

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

In the matter of:)	
)	
LEHIGH SOUTHWEST CEMENT COMPANY)	SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER
)	
NPDES Permit CA0030210, Order R2-2019-0024 Permit Violations)	ORDER R2-2023-1006

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) is entered into by and between the California Regional Water Quality Control Board, San Francisco Bay Region Prosecution Team (Prosecution Team) and Lehigh Southwest Cement Company (Lehigh or Settling Respondent) (collectively, Parties), and is presented to the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), or its delegate, for adoption as an Order by settlement pursuant to California Water Code (Water Code) section 13323 and Government Code section 11415.60. This Stipulated Order resolves the violations alleged herein by the imposition of administrative civil liability against the Settling Respondent in the amount of **\$600,310**.

Section II: RECITALS

1. Lehigh operates the Permanente Plant (Facility), located at 24001 Stevens Creek Blvd., Cupertino, Santa Clara County. The Facility is a limestone quarry and cement production facility that also produces construction aggregate. Hanson Permanente Cement, Inc. owns the property on which the Facility is located.
2. At the time the alleged violations occurred, the Regional Water Board regulated the Facility under a National Pollutant Discharge Elimination System (NPDES) individual permit, Permit No. CA0030210, Order R2-2019-0024 (Permit).
3. Prosecution staff alleges the following violations:
 - a. From approximately June 30, 2022, to July 29, 2022, Lehigh discharged approximately 15.55 million gallons of unauthorized potable water to Permanente Creek, a water of the State and a water of the United States,

- in violation of Clean Water Act section 301 and California Water Code section 13376.
- b. As a result of activities prior to the discharge described above, Lehigh also violated NPDES No. CA0030210, Order R2-2019-0024, Standard Provision Attachment D, Provision I.D, Proper Operation and Maintenance.
 4. The Settling Respondent's alleged violations of its Permit conditions and illicit discharge subject it to administrative civil liability pursuant to California Water Code (Water Code) section 13385, subdivisions (a)(1), (a)(5), and (c).
 5. To resolve the alleged violations in Section II, paragraph 3, by consent and without further administrative proceedings, the Parties agree to the imposition of an administrative civil liability of **\$600,310** against the Settling Respondent. The Prosecution Team calculated the proposed liability using Steps 1 through 10 of the State Water Resources Control Board's 2017 Water Quality Enforcement Policy (Enforcement Policy) (October 2017) as shown in Attachment A, which is incorporated herein by reference.
 6. The Parties have engaged in settlement negotiations and agree to settle this matter without administrative or civil litigation, and to present this Stipulated Order to the Regional Water Board or its delegate for adoption as an Order by settlement, pursuant to Water Code section 13323 and Government Code section 11415.60.
 7. The Prosecution Team contends that the resolution of the alleged violations is fair and reasonable, and fulfills all of its enforcement objectives; that no further action is warranted concerning these violations, except as provided in this Stipulated Order; and that this Stipulated Order is in the public's best interest.

Section III: STIPULATIONS

The Parties incorporate the foregoing Recitals and stipulate to the following:

8. **Administrative Civil Liability:** The Settling Respondent hereby agrees to the imposition of an administrative civil liability of **\$600,310** to resolve the alleged violations set forth in Section II as follows:
9. No later than 30 days after the Regional Water Board or its delegate signs this Stipulated Order, the Settling Respondent shall mail a check for **\$300,310**, made payable to "State Water Pollution Cleanup and Abatement Account," referencing the Order number on page one of this Stipulated Order, to:

State Water Resources Control Board Accounting Office
Attn: ACL Payment
P.O. Box 1888
Sacramento, CA 95812-1888

The Settling Respondent shall email a copy of the check to the State Water Resources Control Board, Office of Enforcement (to Julie Macedo at Julie.Macedo@waterboards.ca.gov), and to the Regional Water Board (to Brian Thompson at Brian.Thompson@waterboards.ca.gov).

The Parties further agree that **\$300,000** (SEP Amount) of the administrative civil liability shall be conditionally suspended pending completion of a Supplemental Environmental Project (SEP), as that term is defined in the State Water Resources Control Board's Supplemental Environmental Project Policy, and as described herein. The SEP proposed by Lehigh, and accepted by the Prosecution Team, is described in Attachment B and called the Pond 22 Permanente Creek Restoration Project.

10. **SEP Requirements:** The Parties agree that the SEP Amount of **\$300,000** is for the SEP identified in Attachment B and that the SEP Amount shall be treated as a suspended administrative civil liability until the time of project completion for purposes of this Stipulated Order. The Regional Water Board is entitled to recover any SEP funds that are not expended in accordance with this Stipulated Order. Detailed project descriptions, including milestones, budgets, and performance measures are attached hereto as Attachment B.
11. **Nexus to the Violation:** The SEP Policy requires that a SEP have a nexus to the alleged violation. (SEP Policy, section VIII.F.) The SEP included in this Stipulated Order has a nexus to the location of the alleged violations because the primary benefits to be attained from the SEP are located within a 50-mile radius of the location of the violations.
12. **SEP Categories:** The SEP Policy provides for seven categories of SEPs. (SEP Policy, section V.) The Pond 22 Permanente Creek Restoration Project SEP falls under the "Environmental Restoration and Protection" category.
13. **Reporting Requirements for the SEPs:** Lehigh agrees to submit the following reports on SEP implementation to the Regional Water Board:
 - a. **Quarterly Reports:** Quarterly Reports must be submitted in accordance with the schedule provided in Attachment B. The Quarterly Reports must describe the tasks completed during the previous quarter, whether Lehigh is in compliance with the milestones and deadlines contained in Attachment B, and if not, the cause(s) of the delay(s) and the anticipated date of compliance with this Stipulated Order. The Quarterly Reports may also include descriptions and photos of activities completed during the previous quarter and an analysis of the SEP's progress.

