

County of Santa Clara

Department of Planning and Development
Planning Office

County Government Center, East Wing, 7th Floor
70 West Hedding Street
San Jose, California 95110-1705
(408) 299-5770 FAX (408) 288-9198
www.sccplanning.org



MEMORANDUM

Date: November 19, 2010

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

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

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

Re: **Responses to comments made during the Public Comment portion of the Board of Supervisors Meeting on November 9, 2010, related to Lehigh Southwest Cement Plant and the Permanente Quarry**

During the Public Comment portion of the November 9, 2010, meeting of the Board of Supervisors five 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. 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 for your information.

SPEAKER ONE: Barry Chang :

"Good Morning President Yeager and honorable Board of Supervisors. My name is Barry Chang, and I am a member of Cupertino City Council. Make it clear. I am a member. Okay, because I had got accusation of making false statement. I don't want to have any misunderstanding. I'm a member of Cupertino City Council. I'm here to ask you--this is my eighth consecutive time--to put Lehigh Southwest Cement Plant's Notice of Violation on the agenda because the County give them Notice of Violation in 2006 and 2008, especially in 2008. It required number one to cease depositing material in an illegal dumping area. But, as of today, still going on and there is no enforcement. So, my constituents, also your constituents, wonder why the County is not taking action to enforce the law. Thank you. Bye.."

President Yeager: Thank you. As you know, Barry, on November 23rd there will be a vested rights hearing with Lehigh, so maybe that will be an opportunity for you to present some of your opinions.

Councilmember Chang: Sure, and that will make me even more concerned, more worried, because now suddenly what I can see, what my constituents can see, is that the County is going to legalize the violation

for the polluter which is really bad for your impression for all the elected officials, so please take that into consideration. Thank you.

Response:

Notices of Violation

As previously noted in the October 21 and 28, 2010, responses to public comments made to the Board, the Surface Mine and Reclamation Act (SMARA) establishes a process to cure a violations including filing for and obtaining a Reclamation Plan Amendment from the lead agency. Fines may be imposed if the mine operator fails to take action to correct the violation(s). The mine operator has taken actions to correct the 2006 and 2008 Notices of Violation (NOV), therefore, no fines can or should be imposed at this time:

- Lehigh Southwest Cement Company (“Lehigh”)has submitted (comprehensive) Reclamation Plan Amendment application materials in response to the 2006 NOV, as required. Plan review is in process and will result in public hearings on the associated environmental impact report and Plan itself in spring 2012.
- Lehigh has also submitted a separate Reclamation Plan Amendment in response to the 2008 NOV. This plan specifically addresses the storage of overburden on an area referred to as the East Materials Storage Area (EMSA) In addition, the County and Lehigh have also entered into an agreement to allow the continued use of the EMSA subject to and on condition of filing/processing of the EMSA Reclamation Plan Amendment.

Approval of the proposed amendments would correct or “cure” the 2006 and 2008 violations and are thus the means of enforcement.

Mr. Chang has again asked, “Why is the County not taking action?” The County has taken action by issuing NOV’s. And by filing for reclamation plan amendments, Lehigh has taken action to cure the violations. There are no other actions the County can or should take at this time.

Vested Rights Hearing

In his comments, Mr. Chang stated that the County had scheduled a hearing for November 23rd to “.....legalize the violation for the pollution”. This is incorrect. The elected officials have not yet heard the evidence and testimony from the operator, staff and the public and have not concluded anything at this time. When the public hearing is conducted, the County will be asked to decide whether and to what extent Lehigh has or has not established a legal non-confirming use to continue use of the EMSA (a status referred to as a vested right by the state Surface Mine and Reclamation Act).

As of Friday, November 12, 2010, staff found that it did not have sufficient information to complete the analysis and therefore issued a notice to the public advising that the hearing would be continued to a date uncertain. Staff must ensure that sufficient detail is obtained and reported, and also must ensure adequate time is provided for the public to review the final report ahead of a hearing before the Board. When the analysis is complete staff will re-notice the hearing, which is expected to take place in January or February 2011.

SPEAKER TWO – Joy Barret

“Good morning. My name is Joy Barret. I’m here also about Lehigh Cement Company, and that I noticed that they had a Notice of Violation on June 2008, and they were supposed to stop dumping toxic waste in this one area. And, so far, nothing has been done about it. They had about a month to comply, and I’m wondering why nothing has been done. Umm--- That’s it. .”

Response:

In 2008 the County issued a Notice of Violation (NOV) to the Lehigh Southwest Cement Company for stockpiling overburden material extracted from the existing Permanente Quarry within the area referred to as the East Materials Storage Area. The material was found to be material excavated from the mine pit and not toxic materials. The mine operator ceased this activity as required under the NOV. The operator also filed for a Reclamation Plan Amendment (RPA) in order to abate the NOV. Under an agreement with the County the mine operator has been allowed to use the EMSA to receive additional overburden while the reclamation plan amendment continues to be processed. The agreement provides for fines, if necessary. Potential environmental impacts of the proposed reclamation plan amendment are being analyzed as required under CEQA. The potential impacts will be reported in a Draft Environmental Impact Report, as described above. When the EIR is complete a hearing will take place to consider approval of the RPA, which is expected to take place in 2011.

