

County of Santa Clara

Board of Supervisors

County Government Center, East Wing
70 West Hedding Street
San Jose, California 95110-1770
(408) 299-6435 TDD 993-8272

Contract Auditor: Harvey M. Rose Associates, LLC
E-mail: cheryl.solov@bos.sccgov.org

October 19, 2020

To: Supervisor S. Joseph Simitian,
Board of Supervisors

From: Cheryl Solov
Board of Supervisors Management Audit Manager



Subject: Stevens Creek Quarry Compliance Monitoring - Revision

On July 22, 2020, your office requested that we examine the Department of Planning and Development's compliance review mechanisms to ensure Stevens Creek Quarry Operator's adherence to the conditions of approval enumerated in the County's Use Permit and Mediated Agreement (Attachments A and B).

The Upshot

The conditions of approval for the County's Use Permit and Mediated Agreement can be separated into two categories: conditions that do not require ongoing monitoring and conditions that do. The former set of conditions pertains to requirements that a) are purely informational in nature; b) were one-time actions that were completed shortly after adoption of the Use Permit and Mediated Agreement; and c) conditions that cannot yet be monitored because they cover reclamation activities, which have not initiated.

For conditions that require ongoing monitoring, the Department of Planning and Development assesses compliance primarily through the following:

1. Periodic on-site investigations, including an annual Surface Mining and Reclamation Act Investigation. The latter is required under PRC Section 2774(b)(1) and is submitted to the State Department of Conservation, Division of Reclamation.
2. Inquiries to other monitoring entities such as the Bay Area Air Quality Management District, California Highway Patrol, and the County Environmental Health Noise Specialist.

Board of Supervisors:

Mike Wasserman
District 1

Cindy Chavez
District 2

Dave Cortese
District 3

Susan Ellenberg
District 4

S. Joseph Simitian
District 5

County Executive: Jeffrey V. Smith

3. Receipt and review of data from the quarry operator such as truck ticket logs and annual reports, as well as review of security footage.
4. Checking whether complaints have been filed through the Department's code enforcement, California Highway Patrol, or the Sheriff's Office process in relation to condition requirements.

From calendar years 2002 to 2017, compliance investigations were performed monthly by a contractor retained by the Department. However, this contractor was only responsible for tracking compliance with Use Permit conditions, and none of the reports provided by the Department explicitly discussed the Quarry Operator's compliance with Mediated Agreement conditions concerning Parcel B. While there are substantial areas of overlap between the Use Permit and Mediated Agreement, there are multiple conditions requiring ongoing monitoring that are unique to the Mediated Agreement. Due to the age of this contract, current Department personnel were unable to provide a reason for why the contractor's scope of work did not extend to tracking Mediated Agreement compliance.

In 2018, the Department moved its on-site Use Permit investigations in-house, and the frequency and documentation of these investigations decreased. When we contacted the Department in July and August of 2020, staff reported that the Department was in the process of implementing a more robust investigation protocol with improved tracking. Further, staff had re-initiated monthly investigations beginning July 2020 with two separate checklists—one for the Use Permit and another for the Mediated Agreement.

Of the conditions requiring ongoing monitoring, six conditions from the Use Permit have no record of being currently monitored or enforced. In addition, while Mediated Agreement compliance was not monitored systematically until July 2020, the Department confirmed that the Quarry Operator is out of compliance with one of its conditions, and that there is no history of enforcement action from the Department concerning this condition.¹ The conditions in question include #21e, #44, #47, #48, #49, and #51 from the Use Permit and condition #34 from the Mediated Agreement. There is no record of the County taking the following actions as required by these conditions of approval:

1. Conducting a minimum of two random noise tests annually.
2. Enforcing the Quarry Operator's submission of truck data to assess traffic and material load levels. While the Operator reportedly submitted data from 1995-2000, no data was seemingly submitted after 2001.
3. Enforcing usage requirements and submission of inventories of ancillary trucks and equipment. To note, the Department reported that conditions relating to ancillary trucks and equipment are suspended pending final consideration by the Board of

¹ There are also completed conditions for the Mediated Agreement, which do not require ongoing monitoring, that have no records of compliance. The Department was unable to retroactively track whether appropriate procedures were followed and/or complaints were issued over the course of these tasks, and whether the Department enforced these conditions if complaints were submitted.

