

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

**RESPONSE TO WRITTEN COMMENTS**

on Proposed Settlement Agreement and Stipulation for  
Entry of Administrative Civil Liability Order  
Lehigh Southwest Cement Company  
Permanente Plant  
Cupertino, Santa Clara County

The proposed Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) relates to allegations of two unauthorized chlorinated water discharges to waters of the United States. The Regional Water Board received written comments on the proposed Stipulated Order distributed on March 29, 2021, for public comment from the following:

1. Cathy Helgerson (April 2, 2021)
2. Rhoda Fry (April 22, 2021)
3. Danessa Techmanski (April 27, 2021)
4. San Francisco Baykeeper (April 27, 2021)
5. Gary Latshaw, Ph.D. (April 28, 2021)

Regional Water Board prosecution staff has summarized the comments, shown below in *italics* (paraphrased for brevity), and followed each comment with prosecution staff's response. For the full content and context of the comments, please refer to the comment letters.

Prosecution staff continues to find the proposed liability is appropriate given the factors to be considered pursuant to the California Water Code and State Water Board Enforcement Policy, and past similar enforcement actions intended to protect water quality and prevent future violations. The proposed liability is appropriate for the following reasons: (1) while Lehigh has a history of violations, its compliance has improved and previous violations were unrelated to the current violation; (2) valve failures are common in the drinking water industry, and these valve failures could not have been anticipated; (3) the unauthorized discharges did not cause any observed harm to aquatic receptors, nor did they have any long-term environmental consequences; and (4) Lehigh acted in a reasonable and prudent manner in response to the discharges by implementing corrective and preventive measures to ensure the proper operation of valves and timely detection of potable water flow changes. Thus, prosecution staff recommends approval of the proposed Stipulated Order by the Regional Water Board or its Executive Officer.

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**Cathy Helgerson**

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**Helgerson Comment 1:** *Ms. Helgerson states that Lehigh has been in violation of its permits continually. She says Lehigh's cement plant and wastewater treatment plant are not part of its Reclamation Plan and asks what will happen to reclaim the property?*

**Response:** The violations that led to the Stipulated Order are unrelated to Lehigh's existing permits; however, as shown in Attachment A of the Stipulated Order, the prosecution staff considered Lehigh's history of violations when recommending maximum daily penalties. Ms. Helgerson's question regarding the Reclamation Plant does not pertain to the Stipulated Order.

**Helgerson Comment 2:** *Ms. Helgerson says the permit has been violated in more ways than one since Lehigh started to mine and make cement, and the public has been exposed to ongoing water, air, and soil pollution. She argues that the Regional Water Board should not issue permits to Lehigh.*

**Response:** As discussed in response to Helgerson Comment 1, the unauthorized potable water discharges were unrelated to Lehigh's existing permits. Lehigh has not had similar discharges in the past. Therefore, the proposed Stipulated Order is a more appropriate response to the unauthorized discharges than rescinding Lehigh's permits.

**Helgerson Comment 3:** *Ms. Helgerson poses multiple questions regarding why the unauthorized discharges were not contained by the onsite stormwater retention ponds and pumped to the onsite wastewater treatment system. She further asks why the Stipulated Order does not mention other problems at the site.*

**Response:** The intent of the Stipulated Order is to address the March 2020 and January 2021 unauthorized potable water discharge violations and to deter similar future violations. Lehigh's stormwater retention ponds contain stormwater runoff from the active mining and processing activities at the site. However, the unauthorized potable water discharges took place outside the watershed perimeters of those stormwater retention ponds. The Stipulated Order does not mention other problems at the site because we know of no other significant unresolved violations at this time.

**Helgerson Comment 4:** *Ms. Helgerson asks why wastewater and industrial stormwater are not captured in the ponds, piped up to the wastewater treatment plant, and discharged through one of the six authorized discharge points.*

**Response:** See the response to Helgerson Comment 3.

**Helgerson Comment 5:** *Ms. Helgerson speculates that the unauthorized discharges were "portable" water, not "potable" water and asks whether chlorine is harmful to humans if it is harmful to fish and aquatic life.*

**Response:** The unauthorized discharges were potable water (i.e., drinking water). Like tap water, the potable water in the Fresh Water Tank contained total residual chlorine at a concentration as high as 0.88 milligrams per liter (mg/L) to protect public health from harmful pathogens. The chlorine in drinking water systems is safe for human consumption, but fish and aquatic life are more sensitive to chlorine than humans. The chlorine in potable water can cause lethal aquatic toxicity.

