

November 22, 2019

VIA HAND DELIVERY

Larry Sheingold, Chair
California State Mining and Geology Board
801 K Street, Suite 2015
Sacramento, CA 95814
smgb@conservation.ca.gov

***Re: Intent to Appeal – Reclamation Plan
Permanente Quarry; California Mine ID No. 91-43-0004***

Dear Chair Sheingold:

Lehigh Southwest Cement Company (“Lehigh”) respectfully submits this Intent to Appeal (“Appeal”) under Public Resources Code section 2770, subdivision (e), and Title 14, California Code of Regulations Section 3650.¹

INTRODUCTION

Under SMARA, a mine operator cannot substantially adjust mining operations to reach unharvested mineral reserves either within or beyond the approved reclamation plan boundary until approval of a reclamation plan amendment. For this reason, SMARA recognizes that mine operators’ ability to obtain reclamation plan approvals within a reasonable time is critical to maintaining an adequate supply of mined resources for the State of California.

SMARA accomplishes this goal by authorizing the State Mining and Geology Board (“Board”) to review and approve reclamation plans on appeal. SMARA Section 2770, subdivision (e), and SMARA Regulations Section 3650 et seq., give the Chair of the Board the authority to accept substantial reclamation plan appeals in three circumstances. The first is where the lead agency unreasonably delays its processing of a complete reclamation plan application. The second is where a lead agency denies a reclamation plan based on considerations not related to SMARA and the lead agency’s surface mining ordinance. The third basis for appeal is where the lead agency fails to act according to due process. In any of these circumstances, the Board is authorized to process and approve the reclamation plan.

¹ Further references to the Surface Mining and Reclamation Act provisions in the Public Resources Code shall be to “SMARA” and further references to SMARA’s regulations at Title 14 of the California Code of Regulations shall be to “SMARA Regulations.”

Lehigh's Permanente Quarry ("Quarry") is a vested mining operation.² It is located in Santa Clara County ("County"). The Quarry produces limestone and construction aggregates. The limestone feeds Lehigh's adjacent cement manufacturing plant. The Quarry and cement plant employ roughly 160 workers who are members of various labor unions. From these facilities, Lehigh supplies approximately 80 percent of the cement used in the County and 50 percent of the cement used in the greater San Francisco Bay Area, as well as construction aggregates.

In order to continue supplying these important markets, Lehigh must adjust its mining plans to access unharvested mineral reserves in the vested area. On May 22, 2019, Lehigh filed an application to amend the approved reclamation plan (hereinafter "Amended Reclamation Plan" or "Application") to access these reserves and to improve the reclamation approaches to slope stability and water quality protection.

In a letter dated November 8, 2019, the County found Lehigh's Application to be complete. Within the same letter, however, the County stated that it would not process the Application or bring the Application forward to approval unless Lehigh agreed to suspend its Application indefinitely and submit to a separate process requiring Lehigh to pursue and secure the approval of a different reclamation plan amendment of the County's design.

The effect of this letter is to functionally deny Lehigh's Application following a process not contained in SMARA or the County's surface mining ordinance ("SMARA Ordinance"). Nothing in SMARA or the SMARA Ordinance permit the County to require Lehigh to "freeze" its Application, pursue a different application, and waive its rights to have the Application processed in a reasonable time or at all.

In sum, Lehigh needs to access its vested reserves in a reasonable timeframe to provide business certainty. Lehigh needs the Amended Reclamation Plan approval in order to harvest these reserves. The County's November 8, 2019 action denies, or indefinitely stalls, this Application and its corresponding timely processing. Thus, absent relief from the Board, Lehigh's Amended Reclamation Plan will not be processed or the process will be unreasonably delayed.