Again, the material referenced in the 2008 NOV was found to be material excavated from the mine pit and not toxic materials. The mine operator did cease to stockpile this “overburden” until a agreement was reached with the County to allow for continued use of the EMSA. The agreement also required Lehigh to file for a second Reclamation Plan Amendment. Lehigh made that filing within the time frame as required.

SPEAKER THREE: Craig Lee

“Good morning Board of Supervisors, President Yeager. My name is Craig Lee. I’m a County resident. Recent news reminds us that mine accidents happen. I’m thinking of, not the accident in Chili, but the one in Hungary where a toxic spill occurred from a retention pond. But, also one can recall such an accident in Kentucky almost ten years ago when a coal retention area spilled and eventually reached the Ohio river. These types of accidents are tragic, but they are not unavoidable. Information will be presented next week to you at the hearing that you mentioned to determine whether Lehigh has a vested right to use the quarry. I ask you to consider-- carefully consider this information. They do not have a vested right. I ask you to make sure they are issued a use permit for this facility. Consider first the health and safety of County residents. Help prevent accidents that are preventable. Thank you.”

Response:

The County of Santa Clara is the lead agency charged with implementation of the State Surface Mine and Reclamation Act (SMARA). This statute relates to reclamation of the land where surface mine operations exist, such as the Permanente Quarry. It does not address mine safety. Federal and state law govern mine-safety, and federal and state agencies conduct annual inspections for compliance with those standards. The Mine Health and Safety Administration (MSHA) checks the documentation of all required safety training, the safety of the mine operation (slope stability, safety berms, etc), equipment (including vehicles), and the safety awareness of miners. They also check all health standards for the miners at their work place.

As noted above, a public hearing was scheduled for November 23, 2010, for the Board of Supervisors to consider whether Heidelberg Cement Inc. (property owner) and Lehigh Southwest Cement Company (the mine operator) has a legal non-conforming use at the Permanente Quarry site, as it relates to the East Materials Storage Area (EMSA). As of Friday, November 12, 2010, staff found that it did not have sufficient information to complete the analysis and therefore issued a notice to the public advising that the hearing would be continued to a date uncertain. Staff expects to have its analysis ready for a hearing to take place in January or February 2011.

SPEAKER FOUR: Ann Flager

“Good morning. My name is Ann Flager and I’m also a resident of Santa Clara County. My husband’s family purchased about an acre of land out in that area of the County near the Lehigh cement plant in the early 50s and we’re very concerned about if there is a new proposal that they be granted a new permit for a new open pit mine, and we think these violations need to be addressed first. There are many violations against this company. And, I’m specifically concerned about air quality control because I understand from an EPA report that they drop over two-thousand tons a year of sulfur dioxide into our atmosphere and there are a lot of people with asthma as a result and I would like to see these violations addressed before that new permit is even considered. Thank you.”

Response:

Lehigh Cement Inc., has submitted an application for a Reclamation Plan Amendment (RPA) that would include an expansion to the quarry operation with a second pit. This second pit proposal includes an application for a Use Permit (UP). Both of the proposed RPA and UP approvals must first be evaluated under CEQA for potential environmental impacts. Work will commence in mid-December 2010 on a Draft Environmental Impact Report (DEIR) as it relates to this Comprehensive RPA that will identify and evaluate potential environmental impacts as required under CEQA. Air quality is one of numerous issues that will be evaluated and reported in the DEIR. Public comment will be received regarding this DEIR. Public comment will also be received by the County at the time the Use Permit and Reclamation Plan are taken into consideration by the Planning Commission.

SPEAKER FIVE: Anna Croth

“Good morning. My name is Anna Croth. I am Santa Clara County resident. I live on Montebello Road and that is just east of the Lehigh Cement plant. I know from my neighbors that we have children that go to Montebello school who had higher occurrence of special needs children. So, I think that I’m concerned, and I would also like to urge you not to brush aside the violations that you, the County, issued against the Lehigh, and I think before you grant them any further extensions or amendments on the reclamation plan, that you should really enforce what you’ve already issued against them. Thank you. Can I mention one more thing?”

President Yeager: Very briefly.

Anna Croth: The date of your next meeting is just very inconvenient. It’s just two days before Thanksgiving, and people have Thanksgiving related plans. And, I know that the neighbors,

because of that, would not be able to attend as many numbers as they could, and apparently there is a pattern of scheduling such meetings..”

Response:

We do not have statistics available to verify or otherwise comment on the number of special needs children attending Montebello School.

The Notices of Violation issued by the County against Lehigh Cement Co. are enforced through timely processing of amendments to the Permanente Quarry reclamation plan. Each of these amendments require analysis of potential environmental impacts, as described above.

As noted above, the public hearing referenced by the speaker, scheduled for November 23, 2010, will be re-scheduled when staff completes its research, analysis, and report writing regarding the legal non-conforming use questions related to the Permanente Quarry, East Materials Storage Area. Staff anticipates the hearing will take place in January or February 2011, and thereby avoid conflicts with the holiday season.

cc:

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

Jody Hall Esser, Director, Department of Planning & Development
Rob Eastwood, Senior Planner
Marina Rush, Associate Planner

Miguel Márquez, County Counsel
Lizanne Reynolds, Deputy County Counsel