Supervisors. An inquiry to the Clerk of the Board for information on this hearing was sent in November 2019.

Further, a condition in each agreement requires the Department to, at minimum, check for compliance with all conditions on an annual basis and submit a report to the County's Planning Commission on this matter. The two most recent annual updates on Stevens Creek Quarry were submitted to the Planning Commission on April 25, 2019 and May 8, 2020. However, unlike prior updates, complete annual reports containing compliance tables and monthly monitoring records were not appended to the submitted legislative files due to the cessation of monthly contractor investigations in calendar year 2017. The last complete Annual Compliance Monitoring Report was submitted in 2018 and covered the period of calendar year 2017.

Finally, the Department financially monitors the Quarry Operator through the Operator's submission of an annual Financial Assurance Cost Estimate (FACE), which calculates the cost of reclaiming a mining site based on the *current state of the operation*. The FACE estimates inform the size of the surety bond that is the financial assurance for the mining operation.

State Legal Requirements of Surface Mining

The Surface Mining and Reclamation Act of 1975 (SMARA) was enacted by the California Legislature to balance the State's need for mineral resources with mitigating adverse environmental impacts from mining activities. SMARA contains requirements for "mined-land reclamation," which include maintaining water and air quality, as well as restoring geographic and wildlife characteristics of mined land to levels that would allow affected areas to be usable after cessation of mining operations. The Act applies to all parties engaged in surface mining operations in California, which disturb more than one acre or remove more than 1,000 cubic yards of material.

While the Department of Conservation's Division of Mine Reclamation and the State Mining and Geology Board are jointly responsible for ensuring that the Act's requirements are met, implementation is under the purview of local jurisdictions. City and County "lead agencies" are required to enter into agreements for land use permitting and reclamation procedures with mining operators. In addition, the mining operator is required to provide financial assurances to guarantee costs for reclamation. Reclamation plans and financial assurances must be submitted to the State by lead agencies before approval may be granted. Further, lead agencies must provide ongoing oversight of mining operations and review mining operators' financial assurances annually.

Stevens Creek Quarry and Conditions of Approval

Stevens Creek Quarry is an active aggregate sand quarry located in the Stevens Canyon area south of Cupertino. The quarry consists of two areas, "Parcel A" and "Parcel B." Parcel A contains offices, truck scale, recycling concrete and asphalt operation, and the City of Cupertino compost distribution facility. Parcel B contains surface mining activities, including crushing of rock mined at the quarry.

Operations within Parcel A are governed by a Conditional Use Permit. The Use Permit was originally approved by the Board of Supervisors in 1984, renewed for a twenty-year period in 1995 by the County Planning Commission, and modified to its current state in 1996. The 1996 Use Permit contains 53 conditions of approval covering provisions such as permissible work hours, on-site road maintenance, dust elimination, and noise requirements, among others. Although the Use Permit expired in 2016, operations under this Permit are still permissible so long as the County complies with certain timelines and milestones. Meanwhile, Parcel B activities are guided by a 2002 Mediated Agreement containing 28 conditions for operations and 8 conditions for reclamation.

Condition #53 in the Parcel A Use Permit and Condition #27 in the Parcel B Mediated Agreement define oversight requirements for compliance with these quarry operational standards. A report must be submitted to the County’s Planning Commission annually detailing whether the Stevens Creek Quarry Operator (“Quarry Operator”) is compliant with all conditions in both documents. The Department of Planning and Development is responsible for preparing these reports.

