

# County of Santa Clara

Department of Planning and Development  
Planning Office

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## MEMORANDUM

Date: August 26, 2010

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

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

From: Jody Hall Esser, Director, Department of Planning & Development

Re: Responses to comments made during the Public Comment portion of the Board of Supervisors Meeting on August 24, 2010, related to Lehigh Southwest Cement Plant and the Permanente Quarry

During the Public Comment portion of the August 24, 2010, meeting of the Board of Supervisors three speakers made statements to the Board regarding the Lehigh Southwest Cement Plant and the reclamation plan amendments currently under review by the Planning Office for the adjacent Permanente Quarry. The three speakers included Alex Sakhanyuk, Joyce Eden, and Barry Chang. In order to provide the Board and the County Executive with clear and accurate information related to the issues raised by these speakers staff has prepared the following responses, and obtained the attached documents, for your information.

### SPEAKER ONE: Alex Sakhanyuk :

*"Hello, I'm Alex Sakhanyuk and I'm here to talk about the Lehigh cement plant. The Santa Clara County cited a violation for illegal dumping of mining waste outside of the cement plant's permitted area. Also, Lehigh's Title V air permit has been declared invalid by the EPA, and, yet, Lehigh continues to operate, and none of the one hundred million to two hundred million dollars worth of penalties are being pursued by the County. I respectfully request that these matters are put on the agenda. Thank you."*

### Response:

#### **Title V Permit:**

According the Bay Area Air Quality Management District (the District) the Lehigh Southwest Cement Company's Title V permit is still valid. The District issued a Title V permit for the facility on November 5, 2003. The operator (Lehigh) submitted an application to the District for renewal of the Title V Permit on April 28, 2008. On January 5, 2010, the District withdrew the proposed Title V

permit renewal for the Lehigh facility because the Federal EPA was expected to adopt significantly more stringent standards for mercury and other air contaminants from cement plants. The new standards were announced on August 9, 2010. The District is expected to incorporate those standards in a Title V renewal, and will re-issue a draft permit for public review.

According to District staff the Title V permit previously issued to Lehigh will remain valid until the District takes an action regarding the renewal application.

**Penalties:**

The County issued two Notices of Violation for violations of the State Surface Mine and Reclamation Act. Should the mine operator fail to take action towards abatement of the violations, the County can impose fines for non-compliance. The state statute authorizes the County to fine a mine operator up to \$5,000.00 per day. In determining the amount the lead agency must consider several criteria, including the nature, circumstances, extent, and gravity of the violation or violations. A penalty may only be issued where a mine operator fails to comply with an order to comply, and the statute allows a mine operator to petition for reconsideration of a penalty, first to the legislative body (the County) or to the Superior Court. Lehigh has been working in good faith to date, to abate the violations. As a result, the County has not levied fines against Lehigh. No dollar amount of potential fines have been calculated or published. The amount of money quoted by the speaker appears to have no basis.

**SPEAKER TWO – Joyce Eden**

*“Hi. I’m Joyce Eden with West Valley Citizens Air Watch Cupertino. We’re concerned about the CEQA process regarding the Lehigh cement plant reclamation plan of which you, the County, are charged with overseeing. You the County Supervisors. And, we’re concerned with the way the Planning Department is handling this, and we definitely want you to look into this. The east material storage area which was briefly mentioned was negotiated by the County with Lehigh with no public process to be pulled off the reclamation plan for the entire area of the Lehigh mining, and this appears to be a CEQA piece-mealing. So, we need this to be part of the entire reclamation plans for public clarity. Thank you.”*

**Response:**

The County issued a Notice of Violation (NOV) to Lehigh in 2006, requiring that the company proceed to file for a Comprehensive Reclamation Plan Amendment covering all disturbed areas within the Permanente Quarry due to mining operations.

The County issued a second NOV to Lehigh in 2008 for stockpiling overburden material from the existing mine pit within an area called the East Materials Storage Area (EMSA). The second NOV required the mine operator to cease the stockpiling and provide for erosion control of the material already there. Lehigh complied with both of these requirements.

Lehigh met with staff to explain that the EMSA is necessary for mine operation purposes, and that without access to it at this time would prevent Lehigh from accessing the mineral deposits in the mine pit. Following consultation with County Counsel and other staff, the Director of Planning and Development entered into an agreement with Lehigh that allows access by Lehigh to the EMSA for

continued mine operations, provided that Lehigh proceed to abate the 2008 NOV by processing a focused reclamation plan amendment for the EMSA and complying with rigorous requirements and time limitations. This agreement includes provisions for levying fines against Lehigh for failure to comply with the agreement. No approval of the EMSA reclamation plan amendment has been made. Currently an EIR is being prepared for this reclamation plan amendment. Public hearings before the Planning Commission regarding the proposed EMSA reclamation plan amendment are anticipated to take place in the spring or summer of 2011.

In addition, the EMSA is included in the comprehensive reclamation plan amendment that Lehigh is required to address the 2006 NOV. An application for this amendment was received on May 28, 2010, and is currently under initial review. The comprehensive reclamation plan amendment require an environmental impact report and public hearings before the Planning Commission, which are anticipated to take place in the spring or summer of 2012.

Both Planning Office staff and the County Counsel's office have determined that processing the two separate reclamation plans and environmental impact reports does not constitute piece-mealing under CEQA. These plans can be processed independently and the environmental impact analysis included in the EIR for the comprehensive reclamation plan amendment will evaluate any cumulative environmental impacts associated with both projects.

**SPEAKER THREE: Barry Chang**

*"Good morning. My name is Barry Chang. I'm Cupertino City Council. I'm coming here to ask for your help because I do get a lot of concern, a lot of calls from my constituents in Cupertino before my election, during the campaign, and even after my election, regarding the Lehigh Southwest Cement violation, Notice of Violation, from the County, from EPA, from Water Resource Board, and, also, from Bay Area Air Quality Management District. This is a public health issue. It impacts not only Cupertino, Cupertino will get the most because its right next to it, but the entire region will get to it. According to EPA Notice of Violation on March 10, I'll give you a copy, so you will get a copy too, their Title V permit is invalid, okay, since 1995, because they failed to disclose the toxic air. You're talking about sulfur dioxide that's over 2,000 pounds a year and then also now it's over 5,000 pounds. So, please take care of it. Thank you."*

**Response:**

The U.S. EPA issued a Notice of Violation and Finding of Violation (NOV/FOV) to Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants (refer to pages 2-3 of the NOV/FOV attached). As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify PSD requirements in its application submitted to the BAAQMD after installing the modifications.

The NOV/FOV states that Lehigh violated Title V requirements. It describes enforcement that may be taken by the EPA, including the assessment of penalties, but it does not invalidate the Title V Permit that Lehigh currently holds.