**Helgerson Comment 6:** *Ms. Helgerson asks why there was no alarm system, safety shut off system, or leak detection measures on the Fresh Water Tank to avoid overflow incidents like the one that happened in March 2020. She also asks why San Jose Water Company does not inspect the tank. She concludes that the penalty should be higher than \$60,000.*

**Response:** The prosecution staff considers a liability equal to the maximum daily penalty appropriate and sufficient to deter similar violations. As shown in Attachment A of the Stipulated Order, the prosecution staff considered Lehigh's culpability regarding these violations. The tank was in a remote location and could not have been expected to fail. Lehigh acted in a reasonable and prudent manner in response to the discharges. Lehigh installed a level detection system on the tank and trained its operation and maintenance crews as corrective actions. San Jose Water Company is not responsible for inspecting the tank.

**Helgerson Comment 7:** *Ms. Helgerson suspects the overflow from the Fresh Water Tank may have been an ongoing leak and asks how Lehigh determined the discharge volume.*

**Response:** Based on prosecution staff's review of Lehigh's spill report and follow up investigations, the discharge from the Fresh Water Tank did not last more than five days. Lehigh estimated the discharge volume based on its daily water consumption and the total amount of water it received from its potable water provider, San Jose Water Company. Daily water use was very consistent until the five days of discharge. These data allowed the volume and duration of the discharge to be calculated.

**Helgerson Comment 8:** *Ms. Helgerson expresses concerns about the age and routine inspections of the clayton valve on the Fresh Water Tank.*

**Response:** Lehigh replaced the malfunctioning clayton valve with an electronic level detection valve in 2020. The valve that broke in January 2021 was less than three years old. The mechanical failure most likely resulted from a manufacturing defect.

**Helgerson Comments 9 and 10:** *Ms. Helgerson questions whether total residual chlorine may have been detectable in Permanente Creek because Lehigh monitored and reported the results itself.*

**Response:** All permitted dischargers conduct their own self-monitoring and reporting. State and federal laws impose this burden on dischargers, so the public does not have to take this on. By law, Lehigh's monitoring reports are signed and certified by a

responsible corporate officer. Although water samples from the Fresh Water Tank were found to contain up to 0.88 mg/L of chlorine, the overflow cascaded from the top of the tank to the ground and passed through a highly vegetated area before reaching the creek. When exposed to air or soil, chlorine dissipates quickly. Given the physical characteristics of chlorine and the path of the discharge, it is not surprising that no chlorine was detected in Permanente Creek and no dead fish were found.

**Helgerson Comment 11:** *Ms. Helgerson questions whether Lehigh is telling the truth and calls for U.S. EPA Region 9 to investigate.*

**Response:** See the response to Helgerson Comments 9 and 10. Valve failures are common in the drinking water industry. Prosecution staff investigated Lehigh's incidents and reviewed relevant reports. Lehigh fully cooperated with the investigation. These incidents do not warrant U.S. EPA involvement.

**Helgerson Comment 12:** *Ms. Helgerson has concerns about Lehigh's equipment malfunction in multiple locations and urges for installation of alarm systems to protect Permanente Creek.*

**Response:** See the response to Helgerson Comment 8 regarding Lehigh's corrective actions.

**Helgerson Comment 13:** *Ms. Helgerson argues that Lehigh's operation should be closed down because of its poor compliance.*

**Response:** See the responses to Helgerson Comments 1 and 2. The proposed Stipulated Order is a more appropriate response to the unauthorized discharges than attempting to close down Lehigh's operations.

**Helgerson Comment 14:** *Ms. Helgerson argues the proposed \$60,000 penalty amount is too small. She says Lehigh's violations are criminal.*

**Response:** Prosecution staff has no evidence of criminal behavior. The proposed civil liability (the maximum daily penalties allowed by law) is appropriate considering the nature of the violations. In addition, the Stipulated Order requires Lehigh to implement a *Selenium Fish Tissue Monitoring Study* for Guadalupe Creek and a second creek (either Calabazas Creek or Stevens Creek) in Santa Clara County. The effort to undertake this study is in addition to the proposed penalty.

**Helgerson Comment 15:** *Ms. Helgerson says the \$60,000 liability is insufficient and she is disappointed that it will not go toward improving the environment in the Silicon Valley.*

**Response:** See the response to Helgerson Comment 14. If approved, the \$60,000 penalty must be paid to the State Water Pollution Cleanup and Abatement Account by law. The proposed selenium study is planned for the Santa Clara Valley area.

**Helgerson Comment 16:** *Ms. Helgerson argues that the Regional Water Board should conduct the selenium fish tissue study, not Lehigh. Besides selenium, the study should include other pollutants, such as mercury.*

**Response:** The proposed study would be completed in addition to paying the \$60,000 penalty. It focuses on selenium so the Regional Water Board can assess the extent to which selenium threatens freshwater aquatic life in Santa Clara County. This monitoring goes beyond Lehigh's permit requirements and would not provide information that could be used to evaluate Lehigh's compliance with any permit requirements. Therefore, Lehigh has no incentive to influence the study's conclusions.