To note, while the Department of Planning and Development is tasked with tracking the compliance status of all conditions of approval, evaluations of several conditions are conducted by other parties. For instance, the Department of Roads and Airports is the entity responsible for overseeing conditions related to right-of-way and street improvement construction in the Use Permit.

Department of Planning and Development’s Oversight Activities

Conditions in the Use Permit and Mediated Agreement generally fall into two categories: conditions that do not require ongoing monitoring and conditions that do. The former category encompasses conditions that a) are purely informational in nature; b) were one-time actions that were completed shortly after adoption of the Use Permit and Mediated Agreement; and c) conditions that cannot yet be monitored because they cover reclamation activities, which have not initiated. Examples of these items include definitions, permit acquisitions, and revegetation guidelines. Meanwhile, conditions that require ongoing monitoring generally pertain to current quarry operations. The breakdown of these conditions is presented in Figure 1 below:

Figure 1: Breakdown of Conditions Requiring Ongoing and Non-Ongoing Monitoring

Agreement Name	Ongoing Monitoring	No Ongoing Monitoring	Total
Use Permit	36	16	52 ²
Mediated Agreement	23	12	35 ³

² Does not add up to 53 because one condition about use of explosives has been superseded.

³ Does not add up to 36 because while the conditions are numbered to 36, the Mediated Agreement skips condition #21 and goes from condition #20 to condition #22.

The Department of Planning and Development tests conditions that require ongoing monitoring through the following:

1. Periodic on-site investigations, including an annual Surface Mining and Reclamation Act Investigation. The latter is required under PRC Section 2774(b)(1) and is submitted to the State Department of Conservation, Division of Reclamation.⁴
2. Inquiries to other monitoring entities such as the Bay Area Air Quality Management District, California Highway Patrol, and the County Environmental Health Noise Specialist.
3. Receipt and review of data from the quarry operator such as truck ticket logs and annual reports, as well as review of security footage.
4. Checking whether complaints have been filed through the Department's code enforcement process, California Highway Patrol, or the Sheriff's Office in relation to condition requirements.

When the Quarry Operator is found to be in noncompliance with one or more conditions, the Department's enforcement actions include giving warnings and informing the Operator of necessary corrective actions. If the Quarry Operator does not rectify the situation, the Department may issue a Notice of Violation, such as the Notice that was sent in February 2019 for importing, processing, and reselling aggregate materials from Lehigh Permanente Quarry. After a Notice is issued, the County may impose fines or take further legal action in the event of continued noncompliance.

From calendar years 2002 to 2017, on-site compliance investigations were conducted by a contractor retained by the Department. The contractor had monthly checklists for tracking compliance status and would also prepare an annual report, which served as the basis for the annual report presented by the Department to the County Planning Commission (see Attachments C and D for examples of monthly and annual consultant reports from 2004).⁵ However, records provided by the Department indicate that this contractor was only responsible for tracking compliance with Use Permit conditions, as none of the reports provided by the Department explicitly discussed the Quarry Operator's compliance with Mediated Agreement conditions concerning Parcel B. While there are substantial areas of overlap between the Use Permit and Mediated Agreement, there are multiple conditions requiring ongoing monitoring that are unique to the Mediated Agreement such as tree removal guidelines, inspection protocols for aggregate spillage, and sorting screen requirements to reduce noise. Due to the age of this contract, current Department personnel were unable to provide a reason for why the contractor's scope of work did not extend to tracking Mediated Agreement compliance.

⁴ The Department provided documentation of these SMARA investigations going back to 2004.

⁵ The Department did not have complete records of all Use Permit checklists and annual reports over the 2002-2017 period. However, enough examples were provided to suggest that preparation of both monthly and annual reports was a generally followed practice.