- b. **Certification of SEP Completion:** No later than the deadlines contained in Attachment B, Lehigh must submit a final report that documents SEP completion and provides a certified statement of SEP completion (Certification of SEP Completion), signed under penalty of perjury, that documents the following:
- i. Certification of completion in accordance with the terms of this Stipulated Order, addressing how the expected outcome(s) for the project were met;
 - ii. Certification documenting the expenditures by the SEP Implementing Party during the completion period for the SEP; and
 - iii. Certification that Lehigh followed all applicable environmental laws and regulations in implementing the SEP, including the California Environmental Quality Act, Porter-Cologne Water Quality Control Act, and federal Clean Water Act.

Documentation of SEP completion may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the Regional Water Board to evaluate SEP completion and the costs incurred.

14. **Publicity Associated with the SEP:** Whenever Lehigh or its agents publicizes one or more SEP elements, it shall state in a prominent manner that the project is undertaken as part of a settlement of a Regional Water Board enforcement action against Lehigh.
15. **SEP is Above and Beyond Lehigh's Obligations:** The SEP included in this Stipulated Order contains only measures that go above and beyond Lehigh's obligations. The SEP is not part of Lehigh's normal business operations nor is Lehigh otherwise legally required to implement any portion of the SEP.
16. **No Benefit to Regional Water Board Functions, Members, or Staff:** The SEP provides no direct fiscal benefit to the Regional Water Board's functions, its members, its staff, or any family member of staff.
17. **Regional Water Board Not Liable:** Neither the Regional Water Board members, nor the Regional Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from the negligent or intentional acts or omissions by Lehigh or its respective directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order, nor shall the Regional Water Board or its members, staff, attorneys, or representatives be held as parties to or guarantors of any contract entered into by Lehigh or its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Order.

- 18. Third Party Audit:** If the Regional Water Board obtains information reasonably indicating that Lehigh and/or other SEP implementing entities has not expended money in the amounts claimed, or Lehigh has not adequately completed the work in the SEP, the Regional Water Board or its delegee may require, and Lehigh must submit, at its sole cost, a report prepared by an independent third party(ies) acceptable to the Regional Water Board or its delegee, stating that in its professional opinion, it has or has not expended money in the amounts claimed. In the event of such an audit, Lehigh agrees that the third-party auditor will be provided with access to all documents that the auditor requests. Such information must be provided to the Regional Water Board within three months of the date on which the Regional Water Board or its delegee requires the audit.
- 19. Failure to Expend the SEP Amount on the Approved SEP:** If Lehigh is not able to demonstrate to the reasonable satisfaction of the Executive Officer that the entire SEP Amount was spent on the completed SEP(s), Lehigh shall pay the difference between the SEP Amount and the amount Lehigh can demonstrate was actually spent on the SEP(s) (the Difference). The Executive Officer shall issue a "Notice of Violation" that will require Lehigh to pay the Difference to the State Water Pollution Cleanup and Abatement Account within 30 days of the Notice of Violation's issuance date. Lehigh shall submit payment consistent with the payment method described in paragraph 8, above. Payment of the Difference shall satisfy Lehigh's obligations to implement the SEP.
- 20. Failure to Complete the SEP:** If the SEP is not fully implemented by the SEP Completion Date listed in Attachment B, or if there has been a material failure to satisfy a project milestone, the Executive Officer shall issue a "Notice of Failure to Complete SEP." The amount of suspended liability owed shall be determined via a Motion for Payment of Suspended Liability before the Regional Water Board or its delegee. Lehigh shall be liable to pay the entire SEP Amount (\$300,000), or, if shown by Lehigh, some portion thereof less the value of any completed milestones as stipulated to by the Parties in writing, or as determined by the Motion for Payment of Suspended Liability. Unless the Regional Water Board or its delegee determines otherwise, Lehigh shall not be entitled to any credit, offset, or reimbursement from the Regional Water Board for expenditures made on the SEP prior to the issuance date of the Notice. Within 30 days of the Regional Water Board's or its delegee's determination of the suspended liability amount assessed for Lehigh, it shall submit payment consistent with the payment method described in paragraph 8, above. Payment of the assessed amount shall satisfy Lehigh's obligations to implement the SEP.
- 21. Replacement SEP:** If there is a material failure, in whole or in part, to perform the SEP described in Attachment B due to circumstances beyond Lehigh's control, and the Regional Water Board does not move to collect the Payment of Suspended Liability amount as provided in the preceding paragraphs, the

