

DATE: August 12, 2013
TO: Mayor and Members of the City Council
FROM: Carol Korade, City Attorney
RE: Lehigh Quarry and Cement Plant

I. GENERAL OVERVIEW

Members of Council and community residents have inquired about the City's ability to protect the quality of life of City residents from impacts created by the Lehigh Quarry and Cement Plant ("Plant"), which lies outside the City's boundaries and is subject to Santa Clara County's ("County") land use control. The operation was previously known as the Hanson facility and more recently referred to as the Lehigh Southwest Cement Plant. Part II of this memorandum explains that the Plant is under the County's jurisdiction. Part III discusses federal, state, and local environmental and land use laws applicable to operation of the Plant and describes certain means by which the City and its residents can seek enforcement of these laws to protect the quality of life in Cupertino.

II. THE COUNTY, NOT THE CITY, HAS JURISDICTION OVER THE PLANT

The Plant is located at 24001 Stevens Creek Boulevard, in the western hillsides of Santa Clara County, just west of Cupertino. Under the California Constitution Article II, Section 7, a city may make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with the general law within its city limits. Because the Plant is not within the City limits, however, **the City has no control or permitting authority over the Plant.** Without such jurisdiction, the City cannot impose any conditions on the operation of the Plant. The City can regulate truck traffic on its streets and also can comment on any future County environmental review associated with changes to the Plant, but the City does not have jurisdiction of its own over the Plant.

A. County of Santa Clara Use Permit

Since 1903, Lehigh and its predecessors have operated a limestone quarry and cement plant in an unincorporated area of Santa Clara County. The County first issued a use permit for the plant on May 8, 1939. The use permit was later modified in June 1950 and May 1955 to add rotary kilns to the operations. On December 5, 1977, the County approved a use permit modification for the modernization of the Plant, and in 1980 the Plant converted from a wet-process to a more efficient dry-process kiln system.

The County use permit does not impose any conditions on the Plant's hours of operation or the number of trucks that may travel to and from the Plant nor does it confine the trucks to specific routes. Certain Plant operations are continuous, such as the kiln operation which cannot be turned on and off every day because it requires substantial time and energy to reheat and cool down. The use

permit's only noise condition requires that noise at the property line conform to the Noise Element of the County General Plan and the County's noise ordinances.¹

The County Department of Environmental Health enforces the County's noise ordinances. However, the County currently does not have a continuous noise monitoring program. As part of the environmental review process for the updated Reclamation Plan, the County hired a consultant to monitor noise generated by the plant who determined that the noise levels generated by the Plant operations are within the limits of both the County and City Noise Element and Noise Ordinance.²

B. Surface Mining Reclamation Plans

California's Surface Mining and Reclamation Act of 1975³ ("SMARA") requires local jurisdictions to adopt ordinances to provide a regulatory framework for the conduct of mining within their boundaries. It was adopted to ensure that land is properly reclaimed to usable and aesthetically acceptable condition after the closure of a mine, and that local jurisdictions do not prevent exploitation of available mineral resources. SMARA mandates that every active surface mine have a reclamation plan to reclaim the land for subsequent use upon the closure of the mine and empowers local jurisdictions—in this case, the County of Santa Clara—to review and approve such plans. On March 7, 1985, the County approved the quarry's Reclamation Plan.

Prior to 2006, the Plant began conducting mining operations outside the designated boundaries of its 1985 Reclamation Plan. In September 2006, the California Department of Conservation's Office of Mine Reclamation ("OMR") formally notified the County that the Plant was violating SMARA, and that OMR would consider taking enforcement action if the County did not do so. In October 2006, the County issued a Notice of Violation to the Plant for conducting mining operations outside the boundaries of its Reclamation Plan. In March 2007, Lehigh submitted a proposed Reclamation Plan amendment to the County to update its existing plan and remedy the SMARA violations identified in the Notice of Violation. In 2008, the County issued a Notice of Violation to Lehigh for depositing mining waste in an area outside of the original Reclamation Plan area. The County agreed to allow the Plant to continue depositing the mining waste while the company prepared a proposed Reclamation Plan amendment.