After 2017, compliance investigations were brought in-house, and investigations are now performed by a County Senior Grading Inspector and a Senior Planner. Department staff reported that, from 2018 to 2019, there was no system for documenting and tracking the conditions of compliance on a monthly schedule, although an annual report was still prepared every year. This lack of continuity may partly be attributed to staff turnover that occurred at the Department over this period. However, as of summer 2020, the Department reported re-initiating monthly compliance investigations and tracking. Further, the Department has developed a second checklist to track compliance with the Mediated Agreement, which was apparently absent from the contractor's original scope of work.

The Management Audit Division was provided a matrix from the Department outlining all conditions, their monitoring methods, responsible parties, and compliance status (see Attachment E for the full matrix). From this matrix, the Management Audit Division identified six conditions from the Use Permit and one from the Mediated Agreement that have no record of being currently monitored or enforced, despite the need for ongoing monitoring. These include conditions #21e, #44, #47, #48, #49, and #51 from the Use Permit and condition #34 from the Mediated Agreement.⁶ See Figure 2 below for a list of these conditions:

⁶ There are also completed conditions for the Mediated Agreement, which do not require ongoing monitoring, that have no records of compliance. However, given that the mining tasks around these conditions have already been completed, it is impossible for the Department to retroactively enforce these conditions if complaints were submitted.

Figure 2: Conditions not Monitored or Enforced⁷

Agreement Name	Condition Number	Condition Description	Status
Use Permit	21e	County will conduct a minimum of 2 random noise tests annually and report the results to the Secretary of the Planning Commission.	Compliance with this condition has not been enforced. No record of noise testing by County staff since at least 2008.
Use Permit	44	The applicant shall supply monthly totals of vehicular (truck) traffic serviced by the quarry operations. These totals are to be submitted in a report form to the County and shall be submitted every six months in January & July.	<p>Compliance with this condition has been sporadically enforced. Applicant submitted truck traffic data covering 1995 - 2000, but no record exists data being submitted for 2001 onward, and there is no record of the Department requiring the operator to submit this data or taking enforcement action for failure to comply with this condition. On June 10, 2020, Department staff issued a letter to the operator noting the requirement and directing the operator to comply with this condition starting in July 2020, along with other data requirements.</p> <p>On July 31, 2020, the operator provided the required information to the Department, and provided historical traffic data going back three years.</p>

⁷ Some of these conditions have been summarized for brevity.

Agreement Name	Condition Number	Condition Description	Status
Use Permit	47	The operator shall submit within 60 days an inventory of rental quarry trucks and equipment which existed as of October 28, 1986.	No record of this information having been submitted by the operator.
Use Permit	48	The ancillary use of equipment rental and storage is limited to trucks & equipment owned and operated by the operator which is normally used in the quarrying activities and is only rented for off-site use when not required on site.	No record of enforcement of this condition.
Use Permit	49	All other vehicles and or equipment not owned and operated in the quarry operations, except the horse boarding operator, shall be removed with 30 days.	No record of enforcement of this condition.
Use Permit	51	The operator shall submit an annual report of the current inventory of ancillary trucks and equipment. There may be an allowance for replacement but no intensification in numbers is permitted.	No record of this information having been submitted by the operator.
Mediated Agreement	34	The Quarry will limit the total number of material loads to no greater than 1,300 per day. A load is the total material hauled by a single motorized vehicle, i.e. the amount a single driver can haul.	See status of condition 44 from the Use Permit in this chart on the preceding page.

Further, both the Use Permit and Mediated Agreement require the Department to, at minimum, check for compliance with all conditions on an annual basis and submit a report to the County's Planning Commission on this matter. The two most recent annual updates on Stevens Creek Quarry were submitted to the Planning Commission on April 25, 2019 and May 8, 2020. However, unlike prior updates, complete annual reports containing compliance tables and monthly monitoring records were not appended to the submitted legislative files.