**Helgerson Comment 17:** *Ms. Helgerson says the Stipulated Order is not in the best interest of the public. She feels the penalty should be in the hundreds of thousands of dollars and asks who will monitor Lehigh's compliance and adherence to the settlement agreement.*

**Response:** The unauthorized discharges did not cause any observed harm to aquatic receptors, nor did they have any long-term environmental consequences. Given the nature of the violations, the proposed penalty is fair; consistent with existing laws, regulations, and policies; and in the best interest of the public. See response to Helgerson Comment 14. If the Stipulated Order is approved, Regional Water Board staff will ensure that Lehigh adheres to the agreement.

**Helgerson Comment 18:** *Ms. Helgerson advocates for closing the Lehigh and Stevens Creek quarries to protect the public from exposure to pollution.*

**Response:** The unauthorized discharges that occurred in March 2020 and January 2021 are unrelated to Lehigh's quarry operations and have nothing to do with Stevens Creek Quarry. The proposed Stipulated Order is a more appropriate response to the unauthorized discharges than attempting to close those facilities.

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## Rhoda Fry

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**Fry Comment 1:** *Ms. Fry says the proposed \$60,000 penalty is too small to deter future violations and points out that penalties of \$2,500 to \$25,000 per day may be imposed for criminal violations. Ms. Fry asks why the penalty is based on 6 days of discharge as opposed to 7 days.*

**Response:** See the response to Helgerson Comment 14. The proposed penalty is based on 5 days of violation in March 2020 and 1 day of violation in January 2021. The March 2020 discharge started on March 18, 2020, but the precise time is unknown. Based on the evidence, however, although the discharge spanned six calendar days, its duration did not exceed 120 hours (5 days).

**Fry Comment 2:** *Ms. Fry says the Stipulated Order should require Lehigh to disclose that the Selenium Fish Tissue Monitoring Study was undertaken as part of a settlement of an enforcement action when making public statements about the study.*

**Response:** We agree. Section III, paragraph 4 of the Stipulated Order already contains this requirement: *“Whenever Lehigh, or its agents or subcontractors, publicizes one or more elements of the study, it shall state in a prominent manner that the study is undertaken as part of a settlement in a Regional Water Board enforcement action against Lehigh.”*

**Fry Comment 3:** *Ms. Fry says the Stipulated Order should require a third-party water audit and preventive repair of the entire site within six months because of the site’s history of industrial uses and violations.*

**Response:** As discussed in response to Helgerson Comment 3, the intent of the Stipulated Order is to address the March 2020 and January 2021 unauthorized potable water discharges and to deter similar future violations. A third-party water audit and preventive repair of the entire site would not deter similar future violations because Lehigh’s water consumption and quarry operations are unrelated to the valve failures that caused the violations. Valve failures are common in the drinking water industry. Lehigh acted in a reasonable and prudent manner in response to the discharges by implementing corrective and preventive measures to ensure the proper operation of valves and timely detection of potable water flow changes.

**Fry Comment 4:** *Ms. Fry argues the Stipulated Order should not contain language suggesting Lehigh does not admit to any of the alleged violations because it is important to create a record of historical violations.*

**Response:** Although section III, paragraph 18 of the Stipulated Order includes “no admission of liability” language for settlement purposes, the paragraph also states that “... in the event of any future enforcement actions by the Regional Water Board, the State Water Resources Control Board, or any other Regional Water Quality Control Board, this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code section 13327 or section 13385, subdivision (e).” Lehigh’s violations are documented in our records, including the State Water Board’s public California Integrated Water Quality System (CIWQS) website ([http://waterboards.ca.gov/water\\_issues/programs/ciwqs](http://waterboards.ca.gov/water_issues/programs/ciwqs)).

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**Danessa Techmanski**

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**Techmanski Comment 1:** *Ms. Techmanski asks that we require a study regarding the unplanned potable water discharges’ impacts on fish, frogs, and other aquatic life. Ms. Techmanski believes requiring a study is warranted given Lehigh’s track record of noncompliance and would set a good precedent for similar future violations.*

**Response:** The unauthorized discharges did not cause any observed harm to aquatic receptors, nor did they have any long-term environmental consequences. As described in the response to Helgerson Comments 9 and 10, when exposed to air or soil, chlorine dissipates quickly. Given the physical characteristics of chlorine and the path of the discharges, it is not surprising that no chlorine was detected in Permanente Creek and no dead fish were found. Thus, a study of the discharges' long-term impacts on aquatic life is unwarranted. Nevertheless, the Stipulated Order requires Lehigh to fund an unrelated *Selenium Fish Tissue Monitoring Study* to assess the extent to which selenium threatens freshwater aquatic life in Santa Clara County, focusing on Guadalupe Creek and a second creek (either Calabazas Creek or Stevens Creek). Lehigh's National Pollutant Discharge Elimination System (NPDES) permit (Order No. R2-2019-0024) has a similar requirement to study selenium in fish tissue in Permanente Creek.