FACTUAL BACKGROUND FOR APPEAL

The Quarry is located in the County's western hillsides and has been in continuous operation since the early 1900s. By the 1930s, under the direction of Henry Kaiser, the Quarry became one of the world's largest and most productive limestone facilities. The limestone serves an adjacent and separately permitted cement manufacturing facility. The Board has designated the site as a regionally significant source of minerals for the State of California. **Exhibit A** to this Intent to Appeal contains maps to familiarize the Board with the Quarry.

The Quarry commenced surface mining operations prior to use permit requirements and is therefore a vested operation pursuant to SMARA section 2776. The County Board of Supervisors, in 2011, publicly confirmed the existence and scope of the Quarry's rights. Although vested, the Quarry must under SMARA maintain an approved reclamation plan. In 2012, the County approved the current

² Lehigh operates the Quarry, which is owned by a corporate affiliate, Hanson Permanente Cement, Inc.

reclamation plan based on the surface mining operations and reclamation strategies envisioned at that time.

On May 22, 2019, Lehigh filed the Application with the County. The Application would incorporate new areas of ongoing mineral extraction, new slope stability treatments and a new approach to reclaiming the mine excavation to improve water quality. These changes are intended to assure a permanently safe and stable reclaimed landscape. A complete copy of the proposed Amended Reclamation Plan, as deemed complete by the County, accompanies this Intent to Appeal.

On June 13, 2019, twenty-two days after Lehigh filed the Application, the County notified Lehigh of violations of the approved reclamation plan. (See **Exhibit B**, “NOV”.) The NOV identified sediment discharges in the “Yeager Yard,” an area within the southeast portion of the West Materials Storage Area that contains steep slopes adjacent to Permanente Creek. (See **Exhibit A** maps.) The area is within both the approved reclamation plan boundary and the Amended Reclamation Plan boundary. The County based the NOV on erosion that occurred during heavy winter rains in the preceding wet season. The NOV asserted violations of sediment-control BMPs required by the reclamation plan, and identified six corrective actions for Lehigh to implement to return to compliance. (**Exhibit B**.)

On June 28, 2019, Lehigh responded to the NOV. (See **Exhibit C**.) The response informed the County of the corrective actions already completed by Lehigh and provided a schedule for the remaining actions that by their nature required more time to complete. Subsequently, on October 29, 2019, Lehigh advised the County that it had completed all of the corrective actions in the NOV. (See **Exhibit D**.) To date, Lehigh has spent more than \$4.9 million on geotechnical and environmental studies and drainage improvements.

Importantly, this appeal does not concern the NOV. Lehigh is confident that its corrective actions cure the issues described in the NOV and that, working with the County, the NOV will be resolved to the County’s satisfaction through the appropriate compliance process.

On November 8, 2019, six months after Lehigh filed its Application, the County sent a letter deeming the Application complete. (See **Exhibit E**.) In this letter, however, the County declared that it would not process or approve the complete Application, would not perform review under the California Environmental Quality Act (“CEQA”), and would deny the Application unless Lehigh agreed to process it in a way not described in SMARA or the SMARA Ordinance (S.C.C. Ord., § 4.10.370, **Exhibit F**), and which dramatically departs from typical and accepted lead agency practice.

The County instructed Lehigh to submit a letter “requesting” that the County suspend all processing of the Application just deemed complete. In addition, the County required Lehigh to process a new and different reclamation plan amendment that would combine new County requirements for the Yeager Yard with an existing application for a minor boundary adjustment already being processed for a different area known as the “Utility Haul Road.”³ (See **Exhibit E**, pp. 2, 4 and Attachment A, p. 3, ¶ F; see also **Exhibit A**, Maps.) The letter required Lehigh to suspend the Application indefinitely as this County-devised amendment was processed. The County expressed this requirement in blunt terms:

³ The Utility Haul Road involved different area two miles away from the Yeager Yard. That application was nearing completion and a Planning Commission hearing was planned for December 2019.