C. Environmental Review of the 2011 Reclamation Plan Amendment

The California Environmental Quality Act⁴ ("CEQA"), requires public agencies to prepare an environmental impact report ("EIR") when the approval of a proposed project would have a

¹ See the Noise Element of the County General Plan, Book A, I-27, *available at* <http://www.sccgov.org/sites/planning/PlansPrograms/GeneralPlan/Pages/GP.aspx>; County noise ordinance, Title B, Division B11-150-59, *available at* <http://www.sccgov.org/sites/bos/Legislation/Ordinance-Code/Pages/default.aspx>

² Pack, Jeffrey, NOISE MONITORING LEHIGH QUARRY SANTA CLARA COUNTY, *available at*, <http://www.sccgov.org/sites/planning/PlansPrograms/SMARA/PermanenteQuarry/Documents/Pack-Assoc-41-020-R.pdf>.

³ Public Resources Code §§ 2710 et seq.; SMARA is *available at* <http://www.conservation.ca.gov/omr/lawsandregulations/Pages/SMARA.aspx>.

⁴ CEQA, Public Resources Code §§ 21000 et seq.

significant adverse effect (“impact”) on the environment. CEQA and the CEQA Guidelines,⁵ dictate the contents of an EIR and the process for certifying its accuracy. An EIR must include sufficient analysis to allow the “lead agency” (here, the County) to make an informed decision on a project by identifying its environmental consequences as well as feasible mitigation measures and alternatives. An EIR must include: (1) a brief summary; (2) a description of the proposed project; (3) a range of reasonable alternatives to the proposed project; (4) the environmental setting; (5) an analysis of each environmental impact and a determination of whether the impact is considered “significant”; (6) a cumulative impact analysis; (7) mitigation measures to reduce environmental impacts to the extent feasible; and (8) a description of any significant effects on the environment that would be unavoidable or irreversible if the project is implemented.

Lehigh’s application for a Reclamation Plan amendment required the County Planning Commission to prepare an EIR addressing the environmental impacts of the amended plan before approving it. The County certified the Final EIR and approved the Reclamation Plan amendment on June 26, 2012.⁶ A local public agency and an environmental organization filed lawsuits challenging the adequacy of the EIR.

III. ENVIRONMENTAL & LAND USE ISSUES

A. Issue Summary and Contact Information

The following table summarizes the potential issues that could arise from Plant operations, and lists the appropriate agency(s) for a community residents to contact to report a complaint. The laws and regulations governing these issues are explained in Part III. B, below.

Topic	Action	Responsible Agency	Contact Information
General	To report complaints regarding Plant operations, or file comments on any future, proposed Reclamation Plan amendment or change to the use permit.	County Planning Office	(408) 299-5770 http://www.sccgov.org/sites/planning/Pages/Planning-Home-Page.aspx Email hansonquarry@pln.sccgov.org to be included on a County mailing list of future notifications for the Plant.
Mining	To report suspected mining violations.	County Planning Office	(408) 299-5770 http://www.sccgov.org/sites/planning/PlansPrograms/SMARA/Pages/SMARA.aspx

⁵ The CEQA Guidelines, California Code of Regulations, Title 14, §§ 15000 et seq., available at <http://ceres.ca.gov/ceqa/>.

⁶ The EIR documents are available here: <http://www.sccgov.org/sites/planning/PlansPrograms/SMARA/PermanenteQuarry/Pages/PermanenteMain.aspx>.