**Techmanski Comment 2:** *Ms. Techmanski asks whether Lehigh has these types of unauthorized chlorinated water discharges often or whether these incidents were out of the ordinary. Ms. Techmanski points out that these types of discharges are serious given the State's current drought conditions.*

**Response:** While Lehigh has a history of violations, previous violations were unrelated to the current violation. We are unaware of previous potable water discharges. We agree that unauthorized potable water discharges are serious given the State's current drought conditions.

**Techmanski Comment 3:** *Ms. Techmanski points out that truck traffic near Lehigh's site has decreased over the last year and speculates that the property use may change. Ms. Techmanski supports setting firm boundaries now regarding unauthorized discharges to set a good precedent for future property owners and tenants.*

**Response:** Regardless of possible changes in how the property is used and who owns or leases the site, Regional Water Board staff will continue to oversee operations in accordance with applicable laws, regulations, and policies.

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## San Francisco Baykeeper

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**Baykeeper Comment 1:** *Baykeeper requests that we reevaluate the proposed penalty considering Lehigh's history of violations and resulting economic benefit. Baykeeper argues that the penalty is inconsistent with the State Water Board Enforcement Policy. In particular, Baykeeper contends that the Stipulated Order does not adequately consider the history of violations and the fact that the March 2020 unauthorized discharge was high-volume.*

**Response:** As described in response to Helgerson Comment 6, a liability equal to the maximum daily penalty is appropriate and sufficient to deter similar violations. As shown in Attachment A of the Stipulated Order, the prosecution staff considered each factor

listed in the Enforcement Policy, including history of violations and economic gain. For discharges in excess of 2,000,000 gallons, the State Water Board Enforcement Policy allows the Water Boards to elect to use a maximum of \$1.00 per gallon penalty amount when calculating a per gallon penalty (reduced from the \$10.00 per gallon maximum). We did not consider a high-volume per gallon penalty adjustment because the Stipulated Order does not assess a per-gallon penalty. We concluded that a per-day penalty would be more fitting considering the circumstances of these violations.

**Baykeeper Comment 2:** *Baykeeper requests that the Stipulated Order address ongoing selenium effluent limitation violations by requiring Lehigh to implement specific remedies to achieve compliance with selenium water quality standards. Baykeeper also criticizes the Selenium Fish Tissue Monitoring Study for targeting Guadalupe Creek and a second creek (either Calabazas Creek or Stevens Creek) as opposed to Permanente Creek, which was the creek impacted by the unauthorized discharges.*

**Response:** The Stipulated Order relates to chlorinated potable water discharges; it does not relate to any ongoing selenium effluent limitation violations. In fact, we are unaware of any significant ongoing selenium violations. Nevertheless, as described in the response to Techmanski Comment 1, the Stipulated Order requires Lehigh to fund a *Selenium Fish Tissue Monitoring Study* to assess the extent to which selenium threatens freshwater aquatic life in Santa Clara County. Lehigh's NPDES permit (Order No. R2-2019-0024) already has a similar requirement to study selenium in fish tissue in Permanente Creek. The study the Stipulated Order requires is intended to go beyond Lehigh's permit requirement by focusing on Guadalupe Creek and a second creek (either Calabazas Creek or Stevens Creek).

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**Gary Latshaw, Ph.D.**

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**Latshaw Comment 1:** *Dr. Latshaw argues that the penalty should be increased. He argues that the unauthorized discharges occurred because Lehigh failed to adequately maintain its infrastructure.*

**Response:** See the responses to Helgerson Comments 6 and 14.

**Latshaw Comment 2:** *Dr. Latshaw asks for evidence that there was no harm to any portion of the Permanente Creek watershed.*

**Response:** We have no evidence of harm to any portion of the Permanente Creek watershed due to the unauthorized chlorinated water discharges. Both Lehigh and Santa Clara County staff inspected Permanente Creek and reported no observations of adverse impacts to aquatic life. See the response to Techmanski Comment 1.

**Latshaw Comment 3:** *Dr. Latshaw provided a link to an online news story regarding the potential sale of the site. Dr. Latshaw speculates that there are fewer employees on*



*site, so the Regional Water Board should ensure the site is properly secured to prevent additional unauthorized discharges to Permanente Creek.*

**Response:** The potential sale of the Lehigh property does not pertain to the Stipulated Order. Regional Water Board staff continue to oversee site operations in accordance with Lehigh's permits and existing laws, regulations, and policies.

**Latshaw Comment 4:** *Dr. Latshaw requests that we require Lehigh to acknowledge that funding of the Selenium Fish Tissue Monitoring Study is a direct result of the Stipulated Order.*

**Response:** See the response to Fry Comment 2.