**ATTACHMENTS:**

- Correspondence from Thu Bui, Senior Air Quality Engineer, BAAQMD, to Gary Rudholm, Senior Planner, County Planning Office, dated August 24, 2010.
- Bay Area Air Quality District "Fact Sheet, July 6, 2010: Lehigh Southwest Cement Plant, BAAQMD Site #A0017."
- Correspondence from Deborah Jordan, Director, Air Division U.S.EPA to David Vickers, President, Lehigh Southwest Cement Company, dated March 10, 2010.
- Correspondence from Deborah Jordan, Director, Air Division U.S.EPA to Jack Broadbent, Air Pollution Control Officer, BAAQMD, dated March 10, 2010.
- Notice of Violation/Finding of Violation issued to Lehigh Southwest Cement Company, Docket No. R9-10-02.

cc:

Colleen Valles, District One (with attachments)  
Gustavo Caraveo, District Two (with attachments)  
Mike Donohoe, District Three (with attachments)  
Tony Filice, District Four (with attachments)  
Scott Strickland, District Five (with attachments)

Miguel Márquez, County Counsel (with attachments)  
Lizanne Reynolds, Deputy County Counsel (with attachments)  
Michael M. Lopez, Manager, Planning Office (with attachments)  
Gary Rudholm, Senior Planner (with attachments)  
Rob Eastwood, Senior Planner (with attachments)

**From:** "Thu Bui" <TBui@baaqmd.gov>  
**Date:** August 24, 2010 3:13:24 PM PDT  
**To:** "Gary Rudholm" <Gary.Rudholm@pln.sccgov.org>  
**Subject:** RE: Status of Lehigh Title V Permit Application

Gary,

1. Lehigh Title V permit is still valid per BAAQMD Regulation 2-6-407. If the permit renewal has not been issued by November 1, 2008, but a complete application for renewal has been submitted in accordance with the above deadlines, the existing permit will continue in force until the District takes final action on the renewal application.

EPA Region 9's website did not list Lehigh's Title V permit as the objected permit:  
<http://yosemite.epa.gov/R9/air/EPSS.NSF/a212c76fedc58a43882565300070b468!OpenView&St art=1&Count=30&Expand=2.1#2.1>.

Even with last submittal, EPA did not object. EPA commented on the TV permit on 9/25/09:  
<http://yosemite.epa.gov/R9/air/EPSS.NSF/45205ab7b757baf688256530006d0478/9a3d166437d26d0888257647005cdc1c!OpenDocument>.

One can turn for information regarding the status of the application by Lehigh to renew the Title V Permit by visiting the District's website for Public Notices on Permit:  
<http://www.baaqmd.gov/Divisions/Engineering/Public-Notices-on-Permits.aspx>, or contact Thu Bui at 415-749-5119.

2. Below are links to the fact sheet and final rule for the final Portland Cement MACT.

Fact sheet:  
[http://www.epa.gov/ttn/oarpg/t1/fact\\_sheets/portland\\_cement\\_fr\\_fs\\_080910.pdf](http://www.epa.gov/ttn/oarpg/t1/fact_sheets/portland_cement_fr_fs_080910.pdf).

Final rule:  
[http://www.epa.gov/ttn/oarpg/t1/fr\\_notices/portland\\_cement\\_fr\\_080910.pdf](http://www.epa.gov/ttn/oarpg/t1/fr_notices/portland_cement_fr_080910.pdf)

The link to Lehigh's fact sheet is below, beginning on page 11.  
[http://www.baaqmd.gov/~/\\_media/Files/Board%20of%20Directors/2010/ssc\\_agenda\\_072310.ashx](http://www.baaqmd.gov/~/_media/Files/Board%20of%20Directors/2010/ssc_agenda_072310.ashx)

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LEHIGH SOUTHWEST CEMENT PLANT  
BAAQMD Site #A0017  
24001 Stevens Creek Boulevard  
Cupertino, CA 94014

## FACT SHEET

July 06, 2010

### Background

- The Lehigh Southwest Cement Plant (formerly Hanson) is located in unincorporated Santa Clara County, west of Cupertino at the end of Stevens Creek Boulevard. Mining at the site dates back to the 1880's, and the cement plant was established in 1939.
- The facility excavates limestone from an on-site quarry for use as a raw material in cement manufacturing. The limestone, and other raw materials, are crushed into a fine powder and blended in the correct proportions. This blended raw material is heated in a pre-heater and rotary kiln where it reaches temperatures of about 2,800 degrees Fahrenheit. The material formed in the kiln, known as "clinker", is subsequently ground and blended with gypsum to form Portland cement. In addition to cement, the facility also produces and sells construction aggregates.
- Nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), and particulate matter (PM), are the primary criteria air pollutants emitted from cement manufacturing. Small quantities of volatile organic compounds (VOC), including the toxic air contaminant (TAC) benzene, are also emitted from the kiln. TAC emissions also include trace metals such as mercury, cadmium, chromium, arsenic, and nickel. The kiln exhaust is equipped with NO<sub>x</sub> and SO<sub>2</sub> continuous emissions monitors to determine compliance with applicable emission limitations. PM and metallic TAC emissions are controlled at the facility by fabric filtration, which is used at various material crushing, grinding, and loading operations, and at the kiln, which is the largest source of emissions.
- Lehigh is subject to a number of District, State, and federal air quality rules and regulations that are delineated in the facility's Title V Permit. A Health Risk Assessment (HRA) completed under the Air Toxics Hot Spots Program indicates that the maximum public health risks associated with the facility's TAC emissions are under thresholds requiring public notification or mandatory risk reduction measures. This HRA is currently being updated to reflect a comprehensive TAC emissions inventory update (see page 5).

### Public Comments/Issues

- Starting in November 2007, District staff has met with representatives of the West Valley Citizen Air Watch (WVCAW) and worked to answer questions from the group about the Quarry Reclamation Plan Amendment proposal, and other air quality

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issues associated with the facility. The Reclamation Plan Amendment entails modification of the existing Reclamation Plan, approved in 1985 under the requirements of the Surface Mining and Reclamation Act (California Public Resources Code, § 2710, et seq.), for activities at the facility's quarry. The proposed Reclamation Plan Amendment, which is being processed by Santa Clara County, would expand the existing Reclamation Plan area to include previously disturbed areas, add a new quarry pit, and extend the expected completion date of mining and reclamation activities, possibly by 25 years. District staff has subsequently processed a number of public records requests, and answered many additional questions from the public, associated with the Lehigh facility.