		California Department of Conservation, Office of Mine Reclamation	(916) 323-9198 or OMR@conservation.ca.gov http://www.conservation.ca.gov/OMR/Pages/Index.aspx
Noise	To report noise impacts. The City and County noise ordinances provide a means to control these impacts.	County Department of Environmental Health	(408) 918-3400 (to report violations of County noise ordinance) http://www.sccgov.org/sites/deh/consumer%20protection%20division/program%20and%20services/noise/Pages/Noise-Pollution.aspx
		County Sheriff's Department	1-800-211-2220 or (408) 808-4400 (to report violations of City noise ordinance) http://www.sccgov.org/sites/sheriff/Pages/Home%20Page.aspx
		Cupertino Code Enforcement	(408) 777-3182 (an alternate number to report violations of City noise ordinance) http://www.cupertino.org/index.aspx?page=491#10
Truck Traffic	To report truck traffic impacts, such as a truck idling for too long, rocks falling from a truck, or other suspected violations of the Vehicle Code or the City or County's ordinances.	County Sheriff's Department	1-800-211-2220 or (408) 808-4400 (to report Vehicle Code violations) (408) 868-6600 (to report damage, e.g. falling gravel) http://www.sccgov.org/sites/sheriff/Pages/Home%20Page.aspx
Air (& Dust)	To report air quality impacts, including fugitive dust from operations at the Plant site and from truck traffic to and from the Plant. State and federal air quality laws are enforced by BAAQMD.	Bay Area Air Quality Management District	(415) 749-5119 - Thu Bui, BAAQMD's senior air quality engineer for cement plants To file a general air quality complaint, call the 24-hour toll-free hotline at 1-800-334-ODOR (6367). http://www.baaqmd.gov/Divisions/Engineering/Title-V-Permit-Programs/Title-V-Permits/Santa-Clara/A0017/Lehigh-Southwest-Cement-Company.aspx
Water	To report water quality impacts, which are governed by state and federal water quality	San Francisco Bay Regional	(510) 622-2376 - Shin-Roei Lee, Chief, South Bay Watershed

	laws that are enforced by the San Francisco Bay Regional Water Quality Control Board.	Water Quality Control Board	Management http://www.waterboards.ca.gov/rwgcb2/report_problem.shtml
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B. Environmental and Land Use Laws and Regulations

Numerous federal, state, and local laws authorize specific public agencies to regulate aspects of the Plant’s operation. The City can comment in public hearings, provide evidence, and otherwise encourage these agencies to protect the quality of life in the Cupertino. The City can also enforce noise and vehicle regulations.

1. Mining and Operations

(a) Surface Mining and Reclamation Act

As explained in Part III.B.2, above, SMARA⁷ provides a comprehensive surface mining and reclamation framework concerning the regulation of surface mining operations to assure that adverse environmental impacts are minimized and mined lands are reclaimed to a usable condition. SMARA also encourages the production, conservation, and protection of the State’s mineral resources. SMARA requires annual reporting for all mines in the state, under which the State Mining and Geology Board is also granted authority and obligations. The State Mining and Geology Board has adopted regulations for the reclamation of mined lands and the conservation of mineral resources.⁸

SMARA requires local jurisdictions, such as the County of Santa Clara, to adopt ordinances to provide a regulatory framework for the conduct of mining within their boundaries. Mines are required to have a reclamation plan to reclaim the land for subsequent use upon the closure of the mine and SMARA empowers the County to review such plans.

The Office of Mine Reclamation (“OMR”) was created in 1991 to administer SMARA. OMR provides assistance to cities, counties, state agencies and mine operators regarding reclamation planning and promotes cost-effective reclamation. OMR strives to reclaim mined lands to a beneficial end-use through the implementation of SMARA to prevent or minimize the adverse environmental effects of mining by providing assistance to lead agencies and miners in the review of reclamation plans, and to minimize residual hazards to public health and safety through the Abandoned Mine Lands program.

OMR has a Reporting, Compliance and Review unit that enforces compliance with annual mine reporting requirements, reviews annual reports for deficiencies, investigates complaints of non-compliance with SMARA, selectively reviews lead agency annual inspections, and exercises SMARA duties for lead agencies that the Mining Board finds deficient in implementing SMARA. If

⁷ Public Resources Code §§ 2710 et seq.; *available at* <http://www.conservation.ca.gov/smgb/Regulations/Documents/SMARA%20Statutes%20Revised%2010-19-12.pdf>.

⁸ Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1, *available at* <http://www.conservation.ca.gov/smgb/Regulations/Documents/SMARA%20Regulations%20Revised%2010-19-12.pdf>.

there is suspected non-compliance with SMARA by the Plant a person can submit a complaint to the Reporting, Compliance and Review unit of OMR for investigation at (916) 323-9198.

