activities. Such measures will be implemented in accordance with the existing dust control plan.
  - d. Insecticide, rodenticide, and herbicide use will be prohibited where there is potential for these agents to enter suitable aquatic or upland habitat for the California red-legged frog.
3. Any material generated by Covered Activities that may be temporarily stored, or ultimately permanently placed, will be done so in accordance with protocols established by, or in accordance with, the facility Waste Discharge Requirements, San Francisco Regional Water Quality Control Board Order No. R2-2018-0028, or other General/Individual Order issued by the Regional Water Quality Control Board to govern the use of suitable soils, within previously disturbed areas that do not provide suitable habitat for the California red-legged frog and are a minimum of 150 feet from suitable aquatic habitat for the species. Material generated by the Covered Activities will be evaluated in accordance with such protocols; if on-site storage or use is not determined to be appropriate, Lehigh will transport the material to a permitted disposal site.
4. Sediment removal and other Covered Activities in storm water capture/sedimentation basins that provide suitable aquatic habitat for the California red-legged frog will only occur when the basins are dry. Covered Activities in suitable breeding habitat for California red-legged frog (*e.g.*, Pond 14) will be conducted between September 1 and October 31, with the exception of monitoring requirements required by a regulatory agency or applicable permits, to avoid potential impacts on California red-legged frog breeding activity, egg masses, and tadpoles.
5. To the maximum extent practicable, ground-disturbing Covered Activities in suitable upland habitat for the California red-legged frog will not occur between November 1 and

March 31, and Covered Activities will not occur during rain events or within 24 hours following a rain event.

6. To the maximum extent practicable, ground-disturbing Covered Activities in suitable upland habitat for the California red-legged frog and all Covered Activities in suitable aquatic habitat for the species will be limited to the period from 30 minutes after sunrise to 30 minutes before sunset. Except when necessary for driver or pedestrian safety, artificial lighting will be prohibited during the hours of darkness.
7. Service-approved biologists and monitors adequately trained by a Service-approved biologist will be identified to implement California red-legged frog avoidance and minimization measures described below. Qualifications of the biologists and monitors will be submitted to the Service for review and written approval at least 14 calendar days before a biologist or monitor conducts activities under the HCP for the first time. Service-approved biologists and monitors will keep a copy of these measures in their possession when onsite.
8. No more than 24 hours before Covered Activities that require work in suitable aquatic habitat or ground disturbance in suitable upland habitat for the California red-legged frog (as identified in the HCP) begin, a preconstruction survey for the California red-legged frog will be conducted by a Service-approved biologist or monitor in the area where such activities will occur. The survey will consist of walking areas that will be subject to ground disturbance and adjacent to aquatic habitat that will be disturbed to investigate possible presence of the species. The Service-approved biologist or monitor will investigate all potential areas that could be used by the California red-legged frog for feeding, breeding, sheltering, movement, and other essential behaviors before work in aquatic habitat or ground-disturbing activities begin.
9. A Service-approved biologist or monitor will be present onsite during Covered Activities that require work in suitable aquatic habitat or ground disturbance in suitable upland habitat for the California red-legged frog, as identified in the HCP.
10. Service-approved biologists and monitors will have the authority to freely communicate at any time with personnel conducting Covered Activities, any other persons otherwise associated with Covered Activities, and the Service. Service-approved biologists and monitors will have oversight for implementing conservation measures in the HCP, and, through Lehigh, will have the authority and responsibility to stop Covered Activities if any of the requirements are not being fulfilled.
11. A Service-approved biologist or monitor will provide training for personnel conducting Covered Activities in suitable aquatic habitat or ground-disturbing Covered Activities in suitable upland habitat for the California red-legged frog. The training presentation will describe California red-legged-frog identification and ecology, including habitat identification; applicable avoidance and minimization measures; legal protection of the species; and other relevant issues. All attendees will provide their signature, printed name, company, and email address or telephone number. The sign-in sheet will be

included in an annual report to the Service. Training will be conducted annually to ensure all new employees are appropriately trained.

12. If a maintenance area is to be temporarily dewatered by pumping, intakes will be completely screened with wire mesh no larger than 5 millimeters to prevent California red-legged frogs from entering the pump system. Water will be released or pumped downstream at an appropriate rate to maintain downstream flows during Covered Activities. Upon completion of Covered Activities, any barriers to flow will be removed in a manner that allows flow to resume with the least disturbance to the substrate.
13. If Covered Activities require excavation of trenches or pits 1 foot deep or deeper that will be left unfilled for more than 48 hours, such trenches and pits will be securely covered with boards or other material. If this is not possible, wooden ramps or other structures of suitable surface that provide adequate footing for the California red-legged frog will be placed in the trench or pit to allow frogs to escape. Auger holes or fence post holes greater than 1.0 inch in diameter will be immediately filled or securely covered. A Service-approved biologist or monitor will inspect relevant trenches, pits, or holes before they are filled to ensure there are no California red-legged frogs in them. The trench, pit, or hole also will be examined by a Service-approved biologist or monitor at least 1 hour before beginning work and no more than 1 hour after work has ceased each day to determine if individuals have become trapped. If the escape ramps fail to allow the animal to escape, a Service-approved biologist will capture and relocate the individual(s) in accordance with the following measure.
14. If a California red-legged frog is encountered before or during Covered Activities: (1) the animal will not be disturbed if it is not in danger; or (2) the animal will be moved to a secure location if it is in any danger, in accordance with the following procedures:
  - a. When a California red-legged frog is encountered, all activities that have potential to result in disturbance, injury, or death of the individual will be immediately halted. A Service-approved biologist will then assess the situation in order to select a course of action that will avoid or minimize adverse effects to the animal. To the maximum extent possible, contact with the frog will be avoided, and it will be allowed to move out of the potentially hazardous situation to a safe area of suitable habitat on its own volition.
  - b. California red-legged frog adults, subadults, or juveniles that are in danger will be captured and released by a Service-approved biologist at Pond 14. If tadpoles or egg masses are found, activities will be delayed until egg masses and/or young have developed to at least the juvenile stage and can be more effectively and safely relocated, if necessary. Only a Service-approved biologist will engage in capture, release, and relocation activities to ensure appropriate precautions are taken for California red-legged frog safety.
  - c. The Service-approved biologist will limit the duration of the handling and captivity of the California red-legged frog to the minimum amount of time necessary to complete relocation. If an individual must be held in captivity, it will



be kept in a cool, dark, moist, aerated environment, such as a clean and disinfected bucket or plastic container with a damp sponge. The container used for holding or transporting the individual will not contain any standing water.

- d. California red-legged frog observations and capture and relocation details will be recorded and included in an annual report to the Service.
  - e. If a dead or injured California red-legged frog is found during Covered Activities, the Service-approved biologist will be notified immediately. If an injured California red-legged frog is found, the Service will be contacted immediately for guidance. If a dead California red-legged frog is found, it will be photographed and its location recorded, and the biologist will contact the Service to determine if the specimen must be transferred to the Service or another party for further evaluation and data development purposes.
15. Service-approved biologists and monitors will permanently remove any aquatic exotic wildlife species, such as bullfrogs, crayfish, and predatory fish from the permit area, including Pond 14, to the maximum extent practicable. To the maximum extent practicable, removal of such predators from California red-legged frog breeding habitat will occur outside the California red-legged frog breeding season.
  16. Introduction and spread of amphibian diseases will be minimized by implementing the decontamination procedures in the “Declining Amphibian Populations Task Force Fieldwork Code of Practice” (<https://www.fws.gov/media/declining-amphibian-task-force-fieldwork-code-practice>).
  17. Habitat conditions at Pond 14 will be monitored annually as part of the HCP to confirm the pond continues to provide suitable breeding habitat for the California red-legged frog (e.g., absence or low numbers of bullfrogs and other invasive predators; suitable hydroperiod; fully functional culverts and weir; sufficient open water habitat with emergent vegetation cover between approximately 20 and 50 percent; sufficient warm, sunny shallow water habitat for tadpole rearing) and to serve as a suitable release site for individuals that require removal from maintenance areas. An annual monitoring survey of the pond will be conducted to assess presence of invasive bullfrogs, predatory fish, and crayfish. Attempt will be made to remove as many predatory individuals as is practicable, based on site conditions. If current habitat conditions deteriorate to an extent that may threaten continued suitability of Pond 14 as breeding habitat for the California red-legged frog, appropriate habitat management activities will be conducted (e.g., excessive emergent vegetation and sediment removal, weir repairs, etc.).
  18. If predator removal or habitat management activities (e.g., vegetation or sediment removal) are required at Pond 14, such activities will be conducted between September 1 and October 31 to minimize potential for impacts on California red-legged frog breeding activity, egg masses, and tadpoles. All applicable avoidance and minimization measures described above also will be implemented at Pond 14 during predator removal and/or habitat management activities.

19. Lehigh will compensate for permanent loss and repeated temporary impacts to 2.2 acres of suitable aquatic and upland habitat for the California red-legged frog from ongoing routine operation and maintenance activities of existing facilities at a 3:1 ratio by purchasing 6.6 acres of California red-legged frog habitat credits at the Ohlone West Conservation Bank in Alameda County. Proof of the credit purchase will be provided to the Service after the Incidental Take Permit (ITP) has been issued. Compensatory mitigation is not required for impacts at Pond 14 because monitoring and potential habitat management would be implemented for the sole purpose of maintaining the pond as California red-legged frog breeding habitat.
20. Pre-construction surveys for monarch butterfly milkweed host plants and adult nectar plants will be conducted by a qualified biologist prior to Covered Activities that include vegetation maintenance (i.e., removal, trimming, or mowing). All milkweed (*Asclepias* species) plants within vegetation maintenance areas will be flagged and avoided. Monarch butterfly nectar plants (Xerces Society 2019) removed during Covered Activities will be replaced by planting appropriate native, flowering plants that are available to monarchs from January-April, as appropriate for the project location at a suitable location on the Permanente property. Lehigh will make all practicable efforts to acquire and plant insecticide-free flowering plants at a 1:1 replacement ratio within 1 year of removal. If insecticide-free plants are not available for acquisition in the first year following removal, Lehigh will acquire and install insecticide-free flowering plants within 2 years of removal at a 2:1 ratio. Lehigh also may plant appropriate insecticide-free flowering plants on the Permanente property in advance of removal to ensure that no net loss of monarch nectar plants would result from the Covered Activities.
21. Pre-construction surveys for active migratory bird nests will be conducted, if Covered Activities occur during the nesting season. If preconstruction surveys determine that active nests are located close enough to work areas where Covered Activities are taking place to be disturbed by the Covered Activities, protective buffers will be established and implemented during Covered Activities until the nests are no longer active. A qualified biologist will determine the appropriate buffer for each nest; the buffer will depend on the type and intensity of Covered Activities, presence of visual buffers, and other variables that could affect susceptibility of the nest to disturbance. Behavior of the nesting birds will be monitored during Covered Activities to ensure the buffers are effective and to adjust buffers, as warranted. The buffers will be maintained until young have fledged or the nest is otherwise no longer active.
22. Water quality related monitoring of selenium in discharge and receiving waters will be carried out consistent with permits issued by the San Francisco Bay Regional Water Quality Control Board.
23. As described in the HCP, the permit area may experience discharges of selenium in excess of San Francisco Regional Water Quality Control Board issued NPDES Permit limits as a result of selenium control infrastructure failure. Where such infrastructure failure results in a discharge of selenium in excess of NPDES Permit limits resulting in an adverse effect on the California red-legged frog, the Service may consider this to be a changed circumstance. The applicant has committed to implement additional BMPs

identified by the Service and agreed to by the Applicant as part of the conservation strategy to avoid the likelihood of jeopardy to or take of the species.

## **II. PUBLIC COMMENT**

The Service published a Notice of Availability (Notice), Permanent Site Operation and Maintenance Project Low-Effect Habitat Conservation Plan (HCP) for California Red-legged Frog, Santa Clara County, California, and incidental take permit application, and announced the availability of the proposed HCP in the *Federal Register* on December 28, 2021 (Service 2021b). The Notice explained that the Permit would allow incidental take of the threatened California red-legged frog contingent upon implementation of the HCP by the Applicant. Publication of the Notice initiated a 30-day public comment period. The public comment period for this Notice ended on January 27, 2022.

The Service received five public comments on the proposed issuance of the section 10(a)(1)(B) permit. The public comments are listed below followed by the Service's responses to the public comments.

### ***Comment Number 1***

Anonymous Comment (FWS-R8-ES-2021-0076-0004): Please protect the red-legged frogs from destruction. 20 years is a long time, and these frogs need protection to thrive and live in peace. Habitat destruction is already a threat to these red-legged frogs. Please help these beautiful frogs to live.

Response (FWS-R8-ES-2021-0076-0004): The HCP includes: (1) avoidance and minimization measures to minimize the effects on the California red-legged frog within the permit area throughout the 20-year permit term; (2) on-site monitoring, management, and restoration of breeding habitat in Pond 14 throughout the 20-year permit term to ensure the pond continues to support breeding California red-legged frogs; and (3) offsite mitigation in perpetuity to preserve and manage higher quality breeding, foraging, and dispersal habitat for the California red-legged frog. The avoidance and minimization measures included in the HCP are the standard avoidance and minimization measures the Service recommends for projects affecting the California red-legged frog. The Service has found the avoidance and minimization measures to be effective in preventing the injury and mortality of the California red-legged frog as few injuries or deaths of California red-legged frogs have been reported by Service-approved biological monitors implementing the avoidance and minimization measures.

### ***Comment Number 2***

Aaron Hebert of Midpeninsula Regional Open Space District Comment (FWS-R8-ES-2021-0076-0005): Please accept this comment on behalf of the Midpeninsula Regional Open Space District (Midpen). Midpen manages Rancho San Antonio Open Space Preserve which is the quarry's closest neighbor, as well as managing the adjacent Rancho San Antonio County Park through an agreement with Santa Clara County.