- On October 22, 2008 and June 11, 2009, District staff participated in community meetings organized by Santa Clara County to answer questions about the facility and the Reclamation Plan Amendment. A variety of concerns were expressed at these meetings including the potential location of a new quarry pit close to residential areas, the use of petroleum coke as a fuel, visible emissions from the kiln, general dust emissions and deposition, mercury emissions, hexavalent chromium emissions, emissions from truck traffic, and the facility's compliance history.
- Lehigh submitted an application to renew its Title V Permit on April 28, 2008. A Title V Permit is a compilation of all existing applicable air quality requirements including emissions limits and standards, monitoring, record keeping, and reporting requirements. Title V Permit renewals are required every five years, and the existing Title V Permit continues in force until the District takes final action on the renewal application. The District conducted a public hearing in Cupertino on September 17, 2009 to solicit comments on the draft Title V permit renewal for the Lehigh facility, and a written public comment period was also held. Approximately one hundred individuals or groups provided comments covering a wide variety of topics.
- Members of the public have raised concerns regarding an Notice of Violation (NOV) issued by the U.S. EPA to the Lehigh facility on March 9, 2010, for alleged violations of the Clean Air Act's Prevention of Significant Deterioration (PSD) permit program. The NOV was part of a national review of PSD applicability for the cement manufacturing industry.

### Facility Status

#### A. Permits

- The Lehigh facility started using 100 percent petroleum coke as a fuel on May 30, 2007 after receiving a permit from the District for this fuel change. Prior to this project, the typical fuel mix had consisted of 90 percent coal and 10 percent coke. Emissions data show that this fuel change has reduced SO<sub>2</sub> and CO emissions, and has had no significant effect on the emissions of other regulated air pollutants. On October 31, 2008, at the request of EPA Region IX, Lehigh submitted a

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demonstration that the fuel change project did not trigger federal PSD permit requirements. The facility was also required by EPA to provide additional information on potential facility modifications as a part of the national EPA review of PSD applicability for the cement manufacturing industry. The NOV issued by EPA on March 9, 2010, for alleged violation of PSD permit requirements, did not include the coke switching project.

- Lehigh has withdrawn a permit application that had been submitted to further increase the permitted coke usage at their facility. A separate application for the use of bio-fuels in the kiln has been placed on an inactive status at the request of the applicant.
- On January 5, 2010, the District withdrew the proposed Title V permit renewal for the Lehigh facility. This was done because EPA is expected to adopt significantly more stringent standards for mercury and other TACs from cement plants in amendments to 40 CFR 63, Subpart LLL, National Emission Standards for Hazardous Air Pollutants (NESHAP) from the Portland Cement Manufacturing Industry. The proposed EPA rule amendments were published on May 6, 2009, and the final rule had been scheduled for adoption no later than June 6, 2010. The deadline for final rule adoption, however, has recently been extended to August 6, 2010 (based on a settlement agreement between EPA and petitioners for reconsideration of the existing NESHAP). Since the requirements of this amended NESHAP will need to be incorporated into the Title V permit, the District will re-issue the draft Lehigh permit renewal after the requirements of the amended NESHAP have been incorporated. It is expected that this can be done within 45 days of promulgation of the amended NESHAP (i.e., on or around September 20, 2010).

### B. Compliance

- Since July 2004, there have been twenty-five violations at the Lehigh facility that resulted in the issuance of twenty-three Notices of Violation by the District. The violations can be characterized as emissions-related, administrative, or permit-related in nature. There were fifteen emissions-related violations; most were issued for excessive visible emissions of dust or smoke from various facility sources. The facility expeditiously took corrective action and brought these violations into compliance. There were eight administrative violations, which included various record keeping deficiencies and late reporting of required reports. Lehigh took corrective action on these violations and brought them into compliance. The two permit-related violations documented unpermitted material stockpiles. Lehigh has obtained the necessary permits and is currently in compliance with District permit requirements. Lehigh has been in intermittent compliance, similar to other Title V facilities; there is currently no ongoing violation, or pattern of recurrent violation, that represents ongoing noncompliance.



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- The NOV issued by EPA to Lehigh on March 9, 2010, concerns a series of physical modifications made to the facility between 1996 and 1999. EPA alleges that these modifications should have undergone pre-construction PSD permit review, but the owners of the facility at the time failed to apply for a PSD permit, which would have required additional emissions controls for NO<sub>x</sub> and SO<sub>2</sub>. The NOV issued by EPA does not contain a detailed listing of the specific projects involved, as these were all claimed confidential by Lehigh. This NOV is similar to other EPA enforcement actions against various cement plants in other states. The Lehigh NOV remains an active enforcement case by EPA without final resolution.
- EPA did not include in its NOV any projects at the Lehigh facility that occurred after EPA adopted major reforms to the PSD regulations on December 31, 2002. According to EPA, “[t]hese reforms were aimed at providing much needed flexibility and regulatory certainty, and at removing barriers and creating incentives for sources to improve environmental performance through emissions reductions, pollution prevention, and improved energy efficiency” (*Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rule*, U.S. EPA, Nov. 21, 2002). The reforms modified PSD applicability tests which, in some cases, had resulted in projects being identified as a major modification even though the project decreased emissions (because of the program’s “actual-to-potential” applicability test and “last two years” baseline emissions procedure, both of which were eliminated with the reforms). In addition, the reforms added to the clarity and certainty of the scope of the program’s routine maintenance exclusion to reduce the unintended consequences of discouraging worthwhile projects that are in fact outside the scope of the program.

### C. Toxic Air Contaminants

- District staff has conferred with staff of Monterey Bay Unified Air Pollution Control District (MBUAPCD) and South Coast Air Quality Management District (SCAQMD) regarding the reason for elevated levels of hexavalent chromium reported downwind of cement plants located in Davenport and Oro Grande, California. It is believed that these elevated hexavalent chromium levels are the result of the use of steel slag as a raw material and/or the use of uncovered clinker storage piles. The Lehigh facility uses a naturally occurring iron ore that has much lower chromium levels than steel slag, and also utilizes enclosed silos rather than open storage piles for clinker storage.
- Following an article appearing in the San Francisco Chronicle, District staff provided community members with information regarding the health effects associated with mercury emissions from the Lehigh cement kiln. Based on HRA results, the mercury health risks were determined to be below Reference Exposure Levels (RELs) established by Cal/EPA’s Office of Environmental Health Hazard Assessment (OEHHA). RELs are concentrations at or below which no adverse non-cancer health effects are anticipated in the general human population, and are designed to protect

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the most sensitive individuals in the population by the inclusion of margins of safety. The mercury RELs were revised by OEHHA on December 19, 2008, to explicitly include consideration of possible differential effects on the health of infants, children and other sensitive subpopulations, in accordance with the mandate of the Children's Environmental Health Protection Act.