2. California Vehicle Code

(a) Truck Operations

Because the City does not have its own police force, it contracts with the County Sheriff's Department for law enforcement services. As the City's contract police force, the Sheriff's Department enforces the State Vehicle Code provisions in Cupertino except on state highways, which are under the jurisdiction of the state California Highway Patrol ("CHP"). Together, the Sheriff's Department and the CHP enforce the Vehicle Code on Foothill Boulevard, Stevens Canyon Road, and the other roadways serving the Plant. The CHP usually relies on the Sheriff's Department for enforcement near the Plant.

Residents have expressed concern over rocks or gravel falling out of the trucks and causing damage to their vehicles.

Vehicle Code Section 24002 states as follows:

(a) It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard.

(b) It is unlawful to operate any vehicle or combination of vehicles which is not equipped as provided in this code.

The Vehicle Code, including the provisions that apply to trucks with loads that exceed the limits provided for each roadway, is enforced by the Sheriff's Department. The Sheriff's Department understands the concerns of Cupertino residents and works to correct any observed violations. It also provides enforcement throughout the City when the trucks use other routes to reach their destination.

Other Vehicle Code provisions pertinent to the Plant describe the requirements for truck registration, safety and inspections, reckless driving, weight, length, tires, exhaust, and noise. If residents wish to report what they believe to be current, in-progress Vehicle Code violations to the Sheriff's Department, they should call (408) 808-4400, which is a non-emergency contact number. Further, if residents wish to report damage, such as from falling rocks, they should call the Sheriff's Department at (408) 868-6600 during regular business hours, Monday through Friday. Residents should be aware that the Plant contracts with various truck companies and so does not necessarily control the trucks. Therefore, if residents wish to report an incident with a truck, they should write down the license plate number and the name of the truck company, if possible.

Because vehicles move through more than one jurisdiction, the rules that apply to vehicles, other than road-specific weight limits, are normally found in State, rather than local, law. Any local regulation must be expressly authorized by the Vehicle Code. While Vehicle Code Section 21100 grants the City limited authority to regulate traffic flow with traffic control officers (for example white glove service when signals are out of order) and with traffic control devices (such as traffic

signals and stop signs), the City has no broader authority over commercial vehicles to protect residents from the noise and traffic they generate.

Vehicle Code Section 35701 states in relevant part:

(a) Any city, or county for a residence district, may, by ordinance, prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit...

(b) The ordinance shall not be effective until appropriate signs are erected indicating either the streets affected by the ordinance or the streets not affected, as the local authority determines will best serve to give notice of the ordinance.

(c) No ordinance adopted pursuant to this section after November 10, 1969, shall apply to any state highway

Vehicle Code Section 35702 states:

No ordinance proposed under Section 35701 is effective with respect to any highway which is not under the exclusive jurisdiction of the local authority enacting the ordinance, or, in the case of any state highway, until the ordinance has been submitted by the governing body of the local authority to, and approved in writing by, the Department of Transportation. In submitting a proposed ordinance to the department for approval, the governing body of the local authority shall designate therein, an alternate route for the use of vehicles, which route shall remain unrestricted by any local regulation as to weight limits or types of vehicles so long as the ordinance proposed shall remain in effect. The approval of the proposed ordinance by the Department of Transportation shall constitute an approval by it of the alternate route so designated.

Together, Vehicle Code Sections 35701 and 35702 authorize cities to prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit, provided there is an alternative route to serve each property affected by the prohibition. While the need to maintain an alternative route to the Plant makes it difficult to impose weight limits on Foothill Boulevard and Stevens Creek Boulevard, Section 35701 can be used to impose weight limits on smaller residential streets to prevent trucks from cutting through residential neighborhoods. Generally, weight limits can be problematic to enforce because a scale is required to identify overweight vehicles. However, if the City limits the weight to a few thousand pounds on certain residential streets, cement and gravel trucks can be identified and cited for exceeding the weight limit without a scale. Alternatively, to avoid enforcement problems, the City can prohibit all commercial vehicles on certain residential streets. It should be noted, however, that any such restrictions will apply to all heavy or commercial vehicles and not only to truck traffic to and from the Plant.