Parties agree that Lehigh may propose a Replacement SEP. Whether there is a material failure to perform the SEP(s) described in Attachment B shall be determined by the Executive Officer. Lehigh shall have 60 days from the date of the Executive Officer's determination to propose a Replacement SEP. The cost of the Replacement SEP shall be for the entire SEP Amount, or, some portion thereof less the value of any completed milestones as stipulated to by the Parties in writing and shall be treated as a suspended liability subject to the same conditions provided for the SEP being replaced. The terms and conditions of the Replacement SEP shall be memorialized in a Supplemental Agreement to this Stipulated Order, signed by both Parties and approved by the Regional Water Board or its delegee. The Replacement SEP shall meet the criteria in the SEP Policy, and shall be completed within 36 months of the Regional Board's or its delegee's approval of the Supplemental Agreement (Replacement SEP Completion Date). The Executive Officer may grant an extension for good cause shown as to why the Replacement SEP cannot be completed by the Replacement SEP Completion Date. The Parties agree that, unless requested by the Executive Officer, the Supplemental Agreement will not be subject to public notice and comment so long as the initial notice and comment period complied with federal and/or state requirements. If there is a material failure to perform a Replacement SEP, then the Executive Officer shall issue a "Notice of Failure to Complete SEP" as described in paragraph 19. Lehigh shall not have an opportunity to propose a second Replacement SEP should it fail to complete the Replacement SEP for any reason.

22. **Regional Board Acceptance of Completed SEP:** Upon Lehigh's satisfaction of its obligations under this Stipulated Order, the completion of the SEP, and any audits, the designated Regional Board or its delegee shall issue a "Satisfaction of Order." The issuance of the Satisfaction of Order will terminate any further obligation of Lehigh under this Stipulated Order and permanently suspend the SEP Amount.
23. **Compliance with Applicable Laws:** The Settling Respondent understands that payment of administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability.

24. Party Contacts for Communications related to this Stipulated Order:

For the Regional Water Board:

Brian Thompson
San Francisco Bay Regional Water
Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612
brian.thompson@waterboards.ca.gov
(510) 622-2422

Counsel:

Julie Macedo
State Water Resources Control
Board
801 K Street, Suite 2300
Sacramento, CA 95814
julie.macedo@waterboards.ca.gov
(916) 323-6847

For the Settling Respondent:

Sanjeet Sen
Senior Environmental Manager
Lehigh Southwest Cement Co.
24001 Stevens Creek Blvd.
P.O. Box 382
Cupertino, CA 95014
sanjeet.sen@heidelbergmaterials.com
(408) 996-4249

Counsel:

Nicole Granquist
Downey Brand
621 Capitol Mall, Suite 1800
Sacramento, CA 95814
ngranquist@downeybrand.com
(916) 520-5369

25. Attorney Fees and Costs: Except as otherwise provided herein, each Party shall bear all attorney fees and costs incurred pursuant to this Stipulated Order.

26. Matters Addressed by this Stipulated Order: Upon the Regional Water Board's or its delegate's adoption, this Stipulated Order represents a final and binding resolution and settlement of the alleged violations described herein.

27. Public Notice: The Settling Respondent understands that this Stipulated Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegate. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board or its delegate for adoption, the Prosecution Team may unilaterally declare this Stipulated Order void and decide not to present it to the Regional Water Board or its delegate. The Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

28. Addressing Objections Raised During Public Comment Period: The Parties agree that the procedure contemplated for public review of this Stipulated Order and the Regional Water Board's or its delegate's adoption of this Stipulated Order is lawful and adequate. The Parties understand that the Regional Water Board or its delegate has the authority to require a public hearing on this Stipulated Order. If procedural objections are raised and the Regional Water Board or its delegate requires a public hearing prior to the Stipulated Order becoming effective, the Parties agree to meet and confer

concerning any such objections, and may agree to revise or adjust this Stipulated Order as necessary or advisable under the circumstances.

29. **Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Parties are represented by counsel in this matter.
30. **Modification:** The Parties shall not modify this Stipulated Order by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Regional Water Board or its delegate.
31. **If the Stipulated Order Does Not Take Effect:** If the Stipulated Order does not take effect because the Regional Water Board or its delegate does not approve it, or because the State Water Resources Control Board (State Water Board) or a court vacates it in whole or in part, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liability for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing, or in any other administrative or judicial proceeding. The Parties agree to waive any and all objections based on settlement communications in this matter, including but not limited to objections related to prejudice or bias of any of the Regional Water Board members or their advisors, or any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulated Order and, therefore, may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged herein in this matter. The Parties also agree to waive any and all objections based on laches, delay, or other equitable defenses pertaining to the period by which the Regional Water Board may commence an administrative or judicial action for the period of time taken to conduct these settlement proceedings.
32. **Waiver of Hearing:** The Settling Respondent has been informed of the rights Water Code section 13323, subdivision (b), provides and, if the settlement is adopted by the Regional Water Board or its delegate, hereby waives its right to a hearing before the Regional Water Board prior to the Stipulated Order's adoption. However, if the settlement is not adopted, or if the matter proceeds to the Regional Water Board or State Water Board for a hearing, the Settling Respondent does not waive its right to a hearing before an order is imposed.
33. **Waiver of Right to Petition or Appeal:** Except in the instance where the Stipulated Order is not adopted by the Regional Water Board or its delegate, the Settling Respondent hereby waives its right to petition the Regional Water

Board's or its delegate's adoption of the Stipulated Order for review by the State Water Board, and further waives its rights, if any, to appeal the adopted Stipulated Order to a California Superior Court and/or any California appellate level court.