- F. By January 6, 2020, Lehigh will agree in writing to amend the Utility Road Reclamation Plan Amendment Application (PLN19-0067) to include the Yeager Yard slope stabilization. In addition, Lehigh will submit a letter in writing requesting that the County cease processing the Major Reclamation Plan Amendment Application (County File No. PLN19-0106) currently under review until such time as the Utility Road Reclamation Plan Amendment Application (PLN19-0067) has been approved by the County.

(See **Exhibit E**, Attachment A, p. 3, ¶ F.)

The November 8, 2019 letter effectively denied the Amended Reclamation Plan by declaring the County's refusal to process it, or to conduct a CEQA review which renders the County functionally unable to approve the Application. The denial of the Amended Reclamation Plan presents a major risk to Quarry operations, which require approval in a timely manner to continue providing limestone and aggregate to the County and San Francisco Bay Area. The County's actions compel Lehigh to bring this Appeal and request that the Board process and approve the Amended Reclamation Plan.

What follows addresses each Appeal element contained in SMARA section 2770, subdivision (e), and the Board's governing regulations.

APPEAL ELEMENTS

A. Section 3650 (Preamble, Timeliness and Exhaustion of Lead Agency appeal procedures)

The appeal is timely. SMARA Regulations Section 3650 requires Lehigh to file an Intent to Appeal within 15 days of exhausting its rights to appeal. This Intent to Appeal is filed within 15 days of the County's November 8, 2019 letter which effectively denied approval of the Amended Reclamation Plan. The County does not have an administrative appeal process where its Planning Department refuses to process a complete application, as is the case here.

B. Section 3650(a) (Map)

Exhibit A to this Appeal contains maps that show the exact location of the Quarry and which identify different parts of the Quarry by name.

C. Section 3650(b) (Complete Reclamation Plan)

Accompanying this Appeal is a complete copy of the Amended Reclamation Plan which the County deemed complete on November 8, 2019.

D. Section 3650(c) (Statement and Documentation Supporting the Basis of the Appeal)

SMARA section 2770, subdivision (e), and SMARA Regulations Section 3650 provide the legal standards for an appeal to the Board. They provide, in relevant part:

A person who can substantiate, based on the evidence of the record, that a lead agency has either (A) failed to act according to due process or has relied on considerations not related to the specific applicable requirements of Sections 2772, 2772.1, 2773, 773.1, 2773.3, and 2773.4 and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774 in reaching a decision to deny approval of a reclamation plan or financial assurances for reclamation, or (B) failed to act within a reasonable time of receipt of a completed application may appeal that action or inaction to the board.

(SMARA Section 2770, subdivision (e)(1).)

Any person filing an appeal to the Board pursuant to PRC 2770 shall, within 15 days of exhausting his or her rights to appeal in accordance with the procedures of the lead agency, file an intent to appeal by submitting the following information...

(c) Written statements with supporting documentation indicating the basis for the appellant's challenge of:

(1) the lead agency's action to deny approval of the reclamation plan submitted pursuant to PRC 2770; or

(2) the lead agency's failure to act according to due process; or

(3) the lead agency's failure to act within a reasonable period of time of submittal of a completed application.

(SMARA Regulations, Section 3650(c).)

Below, we address these standards as applied to the facts before the Board.

1. Denial of Approval Based on Considerations Not Related to SMARA and the County's SMARA Ordinance

SMARA Section 2770, subdivision (e)(1), allows the Board to accept an appeal where a lead agency has denied approval of a reclamation plan relying “on considerations not related to the specific applicable requirements” of SMARA and the SMARA Ordinance.

The County bases its denial of the Amended Reclamation Plan upon the existence of a reclamation plan violation which the County treats as unresolved. The County asserts that a provision of its code, not contained in the SMARA Ordinance, prevents the County from processing the Amended Reclamation Plan until Lehigh resolves the NOV to the County's satisfaction.

No provision within SMARA, however, authorizes a lead agency to either deny or refuse to process a reclamation plan amendment because an operator is in the process of resolving a reclamation plan violation. Nor does SMARA authorize a lead agency to require the operator to process a different, lead agency-devised reclamation plan amendment as a prerequisite to acting on the operator’s application.