Some residents have also asked whether the City can prohibit truck traffic during nighttime hours based on safety or noise concerns.⁹ Some cities have relied on Section 35701 to introduce a

⁹ Noise is discussed in more detail in Part III.B.2.c, below.

time schedule for commercial vehicles on certain streets. However, for Cupertino to prohibit truck traffic on certain streets during nighttime hours there must be an alternate, non-regulated route to the Plant during such hours. Given the location of the Plant, it would be difficult to identify an alternative route that fully protects Cupertino residents from truck traffic to and from the Plant.

The City is also limited by Vehicle Code Section 9400.8, which states in relevant part:

[N]o local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989.

Cupertino had no road impact fee prior to June 1, 1989 and, therefore, cannot adopt one now.

3. County and City Codes

(a) Truck Noise

While the City may not regulate traffic beyond the areas specified in the Vehicle Code, the trucks that serve the Plant are subject to the City’s Noise Ordinance, which provides that a truck may not remain in one location on a public right-of-way, with the engine running for more than three minutes in an hour, if it produces noise above the following levels specified for the land use of the affected property.¹⁰

Land Use at Point of Origin	Maximum Noise Level at Complaint Site of Receiving Property	
	Nighttime	Daytime
Residential	50 dBA	60 dBA
Nonresidential	55 dBA	65 dBA

Additionally, the County’s noise ordinance provides that a motor vehicle with a gross vehicle weight of more than 10,000 pounds or with any auxiliary equipment (*e.g.*, trailers) attached may not operate while the vehicle is stationary for more than 15 minutes in any hour, for reasons other than traffic congestion, on a public right-of-way or public space within 150 feet of a residential area between 10:00 p.m. and 7:00 a.m.¹¹

Hence, the City and County noise ordinances provide the legal standards for a potential course of action for residents who are disturbed by nighttime truck traffic if such traffic produces excessive noise while idling for longer than the specified periods. To report a violation of the City’s noise ordinance, residents may contact the Sheriff’s Department at (408) 808-4400 or Cupertino Code Enforcement at (408) 777-3182. Violations of the County’s noise ordinance can be reported to the County Environmental Health Staff at (408) 918-3400.

¹⁰ Cupertino Municipal Code, Chapter 10.48.055.

¹¹ County Noise Ordinance, Title B, Division B11, Chap. VIII, available at <http://library.municode.com/index.aspx?clientId=13790>

(b) Speed Bumps

Residents have also requested that the City consider placing speed bumps along the truck traffic route. Chapter 11.34.30 of the Cupertino Municipal Code provides that the City Manager, or his designee, may only authorize speed bump installation in locations where the road meets 11 safety and engineering based prerequisites: (1) the (local or collector) street is a neighborhood residential street as defined by the Vehicle Code or by City Council actions; (2) the street is not wider than 40 feet from curb to curb or from edge of pavement to edge of pavement; (3) the street is limited to one lane in each direction; (4) a speed limit of 25 miles per hour has been established in conformance with State law; (5) **the street is not a truck route** or a transit bus route; (6) the street has an average annual daily traffic volume of fewer than four thousand vehicles; (7) the street has a grade of five percent or less for any segment between intersections; (8) the minimum distance from an intersection or curve to the road bump is 150 feet; (9) the spacing between road bumps is between 400 and 500 feet; (10) the road is visible for a distance of 150 feet; and (11) the result of a traffic and engineering survey indicate a minimum 85% approach speed of 32 miles per hour. It further authorizes the Director of Public Works to adjust these requirements if he finds, in his professional opinion, that such adjustments are necessary for the installation to fit the specific conditions of the residential street where it is to be installed.

Accordingly, installation of speed bumps would not be feasible, because Foothill Boulevard and Stevens Creek Boulevard do not meet the prerequisites in the Municipal Code. Among other things, these roads are used as truck routes, have more than one lane in each direction, and have speed limits exceeding 25 miles per hour. While the City can amend its Municipal Code, it cannot change professional traffic engineering standards. Because the Municipal Code provisions reflect professional traffic engineering standards, speed bumps cannot be constructed to slow trucks serving the Plant without exposing the City to potential liability for any resulting traffic accidents.