34. **Covenant Not to Sue:** The Settling Respondent covenants not to sue or pursue any administrative or civil claims against the State of California, any State agency, or its officers, Board members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Stipulated Order.
35. **No Admission of Liability/No Waiver of Defenses:** In settling this matter, the Settling Respondent does not admit to any of the allegations stated herein or admit to any violations of the Water Code, or any other federal, State, or local law or ordinance, but recognizes that this Stipulated Order may be used as evidence of a prior "history of violations" consistent with Water Code sections 13327 and 13385, subdivision (e).
36. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board or its delegate under the terms of this Stipulated Order shall be communicated to the Settling Respondent in writing. No oral advice, guidance, suggestions, or comments from Regional Water Board employees or officials regarding submissions or notices shall be construed to relieve the Settling Respondent of its obligation to obtain any final written approval this Stipulated Order requires.
37. **Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of, and to bind, the entity on whose behalf he or she executes the Stipulated Order.
38. **No Third-Party Beneficiaries:** This Stipulated Order is not intended to confer any right or obligation on any third party, and no third party shall have any right of action under this Stipulated Order for any cause whatsoever.
39. **Severability:** This Stipulated Order is severable; if any provision is found to be invalid, the remainder shall remain in full force and effect.
40. **Counterpart Signatures; Facsimile and Electronic Signature:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document. Further, this Stipulated Order may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

41. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Regional Water Board or its delegate enters the Order incorporating the terms of this Stipulated Order.

IT IS SO STIPULATED.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION, PROSECUTION TEAM**

Date: August 22, 2023

By: _____
Thomas Mumley,
Assistant Executive Officer

LEHIGH SOUTHWEST CEMENT COMPANY

Date: 8/16/2023

By: Gregory J Ronczka
Gregory J Ronczka, MPH, P.G.
Vice President, Environment & Sustainability

ORDER OF THE REGIONAL WATER BOARD

1. This Order incorporates the foregoing Sections I through III by this reference as if set forth fully herein.
2. In accepting this Stipulated Order, the Regional Water Board or its delegate has considered, where applicable, each of the factors prescribed in Water Code section 13385, subdivision (e), and has applied the State Water Resource Control Board's Enforcement Policy, which is incorporated herein by reference. The consideration of these factors and application of the Enforcement Policy are based on information the Prosecution Team obtained in investigating the allegations set forth in the Stipulated Order or otherwise provided to the Regional Water Board.
3. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board or its delegate finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, § 21000 et seq.) in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations.
4. The Executive Officer of the Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the Settling Respondent fails to perform any of its obligations under this Stipulated Order.

IT IS HEREBY ORDERED pursuant to Water Code section 13323 and Government Code section 11415.60, on behalf of the California Regional Water Quality Control Board, San Francisco Bay Region.

Eileen White
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region

Date

ATTACHMENT A

Stipulated Order R2-2023-1006 Specific Factors Considered Lehigh Southwest Cement Company Santa Clara County

Each factor of the Enforcement Policy and its corresponding score for each alleged violation are presented below. Since an administrative civil liability complaint was not issued in this case, this description represents the agreed-upon factors as discussed by the San Francisco Bay Water Quality Control Board (Regional Water Board) Prosecution Team and Lehigh Southwest Cement Company (Lehigh) in settlement.

Introduction

An unauthorized discharge of approximately 15,550,000 gallons of potable water was discharged in alleged violation of Water Code section 13385 and NPDES Permit CA0030210 (Order R2-2019-0024). Each factor of the Enforcement Policy and its corresponding score is presented below.

The Regional Water Board can take the following actions regarding the illicit discharge:

- (a) No action or penalty.
- (b) A penalty based on days of discharge (Water Code section 13385).
- (c) A penalty based on volume discharged (Water Code section 13385).
- (d) A penalty based on both days of discharge and volume discharge (Water Code section 13385).
- (e) A penalty in combination with a supplemental environmental project or enhanced compliance action.

Consistent with the *Enforcement Policy* and *Supplemental Environmental Project Policy*, the Prosecution Team proposes a monetary penalty representing the maximum liability for days of discharge, and foregoing a penalty based on volume. In addition, this settlement also alleges and resolves another non-discharge penalty for inadequate “operations and maintenance.” This exercise of discretion is within the purview of the Prosecution Team. Utilizing the Enforcement Policy factors incorporating the reported volume of more than 15,000,000 gallons results in an inappropriately high penalty. Conversely, the penalty generated by the application of a per-day penalty incorporating the Enforcement Policy factors, without volume and reflecting reductions from the maximum penalty, results in an inappropriately low penalty. The proposed resolution is to instead identify and consider the minimum and maximum penalties as required by the Water Code and Enforcement Policy, but resolve the alleged violation by imposing the statutory maximum for the discharge penalty on a per-day basis, and the penalty

generated by using the Enforcement Policy factors for the “operations and maintenance” non-discharge alleged violation. This results in a penalty of \$600,310.

In addition to the payment of the penalty, Lehigh has proposed, and the Prosecution Team has accepted, a supplemental environmental project involving restoration of Permanente Creek at “Pond 22,” called the “Pond 22 Creek Restoration Project.” This project will improve riparian habitat in an area that does not have any current industrial use, and the project is not required by any regulation, including the County’s mine reclamation efforts. The cost of this project is estimated to be approximately \$800,000, of which \$300,000 (SEP Amount) will be conditionally suspended from the penalty amount until the project is completed, at which time it will be permanently suspended. The creek restoration project must be completed to achieve permanent suspension. A detailed description of the project is attached as Attachment B.