- The District required that Lehigh collect additional data regarding hexavalent chromium, mercury, other metallic TACs, and crystalline silica, in fugitive dust and other sources at the facility in addition to the kiln. This comprehensive TAC emissions inventory update was submitted to the District on March 30, 2009. Lehigh also subsequently revised mercury emission estimates from the kiln, upward to 581 lb/yr, based on the use of a more conservative mass balance approach (the prior approach for estimating emissions had been based on stack testing). The District has performed preliminary air dispersion modeling analyses based on the updated emissions inventory. These preliminary analyses indicate that, although the risk levels resulting from the facility's TAC emissions are higher than the results of the previous HRA, the Air Toxics Hot Spots Program action levels are still likely not exceeded. One possible exception to this that was identified is a narrow band of nearby receptor locations at which the mercury air concentrations appear to be very close to levels that would require public notification. The District has required that Lehigh prepare and submit a more refined update to their HRA in order to determine if public notification requirements have been triggered. This updated HRA is expected to be submitted for District review by September 1, 2010.
- In a letter to the District dated December 2, 2009, Lehigh outlined the actions that the company is taking to upgrade its emission control system in order to comply with the upcoming NESHAP amendments. The District issued permits in 2010 that allow for the initial phase of this control system upgrade. The initial phase involves injecting a sorbent material (hydrated lime) into the flue gases, filtering out the sorbent/pollutant complex, and incorporating the captured pollutants into the finished cement. This technology reduces emissions of several pollutants including hydrochloric acid, sulfur dioxide, and mercury (the latter of which is reduced by approximately 25 percent). On June 23, 2010 Lehigh held a press conference announcing the installation of these new emission controls. The second phase of the emission control system upgrade, which involves activated carbon injection, is expected to increase control of mercury emissions to about 90 percent.

### D. Ambient Air Monitoring

- Because of concerns about elevated hexavalent chromium air concentrations found near some cement plants, the U.S. EPA and the District installed ambient air monitoring equipment at Stevens Creek Elementary School, located approximately two miles from Lehigh, to measure hexavalent chromium as part of EPA's School Air Toxics Monitoring Initiative. The EPA provided the instruments and initial laboratory analysis, and the District installed and is operating the monitoring equipment (and

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now is paying for the analysis). The monitoring commenced on July 30, 2009, and will continue for at least one year. As of May 26, 2010, there were 56 daily samples taken at this site on a once every 6<sup>th</sup> day sampling schedule. The hexavalent chromium concentration was below the method detection limit in about 40 percent of these samples, and very small amounts were detected in the other samples. The average hexavalent chromium air concentration (using the convention that non-detects equal one-half the method detection limit) was 0.000014  $\mu\text{g}/\text{m}^3$ . This is 0.007 percent of the 0.2  $\mu\text{g}/\text{m}^3$  chronic REL adopted by OEHHA for non-cancer health effects (a short-term acute REL has not been adopted for hexavalent chromium). Based on the OEHHA cancer potency factor and age-sensitivity factors, the lifetime cancer risk resulting from exposure to this level of hexavalent chromium is approximately 4 in-a-million. Although hexavalent chromium ambient air monitoring is no longer routinely done at other Bay Area sites, based on comparisons with historical monitoring data, air concentrations observed at the Stevens Creek Elementary School are considered to be typical of background levels present in urban areas.

- On October 28, 2008, the District began operating an ambient air monitor in the vicinity of the Lehigh facility adjacent to Stevens Creek Boulevard (near the intersection of Prado Vista Drive) to determine if truck traffic and dust associated with the facility were having an adverse impact on PM levels in the nearby community. This monitor continuously records particulate matter of 10 microns or less (PM<sub>10</sub>) in the air. The maximum daily and average daily PM<sub>10</sub> concentrations recorded at this site (from Oct. 29, 2008 through June 30, 2010) were 55.5  $\mu\text{g}/\text{m}^3$  and 16.2  $\mu\text{g}/\text{m}^3$ , respectively. A comparison of the PM<sub>10</sub> concentrations at this Cupertino site with PM<sub>10</sub> concentrations at the District's San Jose monitoring site (located about 10 miles east of the Cupertino site) is presented in the following table for common sampling days. The relevant PM<sub>10</sub> National Ambient Air Quality Standards (NAAQS), and California Ambient Air Quality Standards (CAAQS), are also listed.

### **Comparison of PM<sub>10</sub>Air Concentrations at Cupertino and San Jose Monitoring Sites, and PM<sub>10</sub>Ambient Air Quality Standards (Oct. 29, 2008 to Jun. 30, 2010)**

	Cupertino ( $\mu\text{g}/\text{m}^3$ )	San Jose ( $\mu\text{g}/\text{m}^3$ )	NAAQS ( $\mu\text{g}/\text{m}^3$ )	CAAQS ( $\mu\text{g}/\text{m}^3$ )
Average Daily	16.5	19.9	n/a	20
Maximum Daily	51.9	46.8	150	50

#### Table Notes:

- Figures are for common sampling days at the Cupertino and San Jose sites (the San Jose site is a filter-based PM<sub>10</sub> site that operates once every 6<sup>th</sup> day, and the Cupertino site is a Beta Attenuation Monitor that operates continuously). The overall maximum daily concentration at the Cupertino site (i.e., 55.5  $\mu\text{g}/\text{m}^3$ ) occurred on a day on which the San Jose sampler was not operating.
- The Average Daily CAAQS is an annual arithmetic mean.

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The PM<sub>10</sub> concentrations at the Cupertino site were, on average, 17 percent lower than the San Jose site. The maximum daily PM<sub>10</sub> concentration at the Cupertino site was, however, about 11 percent higher than at the San Jose site. It should be noted that these comparisons are for common sampling days only, and the San Jose monitoring site has historically seen maximum daily PM<sub>10</sub> levels higher than the maximum levels seen at the Cupertino site (e.g., the maximum daily PM<sub>10</sub> levels at the San Jose site were 73.2 µg/m<sup>3</sup>, 69.1 µg/m<sup>3</sup>, and 57.3 µg/m<sup>3</sup> for the years 2006, 2007, and 2008, respectively).

The Cupertino site had PM<sub>10</sub> concentrations that were below the annual arithmetic mean CAAQS, and the daily maximum NAAQS. The site had a total of 3 days (approximately 0.5 percent of all monitoring days) during which the daily PM<sub>10</sub> concentrations were slightly over the stringent daily maximum CAAQS. Each of these days also had elevated particulate matter (PM) measurements in San Jose, and occurred in the wintertime PM season when wood burning has been identified as the most significant source of PM air concentrations in the Bay Area. Occasional PM<sub>10</sub> air concentrations over the daily maximum PM<sub>10</sub> CAAQS are common at monitoring sites throughout the Bay Area in the winter season.