4. Air Quality

(a) Federal Clean Air Act¹²

As a major facility, the Plant must obtain operating permits under Title V of the 1990 Clean Air Act Amendments and the Federal Operating Permit Program.¹³ A Title V Permit requires compliance with applicable local, state, and federal air quality requirements, including emissions limits and standards, monitoring, record-keeping, and reporting requirements. The permit holders must submit monitoring reports to the Bay Area Air Quality Management District (“BAAQMD”) every six months and compliance certifications every year. The initial Title V Permit for the Plant was issued on November 5, 2003. Lehigh submitted an application to renew its Title V Permit on April 28, 2008.

The Clean Air Act also requires the United States Environmental Protection Agency (“EPA”) to set National Emissions Standards for Hazardous Air Pollutants (“NESHAP”), which are industry-

¹² 42 U.S.C. §§ 7401 et seq.

¹³ Clean Air Act §§ 501–07; 42 U.S.C. § 7661-7661f.

based standards for air toxics that apply to existing and new emissions sources.¹⁴ On August 6, 2010, the EPA issued amendments to its NESHAPs which for the first time, require reduced toxics air emissions from cement kilns. Lehigh's most recent Title V permit contains NESHAP conditions that will cut the Plant's mercury emissions by 90% and reduce other air toxics.

On March 9, 2010, the EPA issued a Notice of Violation to the Plant for violation of its Title V Permit. The Notice of Violation stated that, between 1996 and 1999, the Plant underwent a series of physical modifications resulting in significant increases in emissions of nitrogen dioxide and sulfur dioxide without applying for a Prevention of Significant Deterioration ("PSD") permit as required under the Clean Air Act.¹⁵ Under the Clean Air Act, the EPA has the authority to enforce the Notice of Violation by issuing an administrative penalty order or seeking an injunction or civil penalty. The Lehigh Notice of Violation remains an active enforcement case by EPA that has not yet been resolved. If a settlement is reached, it will become public and there may be an opportunity for public comment.

BAAQMD implements both federal and state air quality laws in Cupertino, and has authority to issue renewals of the Plant's Title V Permit under EPA's supervision. BAAQMD incorporated the new NESHAPs hazardous air pollutant standards into Lehigh's renewed Title V permit, which was issued on April 17, 2012.¹⁶ Because Title V permits must be renewed every five years, Lehigh's current permit will expire on April 17, 2017.

(b) The California Air Toxics Hot Spots Information and Assessment Act

In 1987, the California Legislature passed the Air Toxics Hot Spots Information and Assessment Act,¹⁷ which established a regulatory program for site-specific air toxic emissions inventories and health risk quantifications. The Act is enforced by local air agencies, such as BAAQMD. Under this program, a wide variety of industrial, commercial, and public facilities must report the types and quantities of toxic substances they release into the air. The program is intended to collect emissions data, identify facilities with potential for localized health impacts, ascertain health risks, notify nearby residents of risks that warrant notice, and reduce significant risks.

BAAQMD routinely conducts or reviews health risk assessments for new and modified sources of toxic air contaminants. In addition, BAAQMD periodically reviews toxic emission reports from existing facilities under the Air Toxics Hot Spots Program to assess these facilities' potential to pose a significant risk to the public. Facilities determined to pose a significant risk must conduct a risk reduction audit and develop a plan to implement risk reduction measures.

¹⁴ See 40 C.F.R. 61 & 63; see also NESHAPs Compliance Monitoring, EPA, available at <http://www.epa.gov/compliance/monitoring/programs/caa/neshaps.html>.

¹⁵ Clean Air Act §§ 160–169b; 42 U.S.C. §§ 7470–92.

¹⁶ The documents related to Lehigh's Title V permit and the permitting process are available on BAAQMD's website: <http://www.baaqmd.gov/Divisions/Engineering/Title-V-Permit-Programs/Title-V-Permits/Santa-Clara/A0017/Lehigh-Southwest-Cement-Company.aspx>.