**Preliminary Penalty Assessment for Lehigh’s Unauthorized Chlorinated Potable Water Discharge – Alleged Violation 1
 15,550,000 Gallons to Permanente Creek from June 30 through July 29, 2022**

Factors	Alleged Violation 1 - Discharge
Toxicity	3
Harm	3
Susceptibility to Cleanup	1
Deviation	Major
Potential for Harm factor	0.41
High volume applied (\$1/gallon)	Not assessed
29 days of alleged violation (\$10,000/day)	\$290,000
Initial Liability	\$118,900
Culpability	1.4
Cleanup and Cooperation	1
History of Violation	1.1
Total Base Liability – Alleged Violation 1	\$183,106

The Enforcement Policy factors are discussed below.

Step 1. Actual or Potential for Harm for Discharge Violations

The first step for alleged discharge violations is to determine the actual or potential harm to the water body’s beneficial uses by using a three-factor scoring system.

This is determined by the sum of the factors for a) the degree of toxicity of the discharge; b) actual or potential for harm to beneficial uses; and c) the susceptibility of the discharge to cleanup or abatement. Here, the Potential for Harm is 7.

a) Factor 1: The Degree of Toxicity of the Discharge (3 = discharged material poses an above-moderate risk)

The degree of toxicity considers the physical, chemical, biological, and/or thermal characteristics of the discharge, and the risk of damage the discharge could cause to the receptors or beneficial uses. A score between 0 and 4 is assigned.

Here, the discharged material was potable water; chlorine in potable water interferes with aquatic life's breathing function. Consistent with other settlements and matters resolved by this region, a factor of 3 was selected for consideration of the initial liability.

b) Factor 2: Actual or Potential Harm to Beneficial Uses (3 = Above Moderate)

This factor considers the actual harm or potential harm to beneficial uses that may result from exposure to the pollutants or contaminants in the discharge. A score between 0 and 5 is assigned.

The Beneficial Uses of Permanente Creek include groundwater recharge; spawning and wildlife habitat for species, including endangered species such as the California red-legged frog; and recreational uses. While this large and continuous discharge could have affected a number of those beneficial uses, the Prosecution Team recognizes that Permanente Creek may not have been flowing at the time of this discharge. Thus, actual exposure and/or impact was minimized.

c) Factor 3: Susceptibility to Cleanup or Abatement (1 = less than 50% of the discharge is susceptible to cleanup or abatement)

A score of 0 is assigned if the discharger cleans up 50% or more of the discharge within a reasonable time, while a score of 1 is assigned if less than 50% of the discharge is susceptible to clean up, or if 50% of the discharge is susceptible to cleanup or abatement, but the discharger failed to clean up 50% or more of the discharge within a reasonable time.

The discharge was not susceptible to cleanup or abatement. Therefore, this factor is assessed with a score of 1.

Final Score – Potential for Harm is 7.

Step 2. Assessments for Discharge Violations

a) *Per-Gallon Assessment for Discharge Violation:*

Consistent with the Enforcement Policy (p. 13), the Prosecution Team considered “whether to assess both per gallon and per day penalties” and determined that any penalty consistent with prior orders and settlements resolving discharges of potable water would be in excess of \$6 million. The Prosecution Team posited that a penalty over a million dollars would be excessive given the circumstances of the discharge. Rather than manipulate the Enforcement Policy factors by selecting factors that would not be appropriate or consistent with other discharges, or adjusting the discharge volume, the Prosecution Team elected to proceed with a daily penalty rather than with a daily and volumetric penalty. Therefore, the per-gallon assessment for the alleged discharge violation was not considered in this assessment.

b) *Initial Liability Amount: Daily: \$118,900*

When there is a discharge, the Water Board determines an initial liability amount on a per-day basis using the Potential for Harm score and the extent of Deviation from Requirement.

(i) Deviation from Requirement: Major

This factor reflects the extent the alleged violation deviated from the specific requirement at issue, and is expressed as either minor, moderate, or major. A factor of “major” is assigned when the requirement has been rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

Here, the “deviation from requirement” is considered major because the discharge was not authorized by the Permit and was not discovered for 29 days. A more specific description of the cause of the discharge and the delay in discovery is described in the factor analysis for Alleged Violation 2, below (*see also* Lehigh’s 5-Day Report). The individual NPDES permit for this facility limits the types of discharge and discharge locations. In comparing these directives with the discharge at issue, a “major” deviation is appropriate.

Utilizing the table in the Enforcement Policy (p. 15), a per-day factor of 0.41 was applied.

(ii) Days of alleged violation: 29

The spill event took place over 29 days.

29 days x \$10,000/day x 0.41 = \$118,900

Step 3. Per-Day Assessment for Non-Discharge Violations

The alleged violation is an alleged discharge violation. Therefore, this step is not applicable.