The District is working on establishing a comprehensive air monitoring site located about three quarters of a mile from the Lehigh facility at Monta Vista Park near the intersection of South Foothill Boulevard and Voss Avenue in Cupertino. The City of Cupertino approved a lease for this site on May 18, 2010, and District staff expects to have the monitoring equipment operational by the end of July 2010. The site will operate for a period of at least one year and will measure a broad array of criteria air pollutants (e.g., PM<sub>2.5</sub>, PM<sub>10</sub>, CO, NO<sub>2</sub>, SO<sub>2</sub>, and ozone), TACs (e.g., a variety of metals including mercury, and a variety of organic gases including benzene), and meteorological conditions (e.g., wind speed, wind direction, and temperature). (Benzene and mercury have been identified by the District as being the primary contributors to health risk resulting from TAC emissions from the Lehigh facility). District staff participated in a community meeting to discuss the new monitoring site held at the Monta Vista Community Center on April 28, 2010.

### E. Other Activities

- District staff participated in a Study Session held by the Cupertino City Council to discuss issues associated with the Lehigh facility. Staff has also been invited to provide an update to the City Council at a follow-up Study Session scheduled for July 20, 2010.
- Santa Clara County has indicated that the overall Lehigh Quarry Reclamation Plan Amendment requires additional geologic studies. Preparation of an Environmental Impact Report (EIR) for the project has been put on hold pending completion of these studies. A revised Reclamation Plan Amendment application was submitted by

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Lehigh to the County on May 28, 2010, and the County has initiated a 60-day review period to determine its completeness. The revised application includes a new South Quarry Pit, which is located due south of the existing quarry pit approximately the same distance from the nearby residential areas to the east as the existing North Quarry Pit.

- In response to a Notice of Violation to the mine operator issued by Santa Clara County, Lehigh has submitted a separate Reclamation Plan Amendment to address stockpiling of material from the quarry in an unauthorized location, the East Materials Storage Area. This separate amendment is being processed by the County, and the process of preparing an EIR for the project has begun. A Public Scoping Session to solicit comments for the Notice of Preparation for this EIR was held on April 28, 2010.
- District staff has begun rule development on Stationary Source Measure 9: Cement Kilns, from the District's 2010 Clean Air Plan (CAP), which was issued in draft form on March 11, 2010. This rule development project is evaluating more stringent standards for NO<sub>x</sub> (and potentially SO<sub>2</sub>) emissions for the Lehigh cement kiln. The draft CAP control measure states that NO<sub>x</sub> reductions of 90 percent are potentially feasible. Staff is also tracking the EPA rulemaking on the NESHAP amendments for cement plants, and will harmonize the proposed District rule with the EPA rule. Staff expects that a draft District rule and workshop notice will be issued by the 3<sup>rd</sup> quarter of 2010, and that a proposed rule can be considered for adoption by the District's Board of Directors by the winter of 2010/2011.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

MAR 10 2010

CERTIFIED MAIL NO. 7003 3110 0006 2000 8625  
RETURN RECEIPT REQUESTED

IN REPLY: AIR-5  
REFER TO: Docket No. R9-10-02

David Vickers  
President  
Lehigh Southwest Cement Company  
12667 Alcosta Blvd.  
Bishop Ranch 15  
San Ramon, CA 94583

Dear Mr. Vickers:

Re: Lehigh Southwest Cement Company Notice and Finding of Violation

Dear Mr. Vickers:

Enclosed is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the "Act"), notifying you that the United States Environmental Protection Agency ("EPA"), Region IX, finds that Lehigh Southwest Cement Company ("Lehigh") has violated certain sections of the Act's Prevention of Significant Deterioration of Air Quality and Title V Operating Permit Program, at its Portland cement plant located in Cupertino, California (the "Facility").

You should be aware that section 113(a)(1), 113(a)(3) and 167 of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, section 306 of the Act, 42 U.S.C. 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the Cupertino Plant being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed NOV/FOV, you may request a conference with EPA within ten (10) working days of receipt of this NOV/FOV. The conference will afford Lehigh an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this NOV/FOV, please contact Charles Aldred of the Air Enforcement Office at (415) 972-3986, or have your attorney contact Ivan Lieben of the Office of Regional Counsel at (415) 972-3914.

Thank you for your cooperation in this matter.

Sincerely,



Deborah Jordan  
Director, Air Division

Enclosure

cc w/enc: BAAQMD  
CARB



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

MAR 10 2010

IN REPLY: AIR-5  
REFER TO: Docket No. R9-10-02

Jack Broadbent  
Air Pollution Control Officer  
Bay Area Air Quality Management District  
939 Ellis St.  
San Francisco, CA 94109

Dear Mr. Broadbent:

Enclosed for your information is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("Act") at Lehigh's Portland cement plant in Cupertino, California (the "Facility").

The purpose of the NOV/FOV is to notify Lehigh that EPA finds that it has violated the Prevention of Significant Deterioration and Title V Operating Permit Program requirements of the Act at the Facility. The violations are set forth more specifically in the enclosed NOV/FOV. The NOV/FOV has been issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Act, 42 U.S.C. § 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any action will be taken pursuant to Section 113 of the Act.

If you have any questions concerning this NOV/FOV, please contact Charles Aldred of the Region 9 Air Enforcement Office at (415) 972-3986, or [aldred.charles@epa.gov](mailto:aldred.charles@epa.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan".

Deborah Jordan  
Director, Air Division

Enclosure





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

MAR 10 2010

IN REPLY: AIR-5  
REFER TO: Docket No. R9-10-02

Jim Ryden  
Enforcement Division Chief  
California Air Resources Board  
P.O. Box 2815  
Sacramento, CA 95812

Dear Mr. Ryden:

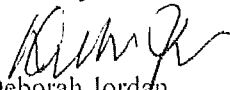
Enclosed for your information is a copy of a Notice of Violation and Finding of Violation ("NOV/FOV") that the United States Environmental Protection Agency ("EPA"), Region IX, issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("Act") at Lehigh's Portland cement plant in Cupertino, California (the "Facility").

The purpose of the NOV/FOV is to notify Lehigh that EPA finds that it has violated the Prevention of Significant Deterioration and Title V Operating Permit Program requirements of the Act at the Facility. The violations are set forth more specifically in the enclosed NOV/FOV. The NOV/FOV has been issued pursuant to sections 113(a)(1), 113(a)(3) and 167 of the Act, 42 U.S.C. § 7401-7671q.

The Act also provides that after 30 days from the issuance of an NOV, EPA may determine if any action will be taken pursuant to Section 113 of the Act.

If you have any questions concerning this NOV/FOV, please contact Charles Aldred of the Region 9 Air Enforcement Office at (415) 972-3986, or [aldred.charles@epa.gov](mailto:aldred.charles@epa.gov).