¹⁷ Health & Safety Code §§ 44300 et seq.

In 2011, BAAQMD approved Lehigh's health risk assessment. The health risk assessment determined that health risks from the Plant's operation were below the levels determined by BAAQMD to warrant either public notice or risk reduction measures. BAAQMD will reevaluate the facility periodically and determine if an updated health risk assessment is necessary.

In July 2009, EPA and BAAQMD began monitoring air quality at Stevens Creek Elementary School, located in Cupertino approximately two miles from the Plant, to measure hexavalent chromium as part of the School Air Toxics Monitoring Initiative.¹⁸ BAAQMD issued a report of its findings on November 8, 2011. The report concluded that the concentrations of hexavalent chromium in air observed at the school are typical of background levels present in urban areas and much lower than sites near other cement plants. No hexavalent chromium was detected in about 40 percent of the samples, and very small amounts were detected in the others, which indicates that the hexavalent chromium emissions from the Plant do not present significant health risks. Periodic results of this ongoing school air quality study, along with a press release and a frequently asked questions document, are posted on EPA's website.¹⁹

5. Water Quality

(a) Federal Clean Water Act

The Clean Water Act²⁰ does not allow the discharge of pollutants to surface waters without a National Pollutant Discharge Elimination System ("NPDES") permit. The Act improves water quality by setting quantitative and qualitative water quality standards for bodies of water and requiring "point sources" to meet "best available technology" standards and "best management practices" to control the pollutants that are released from sources such as the Plant. The Act gives EPA the authority to enable the states to perform many of the permitting, administrative, and enforcement aspects of the NPDES Program. California has been authorized to implement Clean Water Act programs and does so through the State Water Resources Control Board, which in turn delegates its responsibility to Regional Water Boards.

On March 26, 2010, after receiving many citizen complaints, the San Francisco Bay Regional Water Quality Control Board ("Water Board") issued the a Notice of Violation for failure of the Plant to comply with stormwater protection requirements. The Notice of Violation to the Plant stated that it had not completed a water balance survey for all existing plumbing and drainage at the Plant to cover stormwater, process water, and wastewater. Pursuant to the Notice of Violation, the Plant was required to update its site maps to clearly identify all structural control measures that affect stormwater discharges, authorized non-stormwater discharges, and run-on (stormwater coming on to the site from surrounding areas). After continued violations, the Water Board issued Lehigh another Notice of Violation on February 18, 2011, explaining that the Plant's substantial and on-going non-stormwater discharges require the facility to obtain its own NPDES permit, because it was in violation of the State's Industrial Storm Water General Permit and was therefore discharging

¹⁸ See <http://www.epa.gov/ttnamti1/airtoxschool.html>.

¹⁹ See <http://epa.gov/region09/air/schools-monitor/index.html>.

²⁰ 33 U.S.C. §§ 1251 et seq.

pollutants without permit coverage. The Water Board found that Lehigh was in violation due to the type of effluent it was discharging and the technology it was using to control erosion and sediment.

Also under the federal Clean Water Act, the Water Board issued a Mercury Total Maximum Daily Load requirement on February 12, 2008. According to the Board, the Plant is one of the significant local sources that contribute to a high mercury level in the Bay.

(b) California Porter-Cologne Water Quality Act

Under the California Porter-Cologne Water Quality Act,²¹ the Plant is also subject to the water reclamation requirements the Water Board issued in 1994. These requirements regulate treatment and disinfection of sewage for reuse, and require the Plant to submit quarterly self-monitoring reports to the Water Board. The Water Board issued Notice of Violation to Lehigh on January 22, 2013 for failure to submit a Report of Waste Discharge.

IV. CONCLUSION

The Plant has a duty to exercise its property rights responsibly and in compliance with local, state, and federal environmental quality and land use laws. The City has only limited authority to regulate the Plant directly (only as to truck traffic and noise within its borders). A description of the various regulatory processes have been included in this memorandum above.

²¹ Water Code §§ 13000 et seq.