We appreciate US Fish and Wildlife Service looking at the impacts on listed species due to Quarry Operations. As you know, the Quarry has been gradually expanding the spatial extent of mining over the last 100 years. This has resulted in the permanent loss of many acres of habitat for listed species, including the California red-legged frog. In that same time, Permanente Creek has become severely degraded. The Permanente Creek Restoration project is a long overdue response to these conditions. Even in the time of the planning and permitting of that project, another landslide from the quarry has impacted Permanente Creek and its habitats (“the Yaeger Yard slide”). The degradation of the habitats surrounding Rancho San Antonio Open Space Preserve has a direct affect on the habitats that Midpen manages.

The abundance of aquatic breeding habitats in the area has increased greatly as a result of the Valley Water Flood Detention Basin, located downstream. This has increased the probability of encountering frogs during a variety of water years. Midpen supports the Service taking a proactive stance management CRLF on the property, as their numbers have likely increased in recent years.

I am concerned the risk of take from selenium does not appear to be analyzed in the Environment Action Statement. While I agree the risk of selenium exposure has been reduced through the treatment plant, the presence and concentrations of selenium are likely to change as quarry operations change over time. Since this permit is a 20-year permit, I would suggest the absence of a mitigation measure or BMP addressing that issue could directly result in take of the species, as the applicant notes as a threat. Testing the receiving waters and the sediment is likely the only way to avoid take or reduce to not likely affect levels. I would also suggest tissue sampling for any CRLF that have been killed or found dead.

I am also concerned by the boundary of the permit area. While certain features like the ponds are somewhat fixed in space, the access routes, staging areas, etc appear to be overly narrow in places, understating the extent of the impact and reducing overall mitigations. How have those areas been determined to be the full extent of areas that may require take coverage? CRLF move in and out of breeding points at some distances during the winter and it does not appear the permit area around the ponds sufficiently accounts for their movements.

My other concern is that areas of potential take go far beyond the proposed HCP. As the service knows, CRLF move in uplands areas after rain events potentially great distances, in search of breeding habitats. For example, could CRLF move from pond 31B to 13b? (See Bulger et al 2002 or Fellers and Kleeman 2007). This raises questions about what is in the scope of this HCP. Is moving sediment elsewhere on the property to or from these areas covered by the HCP? The risk to the species seems the same, but it does not appear to be analyzed as such.

Again, Midpen appreciates USFWS taking a look at this topic and protecting listed species.

-Aaron Hebert, Sr. Resource Management Specialist  
Natural Resources Department

Response to Midpeninsula Regional Open Space District (FWS-R8-ES-2021-0076-0005):

The Applicant identified the permit area boundary based on the Applicant's determination of where on-going facility operation and maintenance (O&M) activities occur in and near suitable habitat for California red-legged frog and there exists potential for "take" of the California red-legged frog to occur. These specific locations are primarily adjacent to Permanente Creek, but also include off-creek storm water capture/sedimentation basins and potential dispersal corridors that provide suitable habitat for California red-legged frog. Focused O&M tasks (referred to in the HCP as "Covered Activities") occur in these areas, and implementation of the HCP avoidance and minimization measures will reduce potential injury and/or mortality of the California red-legged frog. The permit area also includes Pond 14, the location to which California red-legged frogs that require removal from the permit area during Covered Activities would be relocated. Areas where facility activities occur but that do not support features of suitable aquatic or upland (including dispersal) habitat for the California red-legged frog were not included in the permit area, because the Applicant determined the potential for "take" to occur in these areas is very low.

The Covered Activities are comprised of the following seven discrete categories of activities, which are described in further detail in Section 2 of the HCP:

1. Storm water capture/sedimentation basin operation and maintenance (including vaults and pump stations and heavy equipment for pond maintenance);
2. Erosion control;
3. Material transport and storage;
4. Vehicle travel, equipment operation, and road and berm maintenance;
5. Vegetation maintenance;
6. Monitoring activities required by state and federal permits or other entitlements; and
7. California red-legged frog habitat monitoring and management and predator monitoring and removal activities at Pond 14.

Each of these seven discrete categories of activities is defined and described in further detail in the text of the HCP. The HCP defines the covered "Material Transport and Storage" activities in HCP Section 2.2.2.3 as including accessing the material stored in the "Rock Pile Area."

The Service has included the increase in the availability of aquatic breeding habitat for the California red-legged frog near the action area at the Valley Water Flood Detention Basin in the environmental baseline and effects analysis in the biological opinion for the HCP. While the Service expects that the number of California red-legged frogs that may be encountered and need to be relocated within the permit area during "Covered Activities" may increase due to the relatively large population of California red-legged frogs and availability of aquatic breeding habitat near the permit area, the Service believes that Lehigh's

commitment to implement the avoidance and minimization measures in the HCP will minimize effects to the species. During the development of the HCP, the Service recommended that Lehigh implement all of the relevant avoidance and minimization measures and BMPs that the Service requires of all applicants in the Service's *Programmatic Biological Opinion for Issuance of Permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, including Authorizations Under 22 Nationwide Permits, for Projects that May Affect the Threatened California Red-Legged Frog in Nine San Francisco Bay Area Counties, California* (Programmatic Biological Opinion) (Service 2014). Lehigh agreed and included all of the relevant avoidance and minimization measures and BMPs in the HCP. The Service has found that the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion are effective because Service-approved biological monitors have reported no injuries or mortalities of California red-legged frogs in the vast majority of projects implementing the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion; only a few California red-legged frogs have been reported injured or killed when the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion are implemented properly.

The HCP's conservation measures also provide for the relocation of California red-legged frogs encountered within the permit area during "Covered Activities" to a safe breeding pond at the far end of the site (Pond 14), which will be maintained by Lehigh as California red-legged frog habitat, using the mechanisms described in sections 5.2 and 5.3 of the HCP. Biological monitors contracted by Lehigh to implement the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion safely relocated 22 California red-legged frogs to Pond 14 during emergency culvert cleanout activities conducted by Lehigh in 2017 in Permanente Creek adjacent to the Lehigh Permanente Cement Plant (A. King, GEI, pers. comm. 2017; E. Schickenberg, WRA, Inc., pers. comm. 2017; GEI 2019a). Therefore, the Service believes that Service-approved biologists contracted by Lehigh to implement the avoidance and minimization measures, including BMPs in the HCP will continue to be able to safely relocate California red-legged frogs within the permit area with few to no injuries or mortalities. Additionally, restricting "Covered Activities" to the dry season, dry weather, and when the storm water catchment/detention basins are dry, as required by the HCP's avoidance and minimization measures, will also reduce the potential for encountering California red-legged frogs during "Covered Activities".

The Service has included the "Yeager Yard slide" and the facility's prior selenium contamination issues in the environmental baseline and cumulative effects analysis in the biological opinion for the HCP. Conservation measure 11(e) in the HCP (14(e) in this document) has been modified to include Service evaluation of California red-legged frog mortality. In addition, the HCP's conservation measures have been revised (i.e., conservation measure number 17 added to the HCP (number 21 in this document)) to incorporate testing, required by the San Francisco Regional Water Quality Control Board (Regional Water Board), which includes monitoring of selenium in discharge and receiving waters pursuant to Waste Discharge Requirements (Regional Water Board Order No. R2-2018-0028) and a National Pollutant Discharge Elimination System (NPDES) Permit (NPDES No. CA0030210, Regional Water Board Order No. R2-2019-0024). Further, the NPDES Permit requires Lehigh to meet discharge requirements, achieved through advanced

treatment of process and storm water generated at the facility. These regulatory requirements protect water quality in Permanente Creek and designated beneficial uses, including the Preservation of Rare and Endangered Species, Cold and Warm Freshwater Habitat, and Wildlife Habitat (*see* Regional Water Board’s Water Quality Control Plan at Chapter 2), which are inclusive of the California red-legged frog. The Service understands that Lehigh installed the required treatment facilities in 2014 and 2016.

The Service and Lehigh took into consideration exceedances of water quality limitations for selenium in the NPDES permit that have occurred since the installation of the required treatment facilities in 2014 and 2016. Thus Section 6.2 “Unforeseen/Changed Circumstances and No Surprises Assurances” in the HCP has been revised to include the following:

Infrastructure Designed for Selenium Control – The permit area may experience discharges of selenium in excess of Regional Water Quality Control Board issued NPDES Permit limits as a result of selenium control infrastructure failure. If the infrastructure fails to operate in accordance with the NPDES Permit and that failure results in a discharge of selenium in excess of NPDES Permit limits resulting in an adverse effect on California red-legged frog, the Service may consider this to be a changed circumstance. If the Service determines adverse effects on California red-legged frog have occurred in this circumstance, Lehigh shall implement additional BMPs identified by the Service and agreed to by the applicant as part of the conservation strategy to avoid the likelihood of jeopardy to or take of the species.

As to the timing of the Permanente Creek Restoration Project, the Service understands that the County of Santa Clara is currently in the process of preparing a Supplemental Environmental Impact Report pursuant to the California Environmental Quality Act (CEQA). Once environmental review and permitting is complete, the Service expects that the Permanente Creek Restoration Project will be implemented. The U.S. Army Corps of Engineers (Corps) is the federal lead and the County of Santa Clara is the State lead for the Permanente Creek Restoration Project. The Corps has initiated formal consultation with the Service on the Permanente Creek Restoration Project, which is ongoing and proceeding in parallel with environmental review under CEQA.

Regarding the potential for “take” of the California red-legged frog beyond the permit area for the HCP, Lehigh does not have an incidental take permit to “take” any California red-legged frogs beyond the permit area of the HCP or to “take” any California red-legged frogs during activities that are not “Covered Activities” under the HCP (except for those activities covered under the Service’s biological opinion for five years of culvert maintenance work in Permanente Creek (Service 2020) and any upcoming coverage provided for the Permanente Creek Restoration Project<sup>1</sup>). Thus any “take” of California red-legged frogs by Lehigh’s

---

<sup>1</sup> The Permanente Creek Restoration Project is a separate project involving restoration of the Permanente Creek channel. Consultation with the Service under the Endangered Species Act, specific to the Permanente Creek restoration effort, is separately occurring with U.S. Army Corps of Engineers acting as the federal lead agency.

activities that are not covered by the HCP (or other incidental take permit such as a biological opinion (*e.g.*, Service (2020)) would be a violation of the Endangered Species Act of 1973, as amended (16 U.S.C. §§1531 *et seq.*). The Service analyzed the potential for “take” of California red-legged frogs by activities not covered by the HCP in the environmental baseline and cumulative effects analysis in the biological opinion for the HCP.

The Applicant identified the permit area based on the Applicant’s determination of where on-going facility O&M activities occur in and near suitable habitat for the California red-legged frog and there exists a reasonable potential for “take” of the California red-legged frog to occur. These specific locations are primarily adjacent to Permanente Creek, but also include off-creek storm water capture/sedimentation basins and potential dispersal corridors that provide suitable habitat for the California red-legged frog. Areas where facility activities occur but that do not support features of suitable aquatic or upland (including dispersal) habitat for the California red-legged frog were not included in the permit area, because the Applicant determined the potential for “take” to occur in these areas is very low.

Lehigh would need to request to amend the HCP to expand the “permit area” or add additional “Covered Activities” to provide additional coverage.

### ***Comment Number 3***

#### Anonymous Resident of Santa Clara County Comment (FWS-R8-ES-2021-0076-0006):

Comment Period: Please extend the comment period. Although 30 days have been allotted, the actual available workdays between December 27 and January 27 is limited as most people are on holiday on these weekdays: December 27, 28, 29, 30, 31, January 17. This cuts out a quarter of the number of workdays from a typical comment period. Additionally, with people just returning to work and covering for absences from COVID-19, the comment period is functionally too short. Equally concerning is that the document submitted is dated in October, indicating that the applicant likely could have submitted the application sooner. Please extend the comment period to February 28, 2022. You would receive more comprehensive comments from me and others in the community if an appropriate amount of time had been allocated for review.

#### Covered Activities:

Applicant requests “take” permit for 20 years for mining and reclamation. It is wrong to kill endangered and threatened species for mining; Lehigh has mined enough and local red-legged frog habitat is scarce. The “take” permit must apply only to reclamation. Lehigh’s main operation has been shuttered for two years. The company has manufactured cement using limestone mined onsite. There has been no limestone mining as demonstrated by USGS blasting reports. It is clear that limestone-mining is not essential to this area. The site also shuttered its aggregate operation in 2011. The geology in this area creates unusual amounts of waste-rock (also called overburden) from limestone mining. Some of that rock was sold as aggregate, while the rest was stored in hundreds of acres of “storage areas.” Recently, the quarry started another aggregate operation.



Note that the HCP mentions that information is primarily obtained from the 2012 Reclamation Plan whereas a newer proposal from 2019 is available. Hopefully, the most recent data has been used for developing this plan.

Plans for the future property are in flux per page 6 of screening form and documentation listed below, “Impacts of the ongoing mining activities and subsequent reclamation activities will continue into the future, and additional impacts associated with pending Lehigh projects are likely to occur.” As plans are approved, the HCP should be updated.

Low-Effect Habitat Conservation Plan, why in this category and not a more stringent one?

Does US Fish and Wildlife agree with the categorization of low-effect? Note also that the quarry is adjacent to a highly-populated area that offers very little habitat. So any potential loss in habitat should be taken into account. The quarry is also adjacent to a County park, Rancho San Antonio, which is about the same number of acres as the quarry property. There are also a number of vineyards nearby.