In lieu of a full annual report, the Department's April 2019 update covering calendar year 2018 contained a paragraph on documented compliance with nine Use Permit conditions and a

summary of various areas of violation (along with associated documentation). No detailed compliance table discussing the state of individual conditions was attached. Meanwhile, the Department's May 2020 update included a single compliance monitoring table for the entirety of calendar year 2019 due to the cessation of monthly contractor investigations two years prior. The last complete Annual Compliance Monitoring Report was submitted in 2018 and covered the period of calendar year 2017 (see Attachment F).

Financial Oversight

In addition to the oversight activities described above, the Department monitors the financial capacity of the Quarry Operator through an annual Financial Assurance Cost Estimate (FACE). The FACE calculates the cost of reclaiming a mining site based on the *current state of the operation* (i.e., the costs of reclaiming the site if mining operations were to be abandoned at that point in time). Assumptions in the FACE help inform the size of the financial assurance mechanism, which, in the case of Stevens Creek Quarry, is a surety bond.

The Quarry Operator is responsible for preparing the FACE, which must be submitted to the Department no more than 30 days after the annual SMARA inspection.⁸ If the FACE is satisfactory, the Department approves the estimate, issues a Statement of Adequacy, and the Operator posts a bond. If portions of the FACE are found to be unsatisfactory, the Department issues a Statement of Inadequacy requiring the Quarry Operator to submit additional materials and cost estimates (see Attachment G for an example from January 2019). The State's Division of Mine Reclamation also has 30 days to comment on the Quarry Operator's FACE before it is approved by the Department. For instance, in February 2020, the Division of Mine Reclamation found the submitted 2019 FACE to be inadequate and requested the County consider its comments before final approval (see Attachment H).

The Department agreed with the Division of Mine Reclamation's comments on the 2019 FACE and requested the Quarry Operator to submit a revised FACE to address the Division of Mine Reclamation's concerns. However, while the Quarry Operator was willing to make these changes, the Operator indicated that it would take several months to collect the necessary data. Because the Operator would be required to submit its 2020 FACE soon after this period, and because of the substantial nature of the estimated bond increase from \$2.3 million to \$5.4 million (see Attachment I), the Department decided to approve the 2019 FACE, as originally submitted, after consulting with the Division of Mine Reclamation.

Conclusion

The Department of Planning and Development is responsible for monitoring the Stevens Creek Quarry Operator's compliance with conditions of approval contained within the County's Use Permit and Mediated Agreement. This compliance monitoring is accomplished through a combination of on-site investigations, inquiries to other monitoring entities, checking for public complaints, and reviewing materials submitted by the Quarry Operator.

⁸ The Department provided the Management Audit Division with FACE documentation from 2006 – 2019.

However, the Management Audit Division identified multiple issues with the Department's compliance monitoring:

- The Department's records indicate that there has historically been no systematic compliance monitoring of the Mediated Agreement governing Parcel B.
- Since moving its on-site investigations in-house in 2018, the County's detailed tracking of compliance with individual conditions has also decreased in frequency.
- Six conditions from the Use Permit and one from the Mediated Agreement have no record of being currently or previously monitored or enforced. These include conditions pertaining to County annual noise tests, submittals of Quarry Operator truck data, and enforcement of usage and inventories of ancillary trucks and equipment.
- While the Department has provided the County's Planning Commission with summary updates on Quarry Operator Compliance, complete Annual Compliance Monitoring Reports containing monthly compliance tables were not submitted during calendar years 2019 and 2020.

The Management Audit Division has seen some evidence of the Department addressing some of the items that were previously unmonitored. We suggest that the Department continue with its monthly on-site investigations of both the Use Permit and Mediated Agreement; develop methodologies to monitor all outstanding conditions; and ensure that full Annual Compliance Monitoring Reports containing compliance tables that incorporate the results of monthly investigations are submitted to the County's Planning Commission each year. In addition, the Department should verify that the Division of Mine Reclamation's comments are addressed in the Quarry Operator's 2020 FACE submission.