Step 4. Adjustment Factors

The Enforcement Policy provides that three additional factors are to be considered for modification of the amount of initial liability: (a) the violator's culpability, (b) efforts to clean up or cooperate with the regulatory authority, and (c) the violator's compliance history.

a) Culpability: 1.4

The Enforcement Policy provides that higher liabilities should result from intentional or negligent alleged violations as opposed to accidental violations. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Prosecution Team selected a multiplier of 1.4, which increases the initial liability. Measures were already in place to detect potential discharges from the potable water system's Fresh Water Tank in the event of an overflow; however, these measures reduced the need for daily inspections to the location of the discharge, which is remote and relatively hard to access. The failure involved a branch of pipe that was no longer in use, but still hydraulically tied into the potable water supply, and the material was susceptible to corrosion. The pipe that was no longer in use did not need to be replaced or upgraded, but needed to be disconnected. While the discharge was accidental, Lehigh failed to undertake action to address this decommissioned, yet still connected, pipe. More routine checks of remote facility locations could have allowed discovery of the discharge sooner, resulting in less volume discharged. Lehigh received a penalty for a similar potable water spill roughly one year ago. A reasonable and prudent discharger would have more thoroughly inspected its facility for other areas of potential risk, such as decommissioned equipment still connected to in-use equipment.

b) Cleanup and Cooperation: 1

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation.

Lehigh's actions after discovering the discharge were quick, as expected from a reasonable and prudent operator. A thorough report was prepared and submitted to the Regional Water Board. However, cleanup was impossible. For these reasons, a neutral factor of 1 is applied.

c) History of Violations: 1.1

Lehigh has had previous violations addressed by previous stipulated orders issued by the Regional Water Board. The Regional Water Board has discretion related to this factor, and the Prosecution Team applied a multiplier of 1.1 to increase the base liability.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Potential for Harm determined in Step 2.

Total Base Liability Amount: Daily: \$118,900

Initial liability amount x 1.4 (culpability) x 1 (cleanup and cooperation) x 1.1 (history of violations) =

$$\$118,900 \times 1.4 \times 1 \times 1.1 = \$183,106$$

Step 6. Ability to Pay and Continue in Business

Lehigh has the ability to pay the proposed penalty and continue in business. Lehigh has presented no evidence to contest the proposed liability, or other possible penalties.

Step 7. Economic Benefit

The alleged violation involved failure of a small branch of pipe that was no longer in use and capped, but still hydraulically tied into the potable water supply. The type of metal used for the small branch pipe made the connection susceptible to corrosion. The cost to drain the line, cut out the 2" leak port, and seal it with a cap is less than \$10,000 dollars. The cost of these items has been recovered by the proposed penalty.

Step 8. Other Factors as Justice May Require

The Prosecution Team finds that the proposed penalty is sufficient to recoup investigation and enforcement costs incurred in prosecuting this matter.

The settlement further reflects an appropriate compromise between a monetary penalty and prospective environmental benefit through the implementation of a supplemental environmental project.

Step 9. Maximum and Minimum Liability Amounts

Minimum Liability Amount:

The Enforcement Policy requires that the minimum liability imposed not be below the economic benefit plus ten percent. As discussed above, the Prosecution Team's estimate of Lehigh's economic benefit obtained from the alleged violation

is less than \$10,000. Adding 10% to this amount results in a minimum penalty of \$10,100.

Maximum Liability Amount: \$155,790,000

The Enforcement Policy requires that the maximum and minimum liability amounts be determined to make sure the final liability assessed falls within the legal range for acceptable resolution.

Maximum Penalty for Alleged Discharge Violation:
 15,550,000 gallons x \$10 per gallon = \$155,500,000;
 29 days of discharge x \$10,000 per day = \$290,000

Sum = \$155,790,000

The proposed liability falls within these maximum and minimum liability amounts.

Preliminary Penalty Assessment for Lehigh’s Failure to Exercise Appropriate Operations and Maintenance Required by the Permit – Alleged Violation 2 March 23, 2020¹ through July 29, 2022 (859 days)

Factors	Alleged Violation 2 - Non-Discharge
Potential for Harm	Moderate
Deviation from Requirement	Moderate
Potential for Harm factor	0.35
859 days of alleged violation (\$10,000/day); March 23, 2020- July 29, 2022	
Compressed days	62
Initial Liability	\$217,000
Culpability	1.3
Cleanup and Cooperation	1
History of Violation	1.1
Total Base Liability – Alleged Violation 2	\$310,310

¹ This is the date of the previous potable water discharge from the Lehigh facility, which was the subject of separate enforcement.

Step 1. Actual or Potential for Harm for Discharge Violations

This step is not applicable to alleged non-discharge violations.

Step 2. Assessments for Discharge Violations

This step is not applicable to alleged non-discharge violations.

Step 3. Per-Day Assessment for Non-Discharge Violations

This alleged violation alleges that Lehigh did not properly operate and maintain its facility in an appropriate and prudent manner, contrary to permit requirements (see Order R2-2019-0024, Attachment D, section I.D) by failing to inspect and address decommissioned, but still hydraulically connected, infrastructure within the potable water system.