Neither does the SMARA Ordinance provide such authority. In cases of reclamation plan violations, the SMARA Ordinance states only that the County “shall follow the procedures in SMARA Sections 2774.1 and 2774.2.” (**Exhibit F**, Part III, Sec. C.1.) SMARA Sections 2774.1 and 2774.2 do not authorize the denial of a reclamation plan, or delay of the reclamation plan approval process, as an enforcement remedy.

The sole authority relied on by the County in support of its refusal to process Lehigh’s Application is Section C 1-71 of the County’s ordinances.⁴ (See **Exhibit E**, p.2.) That section is not applicable because it is not part of the SMARA Ordinance and exists in a different part of the County code. Thus, the Application’s denial is based on “considerations not related to the specific applicable requirements” of SMARA and the SMARA Ordinance because it is based on County code provisions that are not contained in the SMARA Ordinance.

Moreover, we observe that, should the County consider itself bound by its interpretation of Section C 1-71 to deny Lehigh’s application until Lehigh resolves the NOV to its satisfaction, that legal constraint would be fundamentally incompatible with SMARA and render the Board alone capable of approving the Amended Reclamation Plan in a timely manner as mandated by SMARA.

2. Lead Agency Failure to Act According to Due Process

SMARA Section 2770, subdivision (e)(1), authorizes the Board to accept an appeal where the lead agency has “failed to act according to due process.” The County has failed to act according to due process by using its November 8, 2019 letter to require Lehigh to waive its rights to have its Amended Reclamation Plan approved within a reasonable time, or at all. Specifically:

- a. The letter instructs Lehigh to stop all processing of its Application, and instead follow a process, not contained within either SMARA or the SMARA Ordinance, which suspends the Application indefinitely. These requirements violate Lehigh’s substantive and procedural rights under SMARA, and general due process rights, to have a reclamation plan application processed and decided upon within a reasonable time.
- b. It mandates, as a prerequisite to the County taking action to process the Amended Reclamation Plan at an indeterminate future date, that Lehigh pursue an entirely different reclamation plan amendment that combines the pending Utility Haul Road application with

⁴ Sec. C1-71. - Violations or conflicts of laws. No permit required by this title shall be issued to any applicant, and no final inspection shall be made in connection with any premises or portion thereof upon which there exists a conflict with any County ordinance or state law. Permits may be issued to applicants in connection with any premises or portion thereof on which there exists a conflict with any County Ordinance or state law if the applicant has executed a compliance agreement and is in the process of completing or has completed the repairs, construction, or reconstruction described in the compliance agreement.

new requirements for the Yeager Yard, although the Yeager Yard is already covered by the existing and proposed reclamation boundaries. Nothing in SMARA permits a lead agency to dictate the terms of a mine operator’s reclamation plan. This requirement violates Lehigh’s substantive and procedural rights.

- c. It requires Lehigh to indefinitely delay a separate application involving the Utility Haul Road. The County accepted this application as complete in August 2019, and as recently as November 4, 2019, County staff assured Lehigh that they would present this application to the Planning Commission for approval in December 2019 (after previously advising that the Planning Commission would hear the application in November). The County’s November 8, 2019 letter removed that assurance. This too violates Lehigh’s rights to have a reclamation plan processed within a reasonable time and is a violation of due process.
- d. It requires Lehigh to grant the Planning Director the sole discretion to revoke or modify the approved reclamation plan, and any future amendments to that plan, or “additional permits” that may be sought in the future. (**Exhibit E**, Attach. A, p. 4.) A provision that entitles the Planning Director to “revoke” an approved reclamation plan conflicts with SMARA’s legal requirement that every surface mining operation have an approved reclamation plan and represents a deprivation of constitutionally protected property rights.
- e. It requires Lehigh to follow a piecemeal approach to the Amended Reclamation Plan, rather than processing a single, integrated Amended Reclamation Plan for the entire reclamation project, as contemplated by the Application.