Mitigations Should Be Local:

The plan proposes compensatory mitigations in Alameda County, a non-contiguous County to Santa Clara. Any compensatory mitigations should remain as close to the source as possible. The Habitat Conservation Plan should consider the Santa Clara Valley Habitat Agency <https://scv-habitatagency.org/> Additionally the quarry property shall be converted to open space. Is it possible to create a habitat within the quarry’s property boundary? (Section 5.2.2, 5.3 page 21).

Covered Species - Special Status Wildlife and Plant Occurrences – how are they affected?

Lehigh’s Reclamation Plan Proposal contains 15 special-status animals and 18 special-status plants per a WRA survey in 2011. Source: 2019 Lehigh Reclamation Plan, 3.2 Special-status Species, pdf pages 423- 431:  
[https://stgenpln.blob.core.windows.net/document/2250\\_2019RPA\\_ProjectDescription\\_EnvironmentalInfo.pdf](https://stgenpln.blob.core.windows.net/document/2250_2019RPA_ProjectDescription_EnvironmentalInfo.pdf)

Appendix J of the 2019 Reclamation Plan document lists 9 special-status animal species and 15 special-status plant species within a 5-mile area of the site:

Source: 04-23-19 Reclamation Plan - HTHJ Comments (00398207).DOCX, APPENDIX J BIOLOGICAL RESOURCES pages 249 and 252  
[https://stgenpln.blob.core.windows.net/document/2250\\_2019RPA\\_Plan\\_AppendH\\_thru\\_J.pdf](https://stgenpln.blob.core.windows.net/document/2250_2019RPA_Plan_AppendH_thru_J.pdf)

Egregious Record of Violation Must be Taken into Account:

Lehigh has routinely not followed its own plans or regulations. There must be measures in place to ensure that the Habitat Conservation Plan is followed. Just this week, on January 25, 2022, the County Board of Supervisors voted unanimously to generate a report listing violations across multiple agencies from the past decade, “to help clarify whether Lehigh’s

various violations, taken as a whole, constitute the basis for further regulatory and/or legal action.” You can read more here along with 77 pages of public comment:  
[http://sccgov.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=13887&MediaPosition=&ID=109202&CssClass=](http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=13887&MediaPosition=&ID=109202&CssClass=)

A couple of recent examples follow:

Pertinent to wildlife protection, in 2018 Lehigh failed to perform a wildlife survey, required by its “Conditions of Approval,” prior to building an illegal 40-foot wide road without proper erosion controls. This road was built secretly in order to facilitate commerce with a neighboring quarry. The illegal construction occurred in two jurisdictions, unincorporated County and the City of Cupertino, where this work was also not permitted. Consequently, there were two Notices of Violation. Unfortunately, the County did not include in its NOV that Lehigh had violated its Condition of Approval to create a wildlife survey. As part of its reclamation plan for the illegal road, a survey was conducted. We will never know what wildlife or wildlife habitat might have been taken in an area where there are regular eagle sightings along with special status wildlife and plants.

County NOV: [https://stgenpln.blob.core.windows.net/document/2250\\_NOV\\_20180817.pdf](https://stgenpln.blob.core.windows.net/document/2250_NOV_20180817.pdf)  
Postmortem Tree Survey within this report:  
[https://stgenpln.blob.core.windows.net/document/PLN19\\_0067\\_UtilityRoad\\_Incomplete\\_Response.pdf](https://stgenpln.blob.core.windows.net/document/PLN19_0067_UtilityRoad_Incomplete_Response.pdf) City NOV:  
<https://www.cupertino.org/home/showpublisheddocument/24419/636948094465100000>

In 2020, a Notice of Violation (NOV) related to wasterock and sediment entering Permanente Creek, which leads to the San Francisco Bay Estuary. A companion NOV was submitted by the Water Boards. The larger issue is that the wasterock, sediment, and seeps originate from an unstable landmass of mining waste that could block Permanente Creek and is a documented health and safety hazard to structures and homes downstream. Even Lehigh’s annual reports caution against working in the area during the wet season. Furthermore, Lehigh has stated at a Board meeting of the Midpeninsula Regional Open Space District that it shall not repair this landslide as part of its quarry reclamation plan.

County NOV:

[https://stgenpln.blob.core.windows.net/document/PLN19\\_2250\\_NOV\\_20190613.pdf](https://stgenpln.blob.core.windows.net/document/PLN19_2250_NOV_20190613.pdf)

Water Board NOV:

<https://www.cupertino.org/home/showpublisheddocument/25812/637145268142400000>

Weak Language in Plan:

Section 5. Page 16 states, “Lehigh will also monitor the effectiveness of these measures and consider adjustments via the adaptive management process.” U.S. Fish and Wildlife and other applicable agencies must be involved with changes to the Habitat Conservation Plan.

Section 5.2.1.2, page 20 item 15. Change language from “Lehigh also may plant appropriate insecticide-free” to “Lehigh shall plant appropriate insecticide-free.” Additionally, all plants must be insecticide-free and Lehigh must not be allowed to conduct operations if insecticide-free plans are unavailable.

Section 5.2.1.2, page 21 item 16. Activities must be suspended during nesting season. There are several special-status species within the area.

Per Public Comment Request, Additional Future Plans for the Site, More Biological Information, Historic Information, etc... are available here:

<https://plandev.sccgov.org/policies-programs/smara/permanente>

Comments from a Friend:

As our computer was hacked and still not behaving properly could you follow up on this with Fish & Wildlife or whatever regulatory agency is in charge? Will be eternally grateful.

Can we request Fish & Wildlife to demand federally endangered California red-Legged frogs be safely moved by Lehigh staff or environmental consultants to wetlands or ponds in Rancho San Antonio Preserve as they are uncovered or threatened by Lehigh equipment operations?

US Navy subcontractor was able to salvage 52 Western Pond Turtles in Northern Channel when excavating toxic sediments at Moffett Field. Bulldozer operator stopped for each adult or juvenile turtle he unearthed and, transferred them to golf course pond where they continue to be protected.

If US Navy insisted on that much due diligence, think Fish & Wildlife need demand Lehigh do the same.

Response (FWS-R8-ES-2021-0076-0006):

**Comment Period:** The 30-day comment period meets the Endangered Species Act public review requirements for HCPs (16 USC §1539(c)). Lehigh submitted the final draft HCP to the Service in October 2021. The Service completed its review of the final draft HCP and preparation of the Notice of Availability and the Draft Screening Form in December 2021 and then submitted the documents for publication in the Federal Register.

**Covered Activities:** The HCP covers focused activities in the permit area, which include activities necessary to comply with the facility Waste Discharge Requirements and NPDES Permit (e.g., maintenance of the storm water catchment/detention basins, erosion control BMPs, Stormwater Pollution Prevention Plan, etc., as described by Section 2 of the HCP, which details Covered Activities). These activities will be maintained during mining and reclamation phases at the facility to maintain water quality within Permanente Creek. The most recent facility data has been used for developing the HCP, and the Service has included biological surveys from the proposed 2019 Reclamation Plan amendment submittal

in the environmental baseline and cumulative effects analysis for the biological opinion for the HCP (Lehigh Hanson 2019, WRA 2019, GEI 2019b).

As described in the HCP's cumulative effects analysis and in the Screening Form Low-Effect Incidental Take Permit Determination and National Environmental Policy Act Environmental Action Statement (Screening Form), other activities that may have adverse effects on the California red-legged frog (if any) will be addressed in the cumulative effects analysis in the biological opinion for the HCP.

**Low Effect Designation:** The low effect designation for HCPs is a legal standard that requires analysis of a number of factors set forth in the Screening Form, which accompanies the HCP. The Service has reviewed and evaluated Lehigh's responses to the Screening Form questionnaire, and based on those responses, has determined the proposed HCP is appropriately considered low effect.

**Mitigations Should Be Local:** See the response to the Santa Clara Valley Audubon Society's comment below about the location of the off-site mitigation area within the same recovery unit for the California red-legged frog as the permit area for the HCP and within a core area and critical habitat for the California red-legged frog (Service 2002, 2010). The 6.6 acres of offsite mitigation will be preserved and managed for the benefit of the California red-legged frog and other federally listed species within a much larger 1,280-acre preserve (the 640-acre Ohlone West Conservation Bank and adjacent 640-acre Ohlone Preserve Conservation Bank). The Service believes that combining the mitigation requirements for multiple projects into a network of larger preserves provides far more conservation benefit to the California red-legged frog and contributes to its recovery more than does a patchwork of much smaller project-specific mitigation areas. The Service recognizes and commends the Santa Clara Valley Habitat Agency for its efforts in preserving large networks of preserves in Santa Clara County for the California red-legged frog and other federally listed and rare species. However, according to the Santa Clara Valley Habitat Agency (Santa Clara Valley Habitat Agency 2019, p. 2, <https://www.scv-habitatagency.org/DocumentCenter/View/1135/Mitigation-Only-Policy-ED-7>):

Only impacts within the [Santa Clara Valley Habitat] Plan Area may be addressed by the [Santa Clara Valley] Habitat Agency; out of [Santa Clara Valley Habitat] Plan Area impacts cannot be mitigated by the [Santa Clara Valley] Habitat Agency.

Therefore, the Santa Clara Valley Habitat Agency is not able to take on the mitigation requirements for the HCP since the project effects are outside of the permit area for the Santa Clara Valley Habitat Plan.

**Covered Species - Special Status Wildlife and Plant Occurrences:** The Service has determined in its biological opinion for the HCP that the only federally listed species that will be adversely affected by the "Covered Activities" under the HCP is the federally listed as threatened California red-legged frog (the HCP is more narrow than the scope of the proposed 2019 Reclamation Plan amendment). The Service has determined that the federal candidate monarch butterfly is not likely to be adversely affected due to avoidance measures in the HCP including avoiding milkweed larval host plants and replanting on Lehigh's

Permanente property any nectar plants removed. Since the proposed 2019 Reclamation Plan Amendment is not a “Covered Activity” under the HCP, the Service does not need to evaluate the effects of the 2019 Reclamation Plan Amendment proposal on other special-status species that are not covered species under the HCP.

Egregious Record of Violation Must be Taken into Account: The Service included the past history of violations by Lehigh in the environmental baseline and cumulative effects analysis in the biological opinion of the HCP. Section 6.2 “Unforeseen/Changed Circumstances and No Surprises Assurances” in the HCP has been revised to include the requirement that in the event discharges of selenium in excess of Regional Water Quality Control Board issued NPDES Permit limits as a result of selenium control infrastructure failure result in an adverse effect on the California red-legged frog, Lehigh shall implement additional BMPs identified by the Service and agreed to by Lehigh as part of the conservation strategy to avoid the likelihood of jeopardy to or take of the California red-legged frog.

Weak Language in Plan: The Service will be regularly involved in reviewing and approving any changes proposed by Lehigh under the adaptive management process. Any changes proposed that are beyond the scope of the HCP or would result in additional effects not covered by the HCP would require an amendment to the HCP and submission of the proposed HCP amendment to the Federal Register for public review and comments.

Conservation measure number 15 regarding planting nectar plants for monarch butterfly states (p. 20 in the HCP):

Lehigh will make all practicable efforts to acquire and plant insecticide-free flowering plants at a 1:1 replacement ratio within 1 year of removal. If insecticide-free plants are not available for acquisition in the first year following removal, Lehigh will acquire and install insecticide-free flowering plants within 2 years of removal at a 2:1 ratio. Lehigh also may plant appropriate insecticide-free flowering plants on the Permanente property in advance of removal to ensure that no net loss of monarch nectar plants would result from the Covered Activities.

The intent of this conservation measure is that all flowering plants that are planted by Lehigh are required to be insecticide-free. The intent of the last sentence is to state that Lehigh “**may plant** appropriate insecticide-free flowering plants on the Permanente property **in advance of removal** to ensure that no net loss of monarch nectar plants would result from the Covered Activities.” This means that Lehigh has the option to plant nectar plants **in advance of removal** (instead of within 1-2 years after removal) in order to ensure that there is not a “net loss” or “temporal loss” of nectar plants. It is not meant to say that it is optional whether the plants are insecticide-free.

Conservation measure number 16 in the HCP is consistent with measures typically required by the Service and the California Department of Fish and Wildlife that involve pre-construction surveys for nesting migratory birds and maintaining appropriate buffers during the nesting season to avoid the disturbance of nesting migratory birds that are protected by the Migratory Bird Treaty Act.

Comment from a Friend: The HCP conservation measures include relocation of identified California red-legged frogs out of harm's way during "Covered Activities" to higher quality breeding habitat within the permit area at Pond 14. Biologists contracted by Lehigh safely relocated 22 California red-legged frogs to Pond 14 during emergency culvert cleanout activities conducted by Lehigh in 2017 in Permanente Creek adjacent to the Lehigh Permanente Quarry (A. King, GEI, pers. comm. 2017; E. Schickenberg, WRA, Inc., pers. comm. 2017; GEI 2019a). Therefore, the Service believes that Service-approved biologists contracted by Lehigh will continue to be able to safely relocate California red-legged frogs within the permit area with few injuries or mortalities. Lehigh will also monitor, manage, and restore breeding habitat for the California red-legged frog onsite at Pond 14 throughout the 20-year permit term to ensure the pond continues to provide suitable breeding habitat for the California red-legged frog onsite.

#### ***Comment Number 4***

Santa Clara Valley Audubon Society comment (FWS-R8-ES-2021-0076-0007): Santa Clara Valley Audubon Society (SCVAS) promotes the enjoyment, understanding, and protection of birds and other wildlife by engaging people of all ages in birding, education, and conservation. SCVAS has been engaged with the Lehigh Permanente Quarry Operations for several years. This low-effect habitat conservation plan (HCP) covers ongoing routine operation and maintenance of existing facilities at the Lehigh Southwest Cement Company (Lehigh) Permanente Site, a cement and aggregate mining operation. The site is located on the Permanente property in the Santa Clara County foothills, west of the City of Cupertino, California. Activities include stormwater capture/sedimentation basin operation and maintenance; erosion control; material transport and storage; vehicle traffic and equipment operation; road and vegetation maintenance; water quality monitoring; and restoration if emergent cover increases or decreases enough to substantially diminish breeding habitat quality, maintenance, and monitoring of an onsite California red-legged frog breeding pond (Pond 14) (collectivity, "Covered Activities").