For this alleged non-discharge violation, the Prosecution Team determined that both the “potential for harm” and “deviation from requirement” are moderate. The Enforcement Policy states that most alleged non-discharge violations should be considered to present a moderate potential for harm. It is evident from previous enforcement against Lehigh, for alleged discharge violations and effluent limitation exceedances, that facility operations have improved as a result of Regional Water Board oversight. The enforcement message has been delivered and Lehigh has responded. In addition, Lehigh had implemented some detection measures for the Fresh Water Tank of the potable water system, indicating that the requirements have been somewhat effective. However, failure to adequately inspect and safely decommission aging infrastructure resulted in this alleged violation. This alleged non-discharge violation could have been avoided if proactive efforts had taken place to address the small branch pipeline, rather than relying solely on automatic detection systems that did not effectively catch the discharge (because the small branch pipe is located after the Fresh Water Tank, the Fresh Water Tank remained at capacity, and did not alert Lehigh staff to a problem in the remote location).

Utilizing the table in the Enforcement Policy (p. 16), a per-day factor of 0.35 was applied.

Step 4. Adjustment Factors

The Enforcement Policy provides that three additional factors are to be considered for modification of the amount of initial liability: (a) the violator’s culpability, (b) efforts to clean up or cooperate with the regulatory authority, and (c) the violator’s compliance history.

a) Culpability: 1.3

Culpability examines the discharger’s conduct prior to the alleged violation. The poor operations and maintenance were not discovered until the potable water discharge, and the cause of that discharge was not discovered for several weeks. The Fresh Water Tank (the source of the discharge) is in a remote part of the Lehigh facility, and not inspected daily. Prior efforts were made to prevent or quickly detect *overflows* from the Fresh Water Tank. Because of the

location of this leak, the operable water level sensors did not alert Lehigh to its existence; the Fresh Water Tank never lost volume given additional potable water consumption. The possibility of a leak was only considered after San Jose Water notified Lehigh of higher-than-expected consumption. As soon as the alert was received, Lehigh conducted an investigation that led to the discovery of the leak and subsequent repair and mitigation measures.

The Prosecution Team selected 1.3 for this factor because, while a number of preventative measures were in place at the time of the leak, a reasonable and prudent party would have inspected its decommissioned equipment to lower the possibility of failure and unauthorized discharges.

b) *Cleanup and Cooperation: 1*

This factor is assigned a neutral score of 1. Immediately upon receipt of the San Jose Water notification, Lehigh took appropriate responsive action, including submitting a detailed 5-Day Report.

c) *History of Violations: 1.1*

Lehigh has had previous violations addressed by penalties. The Regional Water Board has discretion related to this factor, and the Prosecution Team applied a multiplier of 1.1 to increase the base liability.

d) *Multiple Day Violations*

The Prosecution Team determined that the period of time for which operations and maintenance fell below an acceptable level was from the date of the previous potable water discharge (March 18, 2020) through the date of the discharge at issue in this action. This represents approximately 859 days of alleged violation, which was adjusted downward, upon express findings that the alleged daily violation of inadequate operation and maintenance did not cause daily detrimental impacts to the environment.

As allowed by the Enforcement Policy, the first 30 days of alleged violation are assessed individually, and every fifth day for days 30 through 60 are assessed as a single day. After day 61 of an ongoing alleged violation, the remaining days can be collapsed in 30-day periods, provided that findings are expressly made that there was not a daily economic benefit to the alleged violation. The 859 days of alleged violation in this case were therefore collapsed to multiple 30-day periods after the 60th day of alleged violation. This results in 62 days of alleged violation, which was considered appropriate based on the actions taken prior to the discharge incident, the increased effort needed to inspect this part of the facility, and the likelihood that a visual inspection would have detected the leak.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors to the per-day factor.

Initial Liability Amount: Daily: \$217,000

62 collapsed days x \$10,000/day x 0.35 = \$217,000

Total Base Liability Amount: Daily: \$310,310

Initial liability amount x 1.3 (culpability) x 1 (cleanup and cooperation) x 1.1 (history of violations) =

\$217,000 x 1.3 x 1 x 1.1 = \$310,310

Step 6. Ability to Pay and Continue in Business

Lehigh has the ability to pay the proposed penalty amount and continue in business. Lehigh has presented no evidence to contest the proposed liability, or other possible penalties.

Step 7. Economic Benefit

The alleged violation involved poor operations and maintenance, resulting in failure of a small branch of pipe that was no longer in use/decommissioned and capped, but still hydraulically tied into the potable water supply. The type of metal used for the small branch pipe made the connection susceptible to corrosion. The maintenance cost to drain the line, cut out the 2" leak port, and seal it with a cap is less than \$10,000 dollars. The cost of these items has been recovered by the proposed penalty.

Step 8. Other Factors as Justice May Require

The Prosecution Team finds that the proposed penalty is sufficient to recoup investigation and enforcement costs incurred in prosecuting this matter.

The settlement further reflects an appropriate compromise between a monetary penalty and prospective environmental benefit through the implementation of a supplemental environmental project.

Step 9. Maximum and Minimum Liability Amounts

Minimum Liability Amount: \$10,100

The Enforcement Policy requires that the minimum liability imposed not be below the economic benefit plus ten percent. As discussed above, the Prosecution Team's estimate of the Discharger's economic benefit obtained from this violation is less than \$10,000. Adding 10% to this amount results in a minimum penalty of less than \$10,100.

Maximum Liability Amount: \$8,590,000

The Enforcement Policy requires that the maximum and minimum liability amounts be determined to ensure the agreed-upon penalty fits within the legal range.

Maximum Penalty for Discharge Violation:

859 days of discharge x \$10,000 per day = \$8,590,000

The proposed liability falls within these maximum and minimum liability amounts.