Sincerely,

  
Deborah Jordan  
Director, Air Division

Enclosure

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

In the Matter of:	)	
	)	
LEHIGH SOUTHWEST CEMENT COMPANY	)	Docket No. R9-10-02
	)	NOTICE OF VIOLATION
Proceeding under Section 113(a)	)	AND FINDING OF
of the Clean Air Act,	)	VIOLATION
42 U.S.C. § 9613(a)	)	
	)	

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NOTICE OF VIOLATION/FINDING OF VIOLATION

This Notice of Violation and Finding of Violation ("NOV/FOV") is issued to the Lehigh Southwest Cement Company ("Lehigh") for violations of the Clean Air Act ("CAA" or the "Act"), as amended, 42 U.S.C. §§ 7401-7671q, at its Portland cement manufacturing facility located in Cupertino, California (the "Facility"). Lehigh violated the Prevention of Significant Deterioration ("PSD") and Title Operating Permit Program requirements of the Act at the Facility. This NOV/FOV is issued pursuant to Sections 113(a)(1), 113(a)(3) and 167 of the Act. Section 113(a)(1) requires the Administrator of the United States Environment Protection Agency ("EPA") to notify any person she finds in violation of an applicable implementation plan or a permit. The federal PSD regulations also clarify that failure to comply with the PSD provisions renders a source subject to enforcement under Section 113 of the Act. See 40 C.F.R. § 52.23. The authority to issue this NOV has been delegated to the Regional Administrator of EPA Region 9 and further re-delegated to the Director of the Air Division in EPA Region 9.

## SUMMARY OF VIOLATIONS

The Facility is a Portland cement manufacturing plant comprised of one kiln, and associated equipment used to produce clinker, including a preheater tower, precalciner, clinker cooler, induced draft ("ID") and other fans, cement finish mills, and extensive sections of ductwork.

This NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999. Lehigh subsequently operated the Facility with the modified equipment which resulted in significant net emission increases. As a result, the projects, either individually or in the aggregate, caused an increase in production of cement and an increase in emissions of air pollutants to the atmosphere from the Facility.

The Facility is located in an area that has at all relevant times been classified as attainment for nitrogen dioxide ("NO<sub>2</sub>") and sulfur dioxide ("SO<sub>2</sub>"). Accordingly, the PSD provisions of Part C, Title I of the Act apply to operations at the Facility for oxides of nitrogen ("NO<sub>x</sub>")<sup>1</sup> and SO<sub>2</sub> emissions. EPA has determined that the physical or operational changes identified in this NOV/FOV, either individually or in the aggregate, were major modifications for PSD purposes since the Facility significantly increased both actual and potential emissions of NO<sub>x</sub> and SO<sub>2</sub> as a result of the changes. Moreover, Lehigh failed to apply for one or more PSD permits for the modifications covering NO<sub>x</sub> and SO<sub>2</sub>.

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<sup>1</sup>NO<sub>x</sub> serves as the regulated pollutant for the NO<sub>x</sub> standard.

emissions. Lehigh's failure to apply for a PSD permit or install and operate additional emissions controls meeting best available control technology ("BACT") covering these pollutants when it constructed and began operating the physical or operational changes was a violation of the PSD requirements of the Act.

Lehigh has also violated the Title V Operating Permit Program requirements of the Act set forth at 42 U.S.C. §§ 7461-7661f, the federal Title V regulations set forth at 40 C.F.R.

Part 70, and the approved Bay Area Air Quality Management District ("BAAQMD") Title V program set forth at Regulation 2 Rule 6. BAAQMD has administered an approved Title V Operating Permit Program since November 29, 1994. Lehigh's failure to identify PSD requirements in its application submitted to BAAQMD for a Title V permit, supplement or correct that application to include PSD requirements, or obtain a Title V permit that contains the PSD requirements after the construction and operation of the physical or operational changes are violations of Title V requirements. See 42 U.S.C. §§ 7661b(a)-(b) and 7661c(a); 40 C.F.R. §§ 70.5(a)(c); BAAQMD Regulation 2 Rule 6. As a result, Lehigh obtained a deficient Title V permit, i.e., one that did not include all applicable requirements, and therefore is operating the Facility without a valid Title V permit in violation of 42 U.S.C. §§ 7661a, 7661b, and 7661c; 40 C.F.R. §§ 70.1, 70.5 and 70.6; and BAAQMD Regulation 2 Rule 6.

## STATUTORY & REGULATORY BACKGROUND

### **National Ambient Air Quality Standards**

1. The Administrator of EPA, pursuant to authority under Section 109 of the Act, 42 U.S.C. § 7409, has promulgated National Ambient Air Quality Standards ("NAAQS") for certain criteria pollutants relevant to this NOV/FOV, including NO<sub>2</sub> and SO<sub>2</sub>. See 40 C.F.R. §§ 50.4, 50.5, 50.7, 50.8, 50.9, and 50.10.

2. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region ("AQCR") in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the California AQCRs are listed at 40 C.F.R. §§ 81.305.

### **Prevention of Significant Deterioration**

3. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA a plan that provides for the implementation, maintenance and enforcement of primary and secondary NAAQS in the state. Upon approval by EPA, the plan becomes part of the applicable state implementation plan ("SIP") for that state.

4. Section 110(a)(2)(C) of the Act, 42 U.S.C. § 7410(a)(2)(C), requires that each SIP include a PSD permit program as provided in Part C of Title I of the Act, 42 U.S.C. §§ 7470-7491. Part C sets forth requirements for SIPs for attainment areas to ensure maintenance of the NAAQS.

5. On June 19, 1978, pursuant to Sections 160 through 169 of the Act, 42 U.S.C. §§ 7470-7479, EPA promulgated federal PSD regulations at 40 C.F.R. § 52.21. 43 Fed. Reg. 26,402.

6. The federal PSD program was incorporated into all applicable implementation plans nation-wide and contains the applicable PSD program requirements for each plan until EPA approves into an individual SIP a replacement program. See 40 C.F.R. § 52.21(a); 42 U.S.C. § 7410(a)(2)(C).

7. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each AQCR in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The NO<sub>2</sub> and SO<sub>2</sub> attainment status designations for the California AQCRs are listed at 40 C.F.R. § 81.305.

8. The BAAQMD has primary jurisdiction over major stationary sources of air pollution sources in the San Francisco Bay Area Intrastate AQCR. 40 C.F.R. § 81.21. This jurisdiction includes the Facility.

9. Section 161 of the Act, 42 U.S.C. § 7471, requires that each SIP contains provisions to implement the Act's PSD program for areas of that state which are designated as being in attainment with any NAAQS for a criteria pollutant. The PSD program applies to major new sources of air pollution.

10. The PSD permitting program for the San Francisco Bay Area Intrastate AQCR is the federal PSD program, which is set forth at 40 C.F.R. § 52.21.