Goal 2 of the Draft Low-Effect Habitat Conservation Plan provides, "Provide compensatory mitigation to offset impacts". The goal includes Objective 2.1 – Purchase 6.6 acres of California red-legged frog habitat credits from the Ohlone West Conservation Bank in Alameda County as compensatory mitigation for permanent and repeated temporary impacts on 2.2 acres of suitable aquatic and upland habitat for the California red-legged frog.

We are opposed to the proposed use of the Ohlone West Conservation Bank in Alameda County for mitigation of unavoidable take and permanent loss and repeated temporary impacts to 2.2 acres of suitable aquatic and upland habitat for the California red-legged frog from ongoing routine operation and maintenance activities impacts that will occur in Santa Clara County. Mitigating California red-legged frog impacts in Alameda County is far from where the actual impacts occur. Mitigation is best done near project impacts or within the same watershed because protecting the genetic richness and abundance of species sub-populations is important to preserving the overall genetic diversity of a species. We believe a better solution would be to mitigate Lehigh Quarry impacts within the County and with the Santa Clara Valley Habitat Agency (Habitat Agency), who is best positioned to mitigate those impacts locally. Like Lehigh, the Habitat Agency is implementing a HCP. The

boundary of their HCP is in areas adjacent to the quarry; California red-legged frog is one of the species they're charged with mitigating impacts to with the goal all HCPs share of collectivity working towards the delisting of the species. The Habitat Agency fee schedule, which is tied to the type of habitats impacted and mitigates those impacts on an acre-by-acre basis, can be found on their website <https://scv-habitatagency.org/DocumentCenter/View/1456/Habitat-Agency-Fee-Schedule-FY-21-22>.

In looking at the website for the Ohlone West Conservation Bank (<https://wesmitigation.com/cabanks/ohlone-west-conservation-bank/#>), we find no specific mitigation monitoring requirements, and no reports on mitigation success for any of the listed species that the bank purports to provide mitigation for. If this mitigation bank is used, please provide the public with the mitigation, monitoring and reporting requirements and require Westervelt Biological Services to post monitoring reports on the website. Reporting of the success (or failure) of the site in maintaining a viable, breeding population of California red-legged frogs should be included.

Sincerely,

Giulianna Pendleton  
Environmental Advocacy Assistant  
Santa Clara Valley Audubon Society

Response to Santa Clara Valley Audubon Society (FWS-R8-ES-2021-0076-0007):

The Ohlone West Conservation Bank, which is 24 miles from the permit area for the HCP, is the closest Service-approved California red-legged frog conservation bank to the permit area for the HCP. The permit area for the HCP is within the Service-approved service area for the Ohlone West Conservation Bank ([https://ribits.ops.usace.army.mil/ords/f?p=107:10:::::P10\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:10:::::P10_BANK_ID:2904)). The Ohlone West Conservation Bank also occurs within the same recovery unit for the California red-legged frog (South and East San Francisco Bay recovery unit) as the permit area for the HCP (Service 2002). The Service regularly recommends that project applicants mitigate within the same recovery unit as the project effects. The Ohlone West Conservation Bank also occurs within a core area for the California red-legged frog (East San Francisco Bay core area) and designated critical habitat for the California red-legged frog (ALA-2 unit) while the HCP permit area and Permanente Creek watershed do not occur within a core area or designated critical habitat for the California red-legged frog (Service 2002, 2010). The only Service-approved California red-legged frog conservation bank in Santa Clara County is the Sparling Ranch Conservation Bank, which occurs in the Pacheco Pass area partly within southeastern Santa Clara County, but mostly in San Benito County, and is approximately 50 miles from the permit area for the HCP. The Sparling Ranch Conservation Bank also occurs in a different recovery unit for the California red-legged frog (Diablo Range/Salinas Valley recovery unit) as the permit area for the HCP (Service 2002). Therefore, the Service believes that the Ohlone West Conservation Bank is a suitable mitigation site due to it being in the same recovery unit as the areas impacted by the HCP. The mitigation provided at Ohlone West Conservation Bank will have the effect of protecting and managing lands for the California red-legged frog's conservation in

perpetuity. The mitigation lands will provide suitable habitat for breeding, feeding, or sheltering better than habitat lost as a result of the HCP. Providing this mitigation as part of a relatively large, contiguous block of conserved land will contribute to other recovery efforts for the California red-legged frog.

The Service works closely with the Santa Clara Valley Habitat Agency and California Department of Fish and Wildlife to implement the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan (Santa Clara Valley Habitat Plan) (ICF International 2012). The Service agrees that large regional HCPs like the Santa Clara Valley Habitat Plan provide valuable conservation and recovery for the California red-legged frog and other covered federally listed and rare species by consolidating mitigation requirements into a network of large, connected preserves which provide more conservation value to listed species like the California red-legged frog compared to a patchwork of small preserves resulting from much smaller project-specific mitigation areas. Similarly, conservation banks like the Ohlone West Conservation Bank are able to consolidate the many smaller project-specific mitigation requirements into a larger preserve for the California red-legged frog and other federally listed species. The 640-acre Ohlone West Conservation Bank and adjacent 640-acre Ohlone Preserve Conservation Bank preserve and manage a total of 1,280 acres of contiguous high quality habitat for the California red-legged frog and other federally listed species (e.g., California tiger salamander and Alameda whipsnake) within a core area and designated critical habitat for the California red-legged frog. Another proposed conservation bank, the Ohlone East Conservation Bank proposed adjacent to the Ohlone Preserve Conservation Bank, would result in the preservation of an even larger network of connected preserves in southern Alameda County within the same recovery unit for the California red-legged frog as the HCP. These conservation banks are also near other large, protected areas managed by the East Bay Regional Park District and San Francisco Public Utilities Commission creating an even larger network of connected preserves. The Service recognizes and commends the Santa Clara Valley Habitat Agency for its efforts in preserving large networks of preserves in Santa Clara County for the California red-legged frog and other federally listed and rare species. However, according to the Santa Clara Valley Habitat Agency (Santa Clara Valley Habitat Agency 2019, p. 2, <https://www.scv-habitatagency.org/DocumentCenter/View/1135/Mitigation-Only-Policy-ED-7>):

Only impacts within the [Santa Clara Valley Habitat] Plan Area may be addressed by the [Santa Clara Valley] Habitat Agency; out of [Santa Clara Valley Habitat] Plan Area impacts cannot be mitigated by the [Santa Clara Valley] Habitat Agency.

Therefore, the Santa Clara Valley Habitat Agency is not able to take on the mitigation requirements for the HCP since the proposed project's effects are outside of the permit area for the Santa Clara Valley Habitat Plan.

The Service requested that Fletcher Conservation Lands, the current bank sponsor for the Ohlone West Conservation Bank, make their monitoring reports available to the public at the RIBITS (Regulatory In-Lieu Fee and Banking Information Tracking System) website. The annual monitoring reports are now available for the public to review at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278_BANK_ID:2904).



California red-legged frog breeding surveys are conducted every five years at the Ohlone West Conservation Bank while habitat assessments are conducted annually. The Center for Natural Lands Management's role, in perpetuity, is to monitor the Ohlone West Conservation Bank every six months to ensure that the terms of the conservation easement and long-term management plan are maintained. The Center for Natural Lands Management is accredited by the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance. The Center for Natural Lands Management conducted a compliance review of the conservation easement at the Ohlone West Conservation Bank on October 23, 2018, April 30, 2019, and November 7, 2019; the spring 2020 inspection had to be canceled due to COVID-19 restrictions (Center for Natural Lands Management 2019 in Exhibit F of Fletcher Conservation Lands 2020; Center for Natural Lands Management 2021 in Exhibit F of Fletcher Conservation Lands 2021). The Center for Natural Lands Management concluded in 2019 and 2021 that they believe "that the conservation values within the Bank are being maintained and that the landowner has managed the Bank in a manner that is consistent with the Conservation Easement. No violations of the Conservation Easement were issued" (Center for Natural Lands Management 2019, p. 3; Center for Natural Lands Management 2021, p. 3).

The last California red-legged frog breeding survey was conducted at the Ohlone West Conservation Bank in 2017 (Fletcher Conservation Lands 2017). During the last California red-legged frog breeding survey in 2017, California red-legged frog egg masses were detected in five of the eight ponds and California red-legged frog tadpoles in two ponds at the Ohlone West Conservation Bank (Fletcher Conservation Lands 2017). Visual detections of California red-legged frog egg masses at two additional ponds in 2017 were hampered by a dense growth of mosquito fern (*Azolla filiculoides*), a native aquatic plant covering the entire surface of the ponds (Fletcher Conservation Lands 2017); therefore, it could not be determined if California red-legged frogs were breeding in these two additional ponds in 2017. The 2021 habitat assessment at the Ohlone West Conservation Bank reported that the ongoing extreme drought of 2020-2021 and early drying of the ponds likely had a negative effect on the recruitment of California red-legged frog juveniles (Fletcher Conservation Lands 2021). A 2013-2019 study of 110 ponds in Contra Costa, Alameda, and Santa Clara counties found that although the number of ponds occupied by breeding California red-legged frogs declined by 36 percent during the megadrought of 2013-2015, California red-legged frogs were highly resilient with the number of occupied breeding ponds increasing by 50 percent as drought conditions eased the following year (McDevitt-Galles et al. 2020). Droughts may also be important for decreasing habitat availability for invasive predators (e.g. bullfrogs and fish) that threaten the California red-legged frog through periodic drying of more permanent ponds that support invasive predators (McDevitt-Galles et al. 2020). The next California red-legged frog breeding survey at Ohlone West Conservation Bank will be conducted in 2022 and will evaluate whether California red-legged frog breeding activity has recovered after the extreme drought in 2020-2021.

### ***Comment Number 5***

Cathy Helgerson comment (FWS-R8-ES-2021-0076-0008):

Lehigh is applying for an Incidental Take Permit (ITP) under the Endangered Species Act (ESA) Supported by a Draft & Low Effect Habitat Conservation Plan (Draft HCP). The Lehigh

Southwest Cement Company (Lehigh) (Applicant) has applied for an ITP which would give them 20 years, if granted, would authorize incidental take of the Federally Threatened California Red- Legged Frog.

Fish and Wildlife Service has stated: In Accordance with NEPA requirements, we have determined that the proposed action qualifies for a categorical exclusion as low effect. We invite the public and local, state Tribal and Federal Agencies to comment on the application. Before issuing the requested permit, we will take into any information that we receive during the public comment period. Date: We must receive your written comments on or before January 27, 2022.

The 73796 Federal Register/Vol. 86. No. 246/Tuesday, December 28, 2021/Notices - Mentions that Lehigh Southwest Cement submitted an application which requires the preparation of a habitat conservation plan (HCP) with measures to avoid, minimize, and mitigate the impacts of incidental take to the maximum extent practicable.

Cathy Helgerson - Comments - It seems that the draft submitted is to be a prelude to the formal application. It is stated that the purpose of the screening form is to assess the effects of issuing the permit and implementing the draft HCP on the natural and human environment.

Lehigh would like this permit for a period of 20 years incidental take permit (ITP) under the Endangered Species Act of 1973 -Application for the permit requires preparation of a habitat conservation plan (HCP) with measures to avoid, minimize, and mitigate the impact of incidental take to the maximum extent practicable.

The Notice states that the Permanente Site Operations and Maintenance, Santa Clara County, California; Draft Screening Form and Draft low-Effect Habitat Conservation Plan is of Low - Effect that is just not true it should be noted that it is really a Critical Habitat situation as is defined and used in the federal Endangered Species Act as specified geographic area that contains features essential for the conservation of a threatened or endangered species and the may require special management and protection. It is also noted that the Lehigh Permanente Property is bordered by open space lands to the north and west Monte Bello Ridge and Stevens Creek Quarry to the South, and the Stevens Creek Reservoir to the Southeast and residential developments to the east. Special Status Species sensitive plant communities and aquatic features on the Lehigh Permanente Property make this land historical in nature and all should be preserved for future generations to come.

The California red-legged frog and the monarch butterfly both an endangered and threatened species need to be protected. Lehigh would like to interrupt and remove them from their natural habitat. They would like to relocate them. Reference Screening Form which mentions taking the red-legged frog from their natural breeding habitat and home and relocating them to a permanent 2.2 acres of suitable aquatic and upland habitat. This is just not true due to the effect that no one has determined if there is enough land or if there is enough water and ponds. How is the relocation taking place how will it be handled and how will the red-legged frog be moved and relocated nothing is really said about that so I am requesting that the Fish and Wildlife Department do a complete investigation?

Screening Form - Goal 2: Mentions Provide compensator mitigation to offset impacts.

Objective 2.1- Purchase 6.6 acres of California red-legged frog habitat credits from the Ohlone West Conservation Bank in Alameda County as compensatory mitigation for permanent and repeated temporary impacts on 2.2 acres of suitable aquatic and upland habitat for the California red-legged frog

The Screen form continues to state: The Low-Effect Habitat Conservation Plan (HCP) - Lehigh proposes to use Best Management Practices (BMP's) that will be implemented to avoid and minimize effects on the California red-legged frog, as well as purchase of 6.6 acres of California red-legged frog habitat credits at the off-site mitigation bank Ohlone West Conservation Bank in Alameda County.