In sum, the County’s November 8, 2019 letter requires one of the state’s most significant surface mining operations to waive its right to have a lead agency process a reclamation plan amendment in a reasonable time or at all, and pursue an entirely different reclamation plan amendment in contravention of SMARA, in exchange for the possibility that the County might act on the operator’s application on an indeterminate future date. This is contrary to established law and policy, and not consistent with a mine operator’s due process rights under SMARA or generally.

3. Lead Agency Failure to Act within a Reasonable Time Following Submittal of a Complete Application

SMARA Section 2770, subdivision (e)(1), authorizes the Board to accept an appeal where the lead agency has “failed to act within a reasonable time of receipt of a completed application.” Here, the County determined that it will not process the Amended Reclamation Plan Application at all, or conduct an environmental review, if Lehigh does not first pursue, to completion, an entirely different reclamation plan amendment application. Even were Lehigh to pursue the County-devised application, the Amended Reclamation Plan will be suspended for an indefinite period likely to last months or years while the other application is processed. In either scenario, the County will not act on the Amended Reclamation Plan within a “reasonable time.” Accordingly, acceptance of the appeal is proper on this ground.

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E. Section 3650 (Notice to Lead Agency)

A notice of this Appeal has been sent to the lead agency. (See **Exhibit G.**)

CONCLUSION

In closing, Lehigh believes that this Appeal raises substantial and important issues relating to a lead agency’s review of reclamation plans under SMARA.

First, there must be stability to the reclamation plan approval process. The need for stability intensifies for designated resources like the Permanente Quarry that supply a large percentage of essential building materials – 80 percent of the cement used in the County, and 50 percent used in the greater San Francisco Bay Area – to an economically important and populous area of the State. The Quarry, although vested, can only continue operations if it can timely process a reclamation plan amendment that meets SMARA standards and keeps pace with ongoing surface mining operations. SMARA, accordingly, is structured to allow reclamation plan amendments to be processed notwithstanding that a notice of violation has been issued. If a lead agency were allowed to use other, non-SMARA code provisions to refuse to process reclamation plan amendments, it would raise a substantial issue for the implementation of SMARA as a whole, and the continued supply of construction materials across the State.

Second, SMARA encourages a unified approach to reclamation. A “piecemeal” approach to reclamation, particularly for large, historic and complex sites, is, and should be, discouraged. If a lead agency were allowed to process an integrated reclamation plan in a segmented manner for separate and distinct portions of the operation, the unified approach would be frustrated. An equally substantial consideration is presented by a lead agency’s demand that an operator process a reclamation plan amendment which the lead agency designs, rather than an amendment that the operator seeks. No provision of SMARA and no provision of the County’s SMARA ordinance authorizes the County to act as the de facto “applicant” in this way.

Third, if a lead agency could demand, as has occurred here, that an applicant ask the lead agency to “cease” processing its reclamation plan application as a condition of resolving a notice of violation, then all of the procedural protections contained in SMARA would be abridged. This matter, too, raises a substantial issue concerning the certainty and stability of the SMARA reclamation plan approval process.

Lastly, if, as the County has asserted, it really believes it cannot process Lehigh’s Amended Reclamation Plan because it is constrained by other ordinances, not its SMARA ordinance, then the Board is the only entity that has the jurisdiction to take action. The notion that a reclamation plan amendment for a surface mining operation of state-wide importance could be held in suspense indefinitely raises an issue of the utmost importance and substance.

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Mr. Larry Sheingold, Chair
Permanente Quarry – Intent to Appeal
November 22, 2019

Respectfully Submitted

HARRISON, TEMBLADOR, HUNGERFORD & JOHNSON

By 
Mark D. Harrison, Esq.

cc: Jeff Schmidt, Executive Officer, State Mining and Geology Board