11. Subsequent to 1978, the PSD regulations have been periodically revised. As the PSD violations identified in this NOV/FOV first commenced from 1991 through 2003, the 1992 amendments to the PSD regulations contain the applicable provisions pertaining to the alleged violations identified in this NOV/FOV. See 57 Fed. Reg. 32314 (July 21, 1992).

12. 40 C.F.R. § 52.21 (b)(1)(i)(a) (1992) defined a "major stationary source" as any stationary source within one of 28 source categories which emits, or has the potential to emit, 100 tons per year ("tpy") or more of any air pollutant subject to regulation under the Act. Portland cement plants are included among the 28 source categories.

13. The PSD Regulations defined a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2)(i) (1992).

14. 40 C.F.R. § 52.21(b)(3)(i) (1992) defined "net emissions increase" as the "amount by which the sum of the following exceeds zero:

a. Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

b. Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and otherwise creditable."

15. 40 C.F.R. § 52.21(b)(21) (1992) defined "actual

emissions" as follows: "In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." The PSD regulations also provide that "[f]or any emissions unit ... which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit on that date." 40 C.F.R. § 52.21(b)(21)(IV) (1992).

16. 40 C.F.R. § 52.21(b)(4) (1992) defined "potential to emit" as the "maximum capacity of a stationary source to emit a pollutant under its physical or operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including the air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable."

17. As such, the PSD regulations utilize an actual-to-potential test to determine whether an emissions increase occurred. Moreover, 40 C.F.R. § 52.21(b)(23)(i) (1992) defined "significant" and states that, in reference to NO<sub>x</sub> and SO<sub>2</sub>, significant net emissions increase means an increase that would equal or exceed 40 tons or more per year.

18. An applicant for a PSD permit to modify a stationary source is required to submit all information necessary to allow the permitting authority to perform any analysis or make any



determination required in order to issue the appropriate permit.  
40 C.F.R. § 52.21(n) (1992).

19. 40 C.F.R. § 52.21(i) (1992) prohibited commencement of actual construction of a major modification to which the PSD requirements apply unless the source had a permit stating that the requirements of 40 C.F.R. §§ 52.21(j)-(r) had been met.

20. The PSD permitting process required, among other things, that for pollutants emitted in significant amounts, the owner or operation of a major source apply BACT to control emissions, 40 C.F.R. § 52.21(j) (1992); model air quality, 40 C.F.R. § 52.21(l) (1992); and perform a detailed impact analysis regarding both the NAAQS and allowable increments, 40 C.F.R. § 52.21(k) (1992).

21. Any owner or operator of a source or modification subject to 40 C.F.R. § 52.21 who commenced construction after the effective date of the PSD regulations without applying for and receiving a PSD permit is subject to appropriate enforcement action by EPA. 40 C.F.R. § 52.21(r)(1) (1992); Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477.

#### **Title V Operating Permit Program**

22. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for "major sources," including any source required to have a PSD permit. See Section 502(a) of the Act, 42 U.S.C. § 7661a(a). Regulations implementing the Title V permit program are set forth in 40

C.F.R. Part 70.

23. Pursuant to Title V, it is unlawful for any person to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V. Section 502(a) of the Act, 42 U.S.C. § 7661a(a).

24. Under Section 502(d)(1) of the Act, states were required to develop and obtain approval to administer Title V programs. 42 U.S.C. § 7661a(d)(1). EPA granted interim approval of BAAQMD's Title V Operating Permit Program effective July 24, 1995, and final full approval was effective November 30, 2001. See 40 C.F.R. Part 70 Appendix A.

25. Sources subject to Title V and falling under BAAQMD's jurisdiction are required to submit to BAAQMD timely and complete Title V applications that identify, among other things, all "applicable requirements," including PSD requirements. See 40 C.F.R. § 70.5(a); BAAQMD Rule 2-6-404 and 2-6-405.

26. Sources subject to Title V and falling under BAAQMD's jurisdiction who have submitted an application are required to supplement or correct the application to include applicable requirements that were not included in the original application. 40 C.F.R. § 70.5(b); BAAQMD Rule 2-6-405.10.

27. Sources subject to Title V and falling under BAAQMD jurisdiction must obtain a Title V permit that: 1) contains such conditions necessary to assure compliance with the applicable

requirements; 2) identifies all applicable requirements the source is subject to; and 3) certifies compliance with all applicable requirements, and 4) where a source is not meeting requirements, contains a plan for coming into compliance. Sections 503 and 504 of the Act, 42 U.S.C. §§ 7661b and 7661c(a); 40 C.F.R. §§ 70.1, 70.5 and 70.6; BAAQMD Rule 2-6-409.

28. Failure of a source subject to Title V to submit a complete application; supplement that application when new requirements become applicable, or to obtain a Title V permit that contains all applicable requirements, such as PSD requirements, are violations of the Act.

#### FINDINGS OF FACT

29. The Facility is a Portland cement manufacturing facility, which is located at 24001 Stevens Creek Boulevard, Cupertino, Santa Clara County, California.

30. The San Francisco Bay Area Air Basin, which includes Santa Clara County where the Facility is located, was designated as attainment/unclassifiable at all times for NO<sub>2</sub> and SO<sub>2</sub> by operation of law under Sections 107(d)(1)(C) and 186(a) of the Act, 42 U.S.C. §§ 7407(d)(1)(C) and 7486(a). See 56 Fed. Reg. 56694 (Nov. 6, 1991); 40 C.F.R. § 81.305.

31. Lehigh is the current owner and operator of the Facility. The Facility was formerly owned by Hanson Permanente Cement and Kaiser Cement Corporation.

32. The Facility includes one kiln, and associated

equipment used to produce clinker, including a preheater tower, precalciner, clinker cooler, induced draft ("ID") and other fans, cement finish mills, and extensive sections of ductwork.

33. The combustion of coal, petroleum coke, and natural gas at the kiln at the Facility produces emissions of NO<sub>x</sub> and SO<sub>2</sub>, which are released to the atmosphere through a collection of 32 individual mini-stacks exiting from the baghouse.

34. Between 1996 and 1999, Lehigh commenced construction of various physical and/or operational changes at the Facility, and has continued to operate the Facility with these modifications, including, but not limited to, the following:

- a. Upgrades to the finish mill; and
- b. Various other modifications, upgrades, and operational changes *[Note: The underlying documents identifying these other projects have been claimed by Lehigh as confidential business information, and therefore are not being specifically identified in this NOV/FOV. Regardless, as the NOV/FOV raises allegations relating to all physical or operational changes commencing from 1996 through 1999, these other projects are covered within the scope of the NOV/FOV.]*

35. Lehigh intended that these physical or operational changes, either individually or in the aggregate, would increase the production capacity of the Facility.