It is stated that the species locations are primarily adjacent to Permanente Creek, but also include several off-creek storm water capture/sedimentation basins. The permit area also includes Pond 14, the location to which California red-legged frog resides. It would seem that there is reason to believe that there are several locations on the Permanente property that the red-legged frog resides.

The Permanente Creek and land surrounding the creek is home for the red-legged frog. The creek has not been restored not because of the frog but because Lehigh needs the creek to stream its polluted water down from the ponds, Cement Plant and Waste Water Treatment Plant.

Lehigh has not been able to ever comply with State Water Resources Control Board and the existing and applicable Clean Water Act permits and Water Quality Certifications. They have been in violation of the Air, Water and Soil acts continually. They have killed frogs and animals over the years destroying their natural habitats without any considerations of any kind. It is time to close them down no more mining.

Lehigh has stated that implementing the Covered Activities and HCP conservation strategy would have minor or negligible effects. The Covered Activities would include limited intermittent equipment operations and vehicle use that would not generate significant pollutant emissions. Covered Activities would include periodic operations of small numbers of vehicles and equipment to complete routine sediment removal, erosion control, vegetation maintenance, and other operation and maintenance activities. Typical equipment would include excavator, grader, dozer, haul truck, pumps, vactor, and chain saws. Equipment would only be operated for several days at a time every 1-2 years at a given location.

Cathy Helgerson- Comments-Continue. - Lehigh has continually disturbed the red-legged frog's habitat no matter how they defend their mining operations and their so- called Best Management Practices (BMPs) do not provide a suitable alternative.

Lehigh has mentioned that there are no Critical Habitat disturbances on Endangered or Threatened Species also mentioning the monarch butterfly and they state that the potential for harassing, harming, injuring, or killing any adult monarch butterflies will be minimized by replacing all adult nectar plants removed onsite. For these reasons, (as stated on the screening form continued - read) For these reasons implementation of the Covered Activities and HCP conservation measures is unlikely to result in adverse effects to the monarch butterfly. The fact is that Lehigh is trying to present a picture of their mining in general as to not be offensive

seriously destructive to the red-legged frog and the monarch butterfly. Moving the adult nectar plants from the construction areas where the monarch butterfly has eaten the plants is destructing their migration and breeding habitat. I strongly oppose this no matter how many excuses Lehigh provides for their evasive processes and mining activities.

In the past I have worked on getting the EPA Superfund Department to conduct a preliminary Superfund Site investigation years ago of the Lehigh Hanson Cement and Quarry this also included the Steven Creek Quarry for the pollution that they emit to the Air, Water and Soil on the properties. Lehigh qualified but they would not conduct the necessary EPA Superfund Site Cleanup. The Steven Creek Quarry did not have enough people living around it to justify the EPA Superfund Site Cleanup. I found this all to be very upsetting considering that for over 100 years and counting that both polluters had polluted the Silicon Valley and the SF Bay Area. There needs to be an EPA Superfund Site Clean up in order to make sure that the land is truly cleaned up and I tried to get the EPA to possibly conduct such a clean up but it seems that no one will take the responsibility. The new or old proposed Lehigh Reclamation plan is in my opinion a Reclamation coverup and it seems to be pushing the cleanup way out into the future this is not acceptable. We the public are continually being exposed to pollution this is against the law.

The 2012 and 2019 Reclamation Plans are at this time hanging in the balance for Amendments as to support more and continued mining at the Lehigh Hanson Permanente Cement and Quarry. Lehigh has acquired a new management team and lawyers to push through another Environmental Impact Report (EIR) to support their continued mining for it is hard to say possibly another 80 year or so. There would be more mining that would destroy 6 hundred acres, cut down 30 thousand trees and kill and displace many of the aquatic life, animals and wildlife that call the Lehigh property their home. This would also affect the Steven Creek Quarry who is also destroying and polluting the Steven Creek Reservoir and creeks. There seems to be no consideration of the fact that many animals will try and run away from the new mining at Lehigh into the Steven Creek Quarry land and the Mid-Peninsula District next door.

There are many deer, coyotes, mountain lions, foxes and other creatures that call these lands their home. I have seen many of them up at the Lehigh, Stevens Creek, Stevens Creek Reservoir and Steven Creek Quarry. This is a very serious matter and with the continuation of any mining of any kind will result in horrible consequences that will change their lives forever a loss to our community.

We the people in Cupertino and the Silicon Valley cannot allow continued mining next to our homes with the ongoing pollution to our air, water and soil. The issuing of a permit to allow Lehigh to impose an Incidental Take Permit (ITP) under the Endangered Species Act (ESA), supported by a draft low-effect habitat conservation plan (draft HCP) for a period of 20 years that would authorize incidental take of the federally threatened California red-legged frog. In accordance with NEPA requirements has the Fish and Wildlife Services, we have determined that the proposed action qualifies for a categorical exclusion as low effect. We the public have been invited to comment. The Fish and Wildlife Service Department needs to review the comments of the public and take them into serious considerations before ever allowing Lehigh to destroy the red-legged frog and other animals and aquatic life. The historical heritage determination of the homeland of the red-legged frog and monarch butterfly is the people's right to voice their voices to keep them here in Cupertino and protect them from harm. They have

been there for over 100 years and counting they are part of Cupertino and the Silicon Valley. It would be nice to see animal and aquatic life museum established here in Cupertino so that our children could view and learn about the habitat and breeding of the all the species.

Please Fish and Wildlife Service Department Personnel and our EPA- Region 9 review my comments and vote to stop this permit application. I would also like to see something permanent that would keep the red-legged frog where they are and protected by the agencies, cities and counties. The public would like to be notified after this matter has been reviewed and decided upon.

Response to Cathy Helgerson (FWS-R8-ES-2021-0076-0008):

Violations: The Service has considered the history of violations by Lehigh in the environmental baseline conditions and the cumulative effects analysis in the biological opinion for the HCP. The Service has also evaluated the degradation of aquatic habitat for the California red-legged frog from Lehigh's mining activities in the environmental baseline and cumulative effects analysis of the biological opinion for the HCP. Section 6.2 "Unforeseen/Changed Circumstances and No Surprises Assurances" in the HCP has been revised to include the requirement that in the event discharges of selenium in excess of Regional Water Quality Control Board issued NPDES Permit limits as a result of selenium control infrastructure failure result in an adverse effect on the California red-legged frog, Lehigh shall implement additional BMPs identified by the Service and agreed to by Lehigh as part of the conservation strategy to avoid the likelihood of jeopardy to or take of the California red-legged frog.

Scope of the HCP: See responses above. If Lehigh desires "take" authorization for areas or activities beyond those identified in the HCP, it would need to request a new permit or to amend the proposed permit to obtain HCP coverage for those other areas or activities.

Avoidance and Minimization Measures and BMPs: During the development of the HCP, the Service recommended that Lehigh implement all of the relevant avoidance and minimization measures and BMPs that the Service requires of all applicants in the Service's *Programmatic Biological Opinion for Issuance of Permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, including Authorizations Under 22 Nationwide Permits, for Projects that May Affect the Threatened California Red-Legged Frog in Nine San Francisco Bay Area Counties, California* (Programmatic Biological Opinion) (Service 2014). Lehigh agreed and included all of the relevant avoidance and minimization measures and BMPs in the HCP. The Service has found that the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion are effective because Service-approved biological monitors have reported no injuries or mortalities of California red-legged frogs in the vast majority of projects implementing the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion; only a few California red-legged frogs have been reported injured or killed when the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion are implemented properly. The HCP's conservation measures also provide for the relocation of California red-legged frogs encountered within the permit area during "Covered Activities" to a safe breeding pond at the far end of the site, which will be maintained by Lehigh as California red-legged frog habitat, using the mechanisms described

in sections 5.2 and 5.3 of the HCP. Similarly, biological monitors contracted by Lehigh to implement the avoidance and minimization measures and BMPs in the Programmatic Biological Opinion safely relocated 22 California red-legged frogs to Pond 14 during emergency culvert cleanout activities conducted by Lehigh in 2017 in Permanente Creek adjacent to the Lehigh Permanente Quarry (A. King, GEI, pers. comm. 2017; E. Schickenberg, WRA, Inc., pers. comm. 2017; GEI 2019a). Therefore, the Service believes that Service-approved biologists contracted by Lehigh to implement the avoidance and minimization measures and BMPs in the HCP will continue to be able to safely relocate California red-legged frogs within the permit area with few injuries or mortalities. The process for relocating California red-legged frogs by a Service-approved biological monitor is described in the Conservation Measures section in the HCP and are consistent with the measures for relocating California red-legged frogs the Service regularly requires of other applicants in the Service's Programmatic Biological Opinion (Service 2014). California red-legged frogs would only be relocated during Covered Activities from the 2.2 acres of low quality habitat and 7.59 acres of developed areas within the 10.2-acre permit area to Pond 14 on Lehigh Permanente property, which provides much higher quality habitat for the California red-legged frog than do the storm water capture/sedimentation basins. Service-approved biologists have visited and evaluated the Pond 14 as a California red-legged frog relocation and breeding pond, and determined the habitat provided by Pond 14 is adequate. Pond 14 would be monitored, maintained, and managed by Lehigh (and invasive predators removed and the pond restored as needed) so that the pond will continue to provide high-quality breeding habitat for the California red-legged frog throughout the 20-year permit term. Work in the storm water capture/sedimentation basins would only be conducted when the basins are dry and California red-legged frogs are less likely to be in the basins.

The monarch butterfly would not be physically relocated during Covered Activities. Effects to monarch butterflies would be avoided by maintaining buffers around its milkweed larval host plants and replanting any nectar plants removed onsite to areas on the Lehigh Permanente property away from disturbance so that there would not be a net loss of nectar plants for the monarch butterfly.

Covered Activities: See responses above.

Critical Habitat: The designation of critical habitat for a species such as the California red-legged frog is conducted by the Service based on a process that involves scientific review of the best available information, a panel of species experts evaluating areas essential to the conservation and recovery of the species, and the submittal of a proposal to designate critical habitat to the Federal Register that is open to comment from the public. The Service's analysis determined that the permit area for the HCP and the surrounding Permanente Creek watershed were not appropriate for the designation of critical habitat compared to other areas in the Santa Cruz Mountains in San Mateo, Santa Clara, and Santa Cruz counties and the Diablo Range in Alameda and Santa Clara counties that contain larger areas of contiguous higher quality habitat for the California red-legged frog and are further removed from the impacts of development. Therefore, the permit area for the HCP does not contain any designated critical habitat for the California red-legged frog that would be adversely affected. The map of designated critical

habitat units for the California red-legged frog is available on the Service's ECOS website at: <https://ecos.fws.gov/ecp/species/2891#crithab>.

**Low Effect Designation:** The low effect designation for HCPs is a legal standard that requires analysis of a number of factors set forth in the "Screening Form Low-Effect Incidental Take Permit Determination and National Environmental Policy Act (NEPA) Environmental Action Statement," which accompanies the draft HCP. The Service has reviewed and evaluated Lehigh's responses to the Screening Form questionnaire, and based on those responses, has determined the proposed HCP is appropriately considered low effect. Note that Low-Effect HCPs must still conform to the standards of the Endangered Species Act, including assurances that the effects of any take will be adequately minimized and mitigated and that the taking (if any) will not appreciably reduce the likelihood of the survival *and recovery* of the species.

**Expansion of Mining under the Proposed 2019 Reclamation Amendment:** This HCP does not authorize "take" (if any) related to any expansion of mining contemplated under the proposed 2019 Reclamation Plan amendment. The purpose of an HCP and accompanying ITP is to authorize the incidental take of threatened or endangered species for Covered Activities within a defined permit area. In this case, the HCP permit area does not involve mining expansion described in the 2019 Reclamation Plan amendment. The Service has evaluated in the cumulative effects analysis of the biological opinion for the HCP the effects on the California red-legged frog of the proposed expansion of mining to the Rock Plant Reserve to the south of the permit area (Lehigh Hanson 2019) in the event such activity occurs in the future. The Service has included biological surveys from the proposed 2019 Reclamation Plan amendment submittal in the environmental baseline and cumulative effects analysis for the biological opinion for the HCP (Lehigh Hanson 2019, WRA 2019, GEI 2019b).

### **III. INCIDENTAL TAKE PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS**

#### **Analysis of the Effects**

##### *Effects to the Monarch Butterfly*

The Service has determined that the proposed project is not likely to result in the harassment, harm, capture, injury, or mortality of the Federal candidate monarch butterfly (*Danaus plexippus*) because (1) the majority of the permit area is highly-disturbed on an existing active quarry site with few monarch butterfly milkweed (*Asclepias* species) larval host plants and adult nectar plants, (2) pre-construction surveys for milkweed larval host plants and adult nectar plants will be conducted by a qualified biologist prior to Covered Activities that include vegetation maintenance (*i.e.*, removal, trimming, or mowing), (3) all milkweed larval host plants will be flagged and avoided, and (4) any nectar plants removed during Covered Activities will be replaced onsite by planting appropriate native, insecticide-free early flowering plants that are available to monarch butterflies from January-April.

*Effects to the California Red-legged Frog*

Table 1 below summarizes the acres of each habitat type for the California red-legged frog that will be temporarily disturbed or permanently lost by the proposed project. The proposed project will result in the infrequent (approximately every 3-5 years) temporary disturbance of 0.21 acre of aquatic breeding habitat for the California red-legged frog at Pond 14 for habitat monitoring, maintenance, restoration activities, and annual predator monitoring activities conducted for the benefit of the California red-legged frog; these activities in Pond 14 would be conducted to ensure that the pond continues to function as suitable breeding habitat for the California red-legged frog and a suitable release site for California red-legged frogs observed within the permit area during Covered Activities. The proposed project will result in the ongoing (every 1-2 years depending on maintenance needs) temporary disturbance of 0.67 acre of non-breeding aquatic habitat within storm water capture/sedimentation basins and 1.64 acres of upland dispersal, foraging, and sheltering habitat for the California red-legged frog; 0.21 acre of the upland habitat that will temporarily disturbed is adjacent to Pond 14 and associated with access for habitat monitoring, maintenance, restoration, and predator management and monitoring activities within Pond 14 conducted for the benefit of the California red-legged frog. Habitat effects associated with the Covered Activities would primarily be temporary and would be limited to the time during which Covered Activities occur at a given location. These temporary effects would result from Covered Activities, such as periodically removing accumulated sediment from existing storm water capture/sedimentation basins, trimming riparian vegetation and cutting grassland vegetation adjacent to existing roadways, implementing erosion control measures in upland habitats, and monitoring and potential predator removal and habitat management at Pond 14.

Table 1. Acres of habitat disturbance.

<b>Habitat Type</b>	<b>Temporary<sup>1</sup> Disturbance (acres)</b>	<b>Permanent<sup>2</sup> Loss (acres)</b>
Aquatic breeding	0.21 <sup>3</sup>	0.10
Aquatic non-breeding	0.67	0.00
Upland	1.64 <sup>3</sup>	0.00
<b>Total</b>	<b>2.52</b>	<b>0.10</b>

<sup>1</sup> Temporary disturbance of aquatic non-breeding and upland habitat could recur approximately every 1-2 years, depending on maintenance needs; temporary effects on aquatic breeding habitat would be limited to potential infrequent (approximately every 3-5 years) habitat management activities and annual predator monitoring activities at Pond 14 conducted for the benefit of the California red-legged frog.

<sup>2</sup> Includes 0.07 acre at Pond 30 that may be lined, permanently converted to non-breeding aquatic habitat, and then repeatedly cleared of sediment and vegetation, and 0.03 acre at Pond 31B that would be repeatedly cleared of sediment and vegetation.

<sup>3</sup> Includes 0.21 acre of aquatic breeding habitat and 0.21 acre of adjacent upland habitat at Pond 14 that would be disturbed during habitat monitoring, management, restoration, and predator monitoring and removal activities conducted for the benefit of the California red-legged frog.

The proposed project may result in the permanent loss of 0.10 acre of low-quality aquatic breeding habitat for the California red-legged frog in two storm water capture/sedimentation basins: (1) 0.07 acre of breeding habitat at Pond 30 could be removed and converted to non-



breeding aquatic habitat after lining the pond and then subjected to repeated disturbance (every 1-2 years depending on maintenance needs) during removal of accumulated sediment, and (2) 0.03 acre of breeding habitat at Pond 31B would be repeatedly disturbed (every 1-2 years depending on maintenance needs) during removal of vegetation and accumulated sediment.

California red-legged frogs found in maintenance areas throughout the 10.2-acre permit area and in danger from maintenance activities will be captured and relocated to Pond 14. If individuals remain in the work areas when Covered Activities occur, they could be displaced, injured, or killed by vehicle movement, equipment operation, sediment excavation, and other direct disturbances related to Covered Activities. There also is the potential for the California red-legged frog to be injured or killed by Covered Activities that do not affect suitable habitat, such as material transport and storage, vehicle travel, and equipment use on existing roadways adjacent to Permanente Creek. It is possible for California red-legged frogs to venture onto roadways and into material storage areas near aquatic habitat particularly during the wet season.

Because breeding has not been documented in any of the storm water capture/sedimentation basins in the permit area (including Ponds 30 and 31B where potentially suitable breeding habitat occurs), take of California red-legged frog egg masses or tadpoles is very unlikely to occur. Additionally, sediment removal within storm water capture/sedimentation basins would be conducted when the basins are dry and California red-legged frog egg masses and tadpoles would be absent. Habitat restoration, predator management, and pond maintenance work in occupied breeding habitat in Pond 14 would occur between September 1 and October 31 (unless required by a regulatory agency or applicable permit) after California red-legged frog tadpoles have completed their metamorphosis; therefore, no California red-legged frog egg masses or tadpoles will be injured or killed.

The potential for injuring and killing California red-legged frogs during Covered Activities will be minimized by: having a Service-approved biologist conduct surveys for and relocating California red-legged frogs before work begins in suitable aquatic habitat and before ground disturbance begins in suitable upland habitat; having a Service-approved biologist present onsite during Covered Activities that require work in suitable aquatic habitat or ground disturbance in suitable upland habitat; requiring all proposed project construction staff be trained in the identification of the California red-legged frog and its habitats and the implementation of the avoidance and minimization measures; limiting sediment removal from the storm water capture/sedimentation basins to when they are dry (or, if wet, after California red-legged frog tadpoles would have completed their metamorphosis); limiting pond maintenance work in Pond 14 to the period after California red-legged frog tadpoles have completed their metamorphosis (unless required by a regulatory agency or applicable permit); avoiding conducting Covered Activities during rain events or within 24 hours following a rain event and at nighttime when California red-legged frogs are most likely to disperse through the permit area; in the event a California red-legged frog enters the work area, the Service-approved biological monitor will have the authority to stop activities if necessary; the Service-approved biologist will relocate any California red-legged frogs from the work area that are in danger of being injured or killed; and decontamination procedures will be implemented to prevent the introduction and spread of amphibian diseases within the action area. The California red-legged frog will also benefit from

the removal of invasive bullfrogs and crayfish within the permit area that are predators and/or competitors of the California red-legged frog.

Aquatic habitat for the California red-legged frog could be degraded if the proposed project resulted in a spill of fuel or other hazardous materials or increased sedimentation in Permanente Creek, Pond 14, or the storm water capture/sedimentation basins in the permit area. Lehigh and its contractors will minimize the potential for the degradation of aquatic habitat from a spill or sedimentation by implementing water quality and erosion control BMPs, a SWPPP, fueling equipment away from all aquatic habitat, implementing a spill prevention plan, limiting work to the dry season to the maximum extent feasible, conducting sediment removal from the storm water capture/sedimentation basins only when the basins are dry, and avoiding work during rain events and within 24 hours after a rain event. In the unlikely event that the storm water capture/sedimentation basins still contain water during scheduled maintenance, dewatering and work in the storm water capture/sedimentation basins that could support breeding California red-legged frogs will be delayed to between September 1 and October 31 when California red-legged frog tadpoles and egg masses are unlikely to be present. The maintenance of the storm water capture/sedimentation basins and ongoing erosion and sedimentation control will benefit the California red-legged frog in the long-term by ensuring aquatic habitat is not degraded, water quality standards are maintained, and elevated levels of selenium are not discharged into Permanente Creek and Pond 14 consistent with the requirements of the Regional Water Quality Control Board-approved discharge permits and the Operations & Maintenance Plan. In addition, Covered Activities at Pond 14 will ensure the pond continues to provide suitable breeding habitat for the California red-legged frog.

As noted previously in the Description of the Proposed Project section, the project proponent has also proposed a set of conservation measures, including the commitment to provide compensatory habitat as a condition of the action. This compensatory habitat is intended to minimize the effect on the species of the proposed project's anticipated incidental take, resulting from the permanent loss and ongoing temporary disturbance of habitat described above. The compensatory habitat proposed will be in the form of the purchase of 6.6 acres of California red-legged frog credits from the Ohlone West Conservation Bank in Alameda County within the South and East San Francisco Bay recovery unit and the East San Francisco Bay core area for the California red-legged frog (Service 2002). This component of the action will have the effect of protecting and managing lands for the species' conservation in perpetuity. The compensatory lands will provide suitable habitat for breeding, feeding, or sheltering commensurate with or better than habitat lost as a result of the proposed project. Providing this compensatory habitat as part of a relatively large, contiguous block of conserved land may contribute to other recovery efforts for the species.

#### Cumulative Effects

Cumulative effects include the effects of future State, Tribal, local, or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act. The only reasonably foreseeable future activity that Lehigh proposes to implement but is not anticipated to require federal involvement is amending the 2012 Reclamation Plan and obtaining related entitlements for the

Rock Plant Reserve (GEI 2021). The proposed expansion of activities into the Rock Plant Reserve area would include mining and reclamation of approximately 30 acres south of Permanente Creek and outside the permit area (GEI 2021, Lehigh Hanson 2019).

The Rock Plant Reserve area is dominated by oak woodland forest and poison oak scrub and includes three small ephemeral drainages on the steep, north-facing slope, and a small isolated seasonal wetland near the top of the ridge (GEI 2021). In years with very high rainfall, the isolated seasonal wetland may remain ponded long enough to support California red-legged frogs (GEI 2019b, GEI 2021, Lehigh Hanson 2019). Although this seasonal wetland is non-contiguous with areas known to support the California red-legged frog and provides lower quality aquatic habitat for the California red-legged frog compared to known and potential breeding ponds in the Permanente Creek canyon (GEI 2019b and 2021), it is within less than 0.5 mile of occupied habitat along Permanente Creek which is well within the up to 2-mile dispersal distance documented by some California red-legged frogs (Bulger et al. 2003). Therefore, California red-legged frogs could colonize the seasonal wetland at the Rock Plant Reserve area and breed there, if suitable breeding habitat is present during wet years. A sub-adult California red-legged frog was also observed in the southern part of the Lehigh Permanente property in the uplands next to Monte Bello Creek (WRA 2019). Thus it is possible that California red-legged frogs could disperse through the Rock Plant Reserve area from known populations along Permanente Creek to the north and Monte Bello Creek to the south. However, only a small proportion (approximately 10-20 percent) of the California-red legged frog population studied by Bulger et al. (2003) made overland movements of this distance, and most individuals were resident in areas with permanent aquatic habitat.

The steep ephemeral drainages in the Rock Plant Reserve area provide marginal quality non-breeding aquatic habitat for the California red-legged frog and only support ephemeral aquatic habitat for very brief periods during and immediately following heavy rainfall; however, the ephemeral drainages could be briefly used by California red-legged frogs during the limited periods when water is present (GEI 2019b, p. 16). Upland and ephemeral aquatic habitat in the Rock Plant Reserve area is approximately 500 feet from Permanente Creek at its closest point (GEI 2021). The California red-legged frog may disperse over 2 miles across a variety of terrain and habitats (Bulger et al. 2003). However, these documented long-distance movements were made by a small proportion of the adult population that made breeding and post-breeding migrations to and from breeding ponds or migrated away from breeding ponds that dried up. Approximately 78-89 percent of the population was resident in permanent aquatic habitat. These resident individuals moved up to approximately 425 feet outward into upland habitat, but 90 percent were always within 200 feet of water (Bulger et al. 2003). Therefore, although it is possible that the California red-legged frog could disperse the 500 feet from suitable aquatic habitat along Permanente Creek to the Rock Plant Reserve area, it is unlikely they make regular movements between Permanente Creek and upland habitat more than several hundred feet from the creek or between Permanente Creek and aquatic habitat farther afield, such as Monte Bello Creek approximately 0.5 mile to the south. In addition, the number of individuals that may make long-distance overland movements is low. However, if California red-legged frogs do occur in the Rock Plant Reserve area, they could be injured or killed during mining and reclamation activities at the Rock Plant Reserve area. Additionally, mining of the Rock Plant Reserve would harm the California red-legged frog through the permanent removal of 30 acres of potential

upland dispersal habitat. Any approved mining and reclamation activities would be implemented in accordance with applicable reclamation plan requirements, which are anticipated to include conducting grading in areas of potential aquatic habitat for the California red-legged frog during the dry season and conducting pre-construction surveys before activities in areas of suitable California red-legged frog habitat (GEI 2021).

The potential for mining and reclamation of the Rock Plant Reserve to result in adverse effects on the California red-legged frog from potential exposure to selenium or other metals would be reduced because groundwater seepage and storm water runoff would be managed and treated in the existing water treatment system (GEI 2021). This water would be returned to Permanente Creek only after being treated, thereby eliminating the potential for selenium-related water quality effects on aquatic organisms (GEI 2021). However, any storm water capture/sedimentation basins constructed at the Rock Plant Reserve could become an attractant for the California red-legged frog that may be present in the permit area (G. Smick, WRA, Inc., pers. comm. 2017; WRA, Inc. 2017; E. Guerra, Lehigh, pers. comm. 2018). Any California red-legged frogs attracted to the storm water capture/sedimentation basins could be injured or killed during maintenance of the storm water capture/sedimentation basins, if conducted when California red-legged frogs are present.

Although the water treatment system would reduce the potential for contamination of Permanente Creek by selenium and other metals, mining activities at the Rock Plant Reserve could further degrade Permanente Creek and its habitats through landslides as occurred at “the Yeager Yard slide” at the Lehigh Permanente Quarry during the 2018-2019 wet season in which wasterock containing selenium levels that exceeded water quality requirements fell into Permanente Creek (A. Hebert, Midpeninsula Regional Open Space District, *in litt.* 2022; Winslow 2019; County of Santa Clara 2019a; San Francisco Bay Regional Water Quality Control Board 2019). However, 2018 – 2019, was associated with well above normal precipitation levels, which likely contributed to the conditions that resulted in the landslide. California red-legged frogs and their offspring could be harmed by elevated levels of selenium as has been observed in other amphibian species (Hopkins et al. 2006; Bergeron et al. 2010; Browne and Dumont 1979).