36. These physical or operational changes, either

individually or in the aggregate, resulted in an increase in annual clinker production at the Facility.

**Prevention of Significant Deterioration**

37. The Title V Permit issued by BAAQMD included, among other conditions, the following annual emissions limits for NO<sub>x</sub> and SO<sub>2</sub> emissions from the Kiln at the Facility:

	NO <sub>x</sub>	SO <sub>2</sub>
Emissions limit (tpy)	5,072	2,106.8

38. As the limits in the Title V Permit for the Facility are federally enforceable, they constitute the Facility's Potential to Emit ("PTE").

39. Based upon a comparison of pre-construction actual emissions to post-construction PTE, the physical or operational changes identified in Paragraph 34, either individually or in the aggregate, resulted in net emissions increases from the Facility of NO<sub>x</sub> and SO<sub>2</sub>.

40. The net emissions increases of NO<sub>x</sub> and SO<sub>2</sub> as a result of the physical or operational changes identified in Paragraph 34, either individually or in the aggregate, constitute a PSD significant net emissions increase since the increases were above 40 tpy for NO<sub>x</sub> and SO<sub>2</sub>.

41. Each of the physical or operational changes identified in Paragraph 34 constituted, either individually or in the aggregate, a "major modification" to the Facility for PSD purposes, as defined by 40 C.F.R. § 52.21 (b) (2) (i).

42. Lehigh did not apply for a PSD Permit covering NO<sub>x</sub> and

SO<sub>2</sub> emissions for any of the physical or operational changes identified in Paragraph 34.

43. Lehigh failed to install and operate BACT-level emission controls for NO<sub>x</sub> and SO<sub>2</sub> emissions from the Facility either at the time each of the physical or operational changes identified in Paragraph 34 were commenced or any time since their completion and operation.

#### **Title V Operating Permit Program**

44. As alleged in Paragraphs 34 through 43, Lehigh commenced one or more major modifications at its Facility commencing from 1996 through 1999, and the modifications triggered the requirements to obtain a PSD permit, undergo a PSD BACT analysis, and operate in compliance with the PSD permit. Lehigh failed to satisfy these requirements.

45. Lehigh first submitted a Title V application to BAAQMD on June 21, 1996. The final permit was issued by BAAQMD on November 5, 2003.

46. Prior to issuance of the Title V permit, Lehigh failed to supplement and/or correct its Title V permit application to identify all applicable requirements, including PSD requirements for NO<sub>x</sub> and SO<sub>2</sub>, a plan to come into compliance with those PSD requirements, and an updated certification of compliance that included the PSD requirements.

47. As a result of Lehigh's failure to provide complete information in its application or to supplement and/or correct

its application to include PSD requirements, Lehigh obtained a deficient Title V operating permit that did not contain all applicable requirements.

48. Pursuant to Section 502(a) of the CAA, 42 U.S.C. § 7661a(a), it is unlawful for any person to operate a source required to have a PSD permit except in compliance with a permit issued by a permitting authority under Title V. Similarly, 40 C.F.R. §§ 70.1(b), 70.6(a) and BAAQMD Rule 2-6-409 require sources subject to Title V to have an operating permit that assures compliance with all applicable requirements.

49. Lehigh has operated and continues to operate the Facility without a valid Title V operating permit in violation of Sections 502, 503 and 504 of the Act, 42 U.S.C. §§ 7661a, 7661b, and 7661c; 40 C.F.R. §§ 70.1, 70.5 and 70.6; and BAAQMD Regulation 2 Rule 6.

#### FINDING OF VIOLATION

##### **Prevention of Significant Deterioration**

50. Pursuant to Section 113(a)(1) of the Act, notice is hereby given to Lehigh that the Administrator of the EPA, by authority duly delegated to the undersigned, finds that Lehigh is in violation of federal PSD requirements at the Facility described in this NOV/FOV. EPA reserves the right to amend this NOV/FOV or issue a new NOV/FOV based on additional information obtained through Section 114 of the Act or any other source available to the Administrator at any point.

### Title V Operating Permit Program

51. Notice is also given to Lehigh that it failed to supplement or correct its Title V application submitted to BAAQMD to include PSD requirements or obtain a Title V permit that contained PSD requirements, and therefore is in violation of Title V of the Act.

#### ENFORCEMENT

52. For any violation of a SIP, such as for PSD violations, Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of a notice of violation, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIP, issue an administrative penalty order, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation that occurs on or before January 30, 1997, not more than \$27,500 per day for each violation that occurs after January 30, 1997, not more than \$32,500 per day for each violation that occurs after March 14, 2004; and not more than \$37,500 per day for each violation that occurs after January 12, 2009. 42 U.S.C. § 7413(a)(1); Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended; 40 C.F.R. Part 19.

53. Sections 113(a)(3) and 167 of the Act, 42 U.S.C. §§ 7413(a)(3) and 7477, provide additional authority for EPA to enforce against violators of the Act.



54. Section 113(c) of the Act, 42 U.S.C. § 7413(c), provides for criminal penalties, imprisonment, or both for persons who knowingly violate any federal regulation or permit requirement. For violations of the SIP, a criminal action can be brought 30 days after the date of issuance of a Notice of Violation.

55. Section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in Lehigh and/or the Facility being declared ineligible for participation in any federal contract, grant, or loan.

#### **PENALTY ASSESSMENT CRITERIA**

56. Section 113(e)(1) of the Act, 42 U.S.C. § 9613(e)(1), states that the Administrator or the court shall determine the amount of a penalty to be assessed by taking into consideration such factors as justice may require, including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, and the seriousness of the violation.

57. Section 113(e)(2) of the Act, 42 U.S.C. § 9613(e)(2),

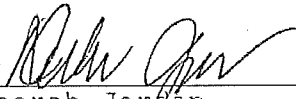
allows the Administrator or the court to assess a penalty for each day of violation. This section further provides that for purposes of determining the number of days of violation, where EPA makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of an NOV, the days of violation shall be presumed to include the date of the NOV and each and every day thereafter until the facility establishes that continuous compliance has been achieved, except to the extent that the facility can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

OPPORTUNITY FOR CONFERENCE

58. Lehigh may confer with EPA regarding this NOV/FOV if it so requests. A conference would enable Lehigh to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. If Lehigh seeks such a conference, it may choose to be represented by counsel. If Lehigh wishes to confer with EPA, it must make a request for a conference within 10 working days of receipt of this NOV/FOV. Any request for a conference or other inquiries concerning the NOV/FOV should be made in writing to:

Ivan Lieben  
Office of Regional Counsel  
U.S. EPA (ORC-2)  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) 972-3914

Dated: 3-9-10

  
\_\_\_\_\_  
Deborah Jordan  
Director, Air Division