Based on the history of violations by Lehigh<sup>2</sup>, the Service believes that additional violations may occur within the action area that could potentially harm the California red-legged frog, if such additional violations result in degradation of its aquatic habitat and exposure to contaminants (e.g., selenium and chlorine). However, the maintenance of the Final Treatment Facilities and the

---

<sup>2</sup> Lehigh has received other notices of violation in the past for unauthorized activities at the Lehigh Permanente property. During the summer of 2018, Lehigh widened an existing Pacific Gas and Electric Company maintenance road that internally connects Lehigh Permanente Quarry and the Stevens Creek Quarry to the south without the County of Santa Clara’s knowledge and without the required permits (County of Santa Clara 2019b, <https://news.sccgov.org/news-release/county-santa-clara-issues-notice-violation-stevens-creek-quarry-0>; City of Cupertino 2021, <https://www.cupertino.org/home/showpublisheddocument/28936/637498693102830000>). It is not known if wildlife surveys were conducted or the proper erosion control measures implemented as required by the Lehigh Permanente Quarry’s Reclamation Plan during construction of the 40-foot wide unauthorized haul road (Anonymous resident of Santa Clara County 2022, <https://www.regulations.gov/comment/FWS-R8-ES-2021-0076-0006>).

storm water capture/sedimentation basins consistent with pertinent water quality permitting have and will continue to reduce the level of selenium discharge into Permanente Creek and Pond 14. Water quality related monitoring of selenium in discharge and receiving waters is and will continue to be carried out consistent with permits issued by the San Francisco Bay Regional Water Quality Control Board. The permit area may experience discharges of selenium in excess of San Francisco Bay Regional Water Quality Control Board issued NPDES Permit limits as a result of selenium control infrastructure failure. If the infrastructure fails to operate in accordance with the NPDES Permit and that failure results in a discharge of selenium in excess of NPDES Permit limits resulting in an adverse effect on the California red-legged frog, the Service may consider this to be a changed circumstance under the HCP. If the Service determines adverse effects on the California red-legged frog have occurred in this circumstance, Lehigh shall implement additional BMPs identified by the Service and agreed to by the Applicant as part of the conservation strategy to avoid the likelihood of jeopardy to or take of the species.

### Conclusion

After reviewing the current status of the California red-legged frog, the environmental baseline for the action area, the effects of the proposed Permanente Site Operation and Maintenance Project, and the cumulative effects, it is the Service's biological opinion that the Permanente Site Operation and Maintenance Project, as proposed, is not likely to jeopardize the continued existence of the California red-legged frog. The Service reached this conclusion because the project-related effects to the species, when added to the environmental baseline and analyzed in consideration of all potential cumulative effects, will not rise to the level of precluding recovery or reducing the likelihood of survival of the species based on the following: (1) successful implementation of the conservation measures described in this biological opinion will minimize adverse effects on individual California red-legged frogs; (2) implementation of the Covered Activities will ensure water quality standards are maintained within aquatic habitat within the permit area and in Permanente Creek consistent with the San Francisco Bay Regional Water Quality Control Board-approved Operations & Maintenance Plan; (3) the majority of the effects will be temporary and would be limited to the time during which Covered Activities occur at a given location; (4) only 0.10 acre of suitable habitat will be permanently removed; (5) suitable breeding habitat will be maintained, monitored, and restored onsite in Pond 14 and invasive predators and competitors removed during the Permit Term; and (6) 6.6 acres of suitable habitat will be preserved and managed in perpetuity offsite within the South and East San Francisco Bay recovery unit and the East San Francisco Bay core area for the California red-legged frog.

In light of these considerations, the Service has determined that the HCP qualifies as a "low-effect" HCP as defined by the Habitat Conservation Planning Handbook (Service and National Oceanic and Atmospheric Administration/National Marine Fisheries Service (NMFS) 1996). Determination of a low-effect HCP is based on the following criteria:

- (1) Implementation of the HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats;
- (2) Implementation of the HCP would result in minor or negligible effects on other environmental values or resources; and

- (3) Impacts of the HCP, considered together with the impacts of other past, present and reasonably foreseeable similarly-situated projects would not result, over time, in cumulative effects to environmental values or resources that would be considered significant.

As explained above, the first criterion has been met. The basis for satisfying the second criterion is explained in Section II.B of the EAS (Service 2021a), which, in summary, states that effects on other environmental values and resources are expected to be minor and negligible because: (1) Covered Activities would include limited intermittent equipment operation and vehicle use that would not generate significant pollutant emissions; (2) equipment would only be operated for several days at a time every 1–2 years at a given location; (3) the majority of the permit area is highly disturbed by ongoing quarry activities; (4) implementing the Covered Activities would have beneficial and negligible adverse effects on geology and soils and water quality because the activities are designed to avoid and minimize erosion and sedimentation and will be implemented in accordance with operational plans prepared pursuant to permits issued by the San Francisco Regional Water Quality Control Board; and (5) the proposed action is not expected to impact cultural resources, recreation resources, or socioeconomics in the area.

The basis for meeting the third criterion is explained in Section II.C of the EAS (Service 2021a), which states portions of the Permanente property that are occupied by the existing quarry, cement plant, materials storage areas, and other mining-related land uses have long been subject to ongoing activities that affect the natural and physical environment, including the Covered Activities. Impacts of the ongoing mining activities and subsequent reclamation activities will continue into the future, and additional impacts associated with pending Lehigh projects are likely to occur. Reasonably foreseeable actions beyond ongoing mining and reclamation activities include Permanente Creek culvert clean-out activities, creek restoration, and potential amendment of the 2012 reclamation plan to address expansion of mining and reclamation activities into the approximately 30-acre Rock Plant Reserve area and the approximately 20-acre North Highwall Lay-Back area. These past, present, and future projects have had and are likely to have significant impacts on the natural and human environment, primarily adverse impacts but also beneficial impacts, particularly those associated with the future Permanente Creek Restoration Project. Environmental impacts associated with the Covered Activities would be very minor and would include avoidance and minimization measures to further reduce any environmental effects. Covered Activities associated with maintaining stormwater treatment ponds would minimize the cumulative effects of mining activities in the area on water quality in Permanente Creek through implementation of the water quality measures required by the San Francisco Bay Regional Water Quality Control Board’s permit and the San Francisco Bay Regional Water Quality Control Board-approved Operations & Maintenance Plan for the Lehigh Permanente Quarry. Covered Activities related to the monitoring and maintenance of

Pond 14 as breeding habitat for the California red-legged frog would be beneficial. The remainder of the HCP's conservation measures are primarily operational BMPs (e.g., imposing a 20 miles per hour speed limit within the permit area, avoiding ground-disturbing activities during and directly after rain events, etc.) that would not result in changes to or impacts on the natural or human environment. Therefore, the adverse effects of implementing the HCP represent an extremely small and negligible contribution to the overall environmental impact of past, present, and future projects. The take allowed under this HCP, considered with the impacts of other past, present, and reasonably foreseeable similarly situated projects would not result in a significant, cumulative effect to environmental values or resources.

## **Findings**

### **1. The taking will be incidental.**

The taking of California red-legged frog would be incidental to the otherwise lawful activities associated with the proposed project. The proposed project complies with all the appropriate local, state, and federal permits.

### **2. The Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.**

The Service has determined that effects to the California red-legged frog likely to result from the issuance of the proposed incidental take permit would be adequately minimized and mitigated by the measures described in the HCP (GEI 2022). To minimize and mitigate the adverse effects of the proposed project on the California red-legged frog, the Applicant will purchase 6.6 acres of California red-legged frog credits from the Ohlone West Conservation Bank in Alameda County within the South and East San Francisco Bay recovery unit (the same recovery unit as the permit area) and the East San Francisco Bay core area for the California red-legged frog (Service 2002). In addition, see the "Conservation Measures" in the Description of the Proposed Project section above for a complete list of measures that will be implemented to avoid impacts to California red-legged frogs. Based on the avoidance, minimization, and mitigation measures described above, we conclude that the Applicant has minimized and mitigated the impacts to the California red-legged frog to the maximum extent practicable.

### **3. The Applicant will ensure that adequate funding for the Habitat Conservation Plan and procedures to deal with unforeseen circumstances will be provided.**

The Applicant has ensured funding for implementation of all take avoidance, minimization, and mitigation measures, and changed circumstances as specified in the HCP (GEI 2022). Prior to Permit issuance, Lehigh will provide the Service a copy of the Agreement for Sale of Conservation Credits, memorializing Lehigh's commitment to purchase the 6.6 acres of credits from the Ohlone West Conservation Bank. Lehigh will provide proof of the credit purchase to the Service after the Permit

has been issued. Lehigh will provide a bond to the Service covering the costs for implementing avoidance and minimization measures, monitoring, and reporting for the full permit term (i.e., in the amount of \$2 million) as a financial assurance mechanism for these components of the HCP conservation strategy. The HCP contains an adaptive management strategy and a method for addressing unforeseen circumstances.

**4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.**

The legislative history of the Endangered Species Act of 1973, as amended (Act), establishes the intent of Congress that this issuance criterion be identical to a regulatory finding of "no jeopardy" under section 7(a)(2) [see 50 CFR 402.03]. As a result, issuance of this section 10(a)(1)(B) permit was reviewed by the Service under section 7 of the Act. The Service concluded in its biological opinion (Service 2022) that issuance of an incidental take permit for the proposed project is not likely to jeopardize the continued existence of the California red-legged frog. The conclusion that the California red-legged frog will not be jeopardized is discussed in detail in the Service's biological opinion (Service 2022) and summarized above in the Analysis of Effects section of the Findings.

**5. Other measures, as required by the Applicant of the Service, have been met.**

The Applicant's HCP has incorporated all elements necessary for issuance of a section 10(a)(1)(B) permit and otherwise required by the Service.

**6. The Service has received assurances that the HCP will be implemented.**

Prior to Permit issuance, Lehigh will provide the Service a copy of the Agreement for Sale of Conservation Credits, memorializing Lehigh's commitment to purchase the 6.6 acres of credits from the Ohlone West Conservation Bank. Lehigh will provide proof of the credit purchase to the Service after the Permit has been issued. A bond covering the costs for implementing avoidance and minimization measures, monitoring, and reporting for the full permit term (i.e., in the amount of \$2 million) will be provided to the Service as a financial assurance mechanism for these components of the HCP conservation strategy.

**Alternatives Considered.** The Applicant considered two alternatives that might have fewer effects to the California red-legged frog than the proposed action and its associated HCP; however, these alternatives do not offer ecologically superior alternatives to the proposed project nor do they meet the needs of the Applicant; therefore, these alternatives were rejected. The alternatives are described below.

**No Action.** Under the No Action Alternative, the Service would not issue an incidental take permit to the Applicant, and routine operations and maintenance activities and pond monitoring and maintenance would not be implemented. The No Action Alternative is not feasible, based on the purpose and need of the operations



and maintenance activities. Without the action, Lehigh would not be able to maintain compliance with applicable water quality and erosion control requirements and operational safety standards. Lehigh is mandated by the State Water Resources Control Board to comply with existing and applicable Clean Water Act permits and Water Quality Certifications; full compliance would not be possible if operations and maintenance activities are not conducted. In addition, not implementing these activities would result in erosion and sedimentation that degrade habitat for the California red-legged frog. Finally, without the Covered Activities, safety of on-site material transport and vehicle travel would be jeopardized. For these reasons, the No Action Alternative has been rejected.

***Reduced Project Alternative.*** Under the Reduced Project Alternative, the Service would issue an incidental take permit to the Applicant for a period of 20 years for the same Covered Activities and species described for the Proposed Action Alternative, but within a reduced HCP area. The smaller HCP area would presumably result in reduced probability for take of California red-legged frog. However, the HCP area associated with the Proposed Action Alternative has been minimized to the smallest possible footprint to fulfill requirements of the existing storm water pollution prevention plan and applicable permits associated with quarry operation, and to preserve safe quarry operations. In addition, a reduced HCP area would reduce the extent and effectiveness of erosion and sedimentation control measures, potentially resulting in degradation of California red-legged frog habitat. For these reasons, the Reduced Project Alternative would not accomplish the project's goals and has been rejected.

#### **IV. SPECIES ASSURANCES - ANALYSIS AND RECOMMENDATIONS**

In addition to obtaining authorization for incidental take of the California red-legged frog, the Applicant is seeking assurances from the Service of no further mitigation for this species in the event of future unforeseen circumstances. Assurances provided under the "No Surprises" rule at 50 CFR 17.3, 17.22(b)(5), and 17.32(b)(5) would extend to the California red-legged frog.

The purpose of the Department of the Interior's "No Surprises" regulations [50 CFR 17.32(b)(5)] is to provide assurances to non-Federal landowners participating in habitat conservation planning that no additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources will be required from an HCP permittee for species adequately covered by a properly-implemented HCP without the consent of the permittee. Species are adequately covered if the HCP addresses the conservation of the species and its habitat and if all section 10 issuance criteria have been met. All section 10 issuance criteria have been met for the California red-legged frog as described under the "Findings" section above.

**V. GENERAL CRITERIA AND DISQUALIFYING FACTORS-ANALYSIS AND FINDINGS**

The Service has no evidence that the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR B.21(b) and (c). The Applicant has met the criteria for the issuance of the permit and does not have any disqualifying factor that would prevent the permit from being issued under current regulations.

**VI. RECOMMENDATION ON ISSUANCE OF PERMIT**

Based on our findings with respect to the proposed action, the Service recommends issuance of the section 10(a)(1)(B) incidental take permit number ESPER004426 to Lehigh for incidental take of the California red-legged frog in accordance with the Applicant's May 2022 HCP. Further, we recommend assurances of no further mitigation requirements from the Applicant pursuant to the "No Surprises" regulations 50 CFR 17.32(b)(S).

\_\_\_\_\_  
Field Supervisor  
Sacramento Fish and Wildlife Office  
U.S. Fish and Wildlife Service

\_\_\_\_\_  
Date

## REFERENCES CITED

- Anonymous Resident of Santa Clara County. 2022. Comment submitted to regulations.gov in response to the Federal Register Notice of Availability for the Permanente Site Operations and Maintenance, Santa Clara County, California; Draft Categorical Exclusion and Draft Low-Effect Habitat Conservation Plan. Comment ID FWS-R8-ES-2021-0076-0006. Available at: <https://www.regulations.gov/comment/FWS-R8-ES-2021-0076-0006>.
- Bergeron, C.M., C.M.B Jachowski, J. Unrine, and W.A Hopkins. 2010. Bioaccumulation and maternal transfer of mercury and selenium in amphibians. *Environmental Toxicology and Chemistry* 29(4):989-97. DOI: 10.1002/etc.125.
- Browne, C.L. and J.N. Dumont. 1979. Toxicity of selenium to developing *Xenopus laevis* embryos. *J. Toxicol. Environ. Health* 5:699-709. DOI: 10.1080/15287397909529781.
- Bulger, J.B., N.J. Scott Jr., and R.B. Seymour. 2003. Terrestrial activity and conservation of adult California red-legged frogs *Rana aurora draytonii* in coastal forests and grasslands. *Biological Conservation* 110(2003): 85–95.
- Center for Natural Lands Management. 2019. Ohlone West Conservation Bank (CNLM No. N036) 2019-2020 Conservation Easement Compliance Report (October 1, 2018 – September 30, 2019). December 2, 2019. Submitted to Fletcher Ranch Road Properties, LLC, Livermore, California. 4 pp. plus appendix. Exhibit F in the Ohlone West Conservation Bank Annual Report for the Period from July 1st 2020 through June 30th 2021. Available at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278_BANK_ID:2904).
- Center for Natural Lands Management. 2021. Ohlone West Conservation Bank (CNLM No. N036) 2019-2020 Conservation Easement Compliance Report (October 1, 2019 – September 30, 2020). January 31, 2021. Submitted to Fletcher Ranch Road Properties, LLC, Livermore, California. 4 pp. plus appendix. Exhibit F in the Ohlone West Conservation Bank Annual Report for the Period from July 1st 2020 through June 30th 2021. Available at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278:::RP,278:P278_BANK_ID:2904).
- City of Cupertino. 2021. Press Release: Response to Lehigh Southwest Cement Company Complaint Against Santa Clara County. February 25, 2021. Cupertino, California. <https://www.cupertino.org/home/showpublisheddocument/28936/637498693102830000>.
- County of Santa Clara. 2019a. Notice of Violation and Public Nuisance: Intent to Record. Memorandum sent to Lehigh Southwest Cement Company. June 13, 2019. Department of Planning and Development. San Jose, California. Available at: [https://stgenpln.blob.core.windows.net/document/PLN19\\_2250\\_NOV\\_20190613.pdf](https://stgenpln.blob.core.windows.net/document/PLN19_2250_NOV_20190613.pdf).
- County of Santa Clara. 2019b. County of Santa Clara Issues Notice of Violation to Stevens Creek Quarry. February 21, 2019. Office of Communications and Public Affairs, San

- Jose, California. Available at: <https://news.sccgov.org/news-release/county-santa-clara-issues-notice-violation-stevens-creek-quarry-0>.
- Fletcher Conservation Lands. 2017. Ohlone West Conservation Bank Annual Report for 2017. August 14, 2017. Livermore, California. 99 pp. Available at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278_BANK_ID:2904).
- Fletcher Conservation Lands. 2020. Ohlone West Conservation Bank Annual Report for the Period from July 1st 2019 through June 30th 2020. August 15, 2020. Livermore, California. 83 pp. Available at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278_BANK_ID:2904).
- Fletcher Conservation Lands. 2021. Ohlone West Conservation Bank Annual Report for the Period from July 1st 2020 through June 30th 2021. August 15, 2021. Livermore, California. 89 pp. Available at: [https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278\\_BANK\\_ID:2904](https://ribits.ops.usace.army.mil/ords/f?p=107:278::::RP,278:P278_BANK_ID:2904).
- GEI Consultants, Inc (GEI). 2019a. Draft Biological Assessment Permanente Creek Maintenance Project. July 23, 2019. Prepared for Lehigh Hanson, Inc., Cupertino, California, by GEI Consultants, Inc., Sacramento, California. 24 pp. plus appendices.
- GEI Consultants, Inc (GEI). 2019b. Biological Resources Report Permanente Quarry Reclamation Plan Amendment – Rock Plant Reserve Component. May 2019. Prepared for Lehigh Southwest Cement Company, Cupertino, California, by GEI Consultants, Inc., Sacramento, California. 24 pp. plus appendices. Available under Appendix E at: [https://stgenpln.blob.core.windows.net/document/2250\\_2019RPA\\_ProjectDescription\\_EnvironmentalInfo.pdf](https://stgenpln.blob.core.windows.net/document/2250_2019RPA_ProjectDescription_EnvironmentalInfo.pdf).
- GEI Consultants, Inc (GEI). 2021. Draft Low-Effect Habitat Conservation Plan Permanente Site Operation and Maintenance. October 2021. Prepared for Lehigh Hanson, Inc., Cupertino, California, by GEI Consultants, Inc., Sacramento, California. 32 pp. plus appendices.
- GEI Consultants, Inc (GEI). 2022. Final Low-Effect Habitat Conservation Plan Permanente Site Operation and Maintenance. May 2022. Prepared for Lehigh Hanson, Inc., Cupertino, California, by GEI Consultants, Inc., Sacramento, California. 32 pp. plus appendices.
- ICF International. 2012. Final Santa Clara Valley Habitat Plan. August. ICF International, San Francisco, California. Available at: <http://scv-habitatagency.org/178/Final-Habitat-Plan>.
- Lehigh Hanson. 2019. Santa Clara County, California Permanente Quarry Application Package Binder 2 of 2: Project Description and Supplemental Environmental Information. CA Mine ID 91-43-0004. May 2019. Prepared for Santa Clara County, Department of Planning & Development Planning Office, San Jose, California. Available at: [https://stgenpln.blob.core.windows.net/document/2250\\_2019RPA\\_ProjectDescription\\_EnvironmentalInfo.pdf](https://stgenpln.blob.core.windows.net/document/2250_2019RPA_ProjectDescription_EnvironmentalInfo.pdf).

- McDevitt-Galles, T., P. Johnson, W. Moss, and C. Briggs. 2020. How extreme weather events, introduced species, and disease interact to affect California red- legged frog (*Rana draytonii*) and California tiger salamander (*Ambystoma californiense*) populations. California Department of Fish and Wildlife Endangered Species Conservation and Recovery Grant Opportunity. A Federal Endangered Species Act Traditional Section 6 Grant P1880108. Final Report to California Department of Fish and Wildlife. September 2020. University of Colorado, Boulder, Colorado. 42 pp. Pathways for Wildlife. 2020. Wildlife Permeability and Hazards across Highway 152 Pacheco Pass 2018-2019. Report prepared for the Santa Clara Valley Habitat Agency. February 2020.
- San Francisco Bay Regional Water Quality Control Board. 2019. Notice of Violation for Discharge of Wasterock to Permanente Creek and Technical Report Requirements related to the Permanente Quarry and Cement Plant (Lehigh), Cupertino, Santa Clara County. July 9, 2019. Oakland, California. Available at: <https://www.cupertino.org/home/showpublisheddocument/25812/637145268142400000>.
- Santa Clara County. 2012. Final Lehigh Permanente Quarry Reclamation Plan Amendment Environmental Impact Report. May 2012. Department of Planning & Development Planning Office, San Jose, California. Available at: [https://stgenpln.blob.core.windows.net/document/2250\\_EIR\\_201205\\_Main.pdf](https://stgenpln.blob.core.windows.net/document/2250_EIR_201205_Main.pdf).
- Santa Clara Valley Habitat Agency. 2019. Mitigation Only Policy. January 23, 2019. Morgan Hill, California. Available at: <https://www.scv-habitatagency.org/DocumentCenter/View/1135/Mitigation-Only-Policy-ED-7>.
- U.S. Fish and Wildlife Service (Service). 2002. Recovery plan for the California red-legged frog (*Rana aurora draytonii*). Portland, Oregon. 173 pages.
- U.S. Fish and Wildlife Service (Service). 2010. Endangered and threatened wildlife and plants; revised designation of critical habitat for California red-legged frog; final rule. Federal Register 75: 12815-12959.
- U.S. Fish and Wildlife Service (Service). 2014. Programmatic Biological Opinion for Issuance of Permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, including Authorizations Under 22 Nationwide Permits, for Projects that May Affect the Threatened California Red-Legged Frog in Nine San Francisco Bay Area Counties, California. U.S. Fish and Wildlife Service file number 08ESMF00-2014-F-0389. Sacramento Fish and Wildlife Office, Sacramento, California. 31 pp.
- U.S. Fish and Wildlife Service (Service). 2017. Information Request for the Permanente Creek Restoration Project near the City of Cupertino, Santa Clara County, California (U.S. Army Corps of Engineers (Corps) file number 2008-00356). August 9, 2017. Service file number 08ESMF00-2016-TA-2377. Sacramento Fish and Wildlife Office, Sacramento, California. 11 pp.

- U.S. Fish and Wildlife Service (Service). 2020. Formal Consultation on the Permanente Creek Culvert Maintenance Project adjacent to the Lehigh Cement Plant/Lehigh Permanente Quarry near the City of Cupertino, Santa Clara County, California, and Appending to the Programmatic Biological Opinion for Issuance of Permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, including Authorizations Under 22 Nationwide Permits, for Projects that May Affect the Threatened California Red-Legged Frog in Nine San Francisco Bay Area Counties, California (U.S. Army Corps of Engineers (Corps) file number 2008-00356S). February 4, 2020. Sacramento Fish and Wildlife Office, Sacramento, California. 18 pp. plus appendix.
- U.S. Fish and Wildlife Service (Service). 2021a. Screening Form for Low-Effect Incidental Take Permit Determination and National Environmental Policy Act (NEPA) Environmental Action Statement. Sacramento Fish and Wildlife Office, Sacramento, California. 11 pp.
- U.S. Fish and Wildlife Service (Service). 2021b. Notice of Availability: Permanente Site Operations and Maintenance, Santa Clara County, California; Draft Screening Form and Draft Low-Effect Habitat Conservation Plan. Federal Register, 86 FR 73796-73797.
- U.S. Fish and Wildlife Service (Service). 2022. Formal Consultation on the Issuance of a Section 10(a)(1)(B) Incidental Take Permit for the Lehigh Southwest Cement Company's Permanente Site Operation and Maintenance Project Low-Effect Habitat Conservation Plan, Santa Clara County, California. Service file number 2022-0001911-S7-001. Sacramento Fish and Wildlife Office, Sacramento, California.
- U.S. Fish and Wildlife Service (Service) and National Oceanic and Atmospheric Administration/National Marine Fisheries Service (NMFS). 1996. Habitat conservation planning and incidental take permit processing handbook. U.S. Department of Interior: U.S. Fish and Wildlife Service and U.S. Department of Commerce National Oceanic and Atmospheric Administration: National Marine Fisheries Service.
- Winslow, M.V. 2019. Lehigh faces water board, county violations for Permanente Creek pollution. July 24, 2019. Los Altos Town Crier. Available at: [https://www.losaltosonline.com/news/lehigh-faces-water-board-county-violations-for-permanente-creek-pollution/article\\_5390a6cd-410f-57b4-800c-b51993640b70.html](https://www.losaltosonline.com/news/lehigh-faces-water-board-county-violations-for-permanente-creek-pollution/article_5390a6cd-410f-57b4-800c-b51993640b70.html).
- WRA, Inc. 2017. CRLF Pond Recovery Action – Study Plan and Recovery Permit Amendment Request, Permanente Quarry, Cupertino, Santa Clara County, California. February 13, 2017. San Rafael, California. 15 pp. plus appendix.
- WRA. 2019. Biological Resources Assessment Lehigh Permanente Quarry, Santa Clara County, California. February 2019. San Rafael, California. Available in Appendix J at: [https://stgenpln.blob.core.windows.net/document/2250\\_2019RPA\\_Plan\\_AppendH\\_thru\\_J.pdf](https://stgenpln.blob.core.windows.net/document/2250_2019RPA_Plan_AppendH_thru_J.pdf).

Xerces Society. 2019. Monarch Nectar Plants California. Available: <http://xerces.org/publications/plant-lists/monarch-nectar-plants-california>. Accessed January 5, 2022.

### **IN LITT. REFERENCES**

Hebert, Aaron. 2022. Comments received through Regulations.gov on the Notice of Availability of the Permanente Site Operations and Maintenance, Santa Clara County, California; Draft Screening Form and Draft Low-Effect Habitat Conservation Plan from Senior Resource Management Specialist, Natural Resources Department, Midpeninsula Regional Open Space District, Los Altos, California, dated January 23, 2022. Available at: <https://www.regulations.gov/comment/FWS-R8-ES-2021-0076-0005>.

### **PERSONAL COMMUNICATION**

Guerra, Erika. 2018. Electronic mail message from Environmental & Land Resources Director, Lehigh Hanson, Inc., Cupertino, California, to Joseph Terry, Senior Biologist, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, Sacramento, California, dated September 28, 2018. Subject: Maintenance Work Pond 31b.

King, Anne. 2017. Electronic mail message from Senior Biologist, GEI Consultants, Inc., Sacramento, California, to Joseph Terry, Senior Biologist, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, Sacramento, California, dated October 21, 2017. Subject: Lehigh Hanson Emergency Culvert Clean out Project and CRLF Monitoring.

Schickenberg, Erich. 2017. Electronic mail messages from Plant Biologist, WRA, Inc., San Rafael, California, to Joseph Terry, Senior Biologist, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, Sacramento, California, dated June 14-August 8, 2017. Subject: Permanente Creek Emergency Culvert Clean Out Project CRLF Relocation Approval Request.

Smick, Geoff. 2017. Electronic mail message from President, WRA, Inc., San Rafael, California, to Josh Hull, Recovery Division Chief, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, Sacramento, California, dated January 10, 2017. Subject: Permanente Quarry CRLF Recovery Pond.