Step 10. Final Liability Amount

The final liability amount generated by the Enforcement Policy for these two alleged violations is approximately \$493,416 (\$183,106 for Alleged Violation 1; \$310,310 for Alleged Violation 2). This penalty was deemed too low. Instead of utilizing the volume of discharge or refusing to collapse days for alleged non-discharge violations, both of which are discretionary determinations, the Regional Water Board negotiated a settlement of **\$600,310**, representing the maximum daily amounts for the alleged discharge violation (29 days x \$10,000/day for Alleged Violation 1) and assessed Alleged Violation 2 consistent with the analysis above. The Prosecution Team also concluded that a multi-million-dollar penalty in response to this discharge was unnecessarily punitive. The settlement amount allows for a significant supplemental environmental project to be undertaken and, if the project is completed, allows suspension of a portion (up to 50%, consistent with the Supplemental Environmental Project Policy) of the monetary penalty. In addition, Lehigh has agreed to complete the project at a cost of approximately \$800,000 to ensure the project's efficacy and impact. The combination of improved riparian habitat and monetary penalty is an appropriate resolution of the alleged violations.

ATTACHMENT B

SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) Pond 22 Permanente Creek Restoration Project

Name of Project: Pond 22 Permanente Creek Restoration Project (Project)

Project Applicant: Lehigh Southwest Cement Company and Hanson Permanente Cement Company (Lehigh)

Address: Santa Clara County
24001 Stevens Creek Blvd.
Cupertino, CA 95014

Project Manager: Carolina D. Addison
Director of Environment Land Resource Development,
Carolina.Addison@lehighhanson.com
408-996-4066

Party completing the project:

Lehigh, with support from Waterways Consulting, Inc. and GEI Consultants, Inc. Lehigh has an established record of completing projects with the Water Board, and the capacity to complete the project.

Project Category (all that are applicable):

Per the State Water Resources Control Board's SEP Policy, the Pond 22 Permanente Creek Restoration Project furthers the Water Boards' mission "to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations."

The primary category of SEP this Project fulfills is *Environmental Restoration and Protection*.

Project Location (include, as appropriate, city, county, address, waterbody):

The proposed project location is along Permanente Creek downstream of the Lehigh Permanente Quarry and Cement Plant just west of Cupertino, California in Santa Clara County (address listed above). The specific project area is located near the eastern boundary of the facility property and adjacent to an area referred to as "Pond 14." Please refer to **Attachment 1** for a site map with visual location details.

Project Description

The Project area includes a historical in-stream concrete retention dam (an area referred to as “Pond 22,” denoting the water instream behind the historical dam) in Permanente Creek that no longer functions as intended. The Project would remove the concrete dam at Pond 22 and the in-creek culvert (Culvert 1 on Attachment 1) located immediately downstream and adjacent (to the left) to the concrete dam that facilitates flow continuing down Permanente Creek, and restore this area as a natural channel (approximately 350 linear feet through the aggraded pond). The two separate culverts located downstream and adjacent (to the right) of the dam that outlet into Pond 14 (Culverts 2 and 3 on Attachment 1) would not be disturbed/would be retained, though the Permanente Creek-facing inlets of these culverts will be improved to limit the potential for sediment to be conveyed along with flow into Pond 14. Floodplain benches will be constructed along an approximately 250-foot reach of Permanente Creek downstream of the dam removal area to enhance habitat along this portion of the creek and a rock-lined channel will also be constructed at the Pond 14 outlet to stabilize a headcut and prevent it from undermining the existing concrete dam at Pond 14 that will be retained.

Brief work plan containing tasks, deliverables, milestones, and schedule. The deliverables must include quarterly progress reports and a final completion report.

The Project will include planning and design, environmental documentation and permitting, contracting, and construction. Project implementation is expected to occur within 36 months.

- Planning and design – 6 months
- Environmental Documentation and Permit Acquisition – 12 months
- Bidding and Award of Contract – 6 months
- Construction – 12 months (Project will be constructed during May – September following award of contract)

As part of federal and state permitting, Lehigh expects the Project will be required to monitor success of the Project for a period of time post-construction.

Lehigh will provide quarterly progress reports to the Regional Water Quality Control Board, San Francisco Region (Regional Water Board) until the Project is completed, and a final report to the Regional Board and Office of Enforcement, within thirty (30) days of completion, which will also detail continuing obligations for success monitoring via Project permitting. At a minimum, the quarterly reports will include a list of all activities on the SEP for each reporting period, an accounting of funds expended, and the proposed work for the following quarter. Reports will be submitted no later than the first day of the second month following the end of each reporting period.

Total project cost and amount of SEP money requested. If there are other funding sources, indicate if the funds have been committed and whether there are any restrictions on the funds.

Lehigh proposes that 50% of the assessed penalty amount be allocated towards the Project. The total estimated cost for the Pond 22 Permanente Creek Restoration project is likely between \$850,000 and \$1,200,000, and Lehigh will complete the Project for actual costs.

Estimated Cost Range ^[1]		
Construction Cost	\$600,000	\$800,000
Engineering Design	\$60,000	\$80,000
Project Permitting (excluding CEQA)	\$100,000	\$150,000
Construction Related Services		
Engineering Oversight During Construction	\$50,000	\$70,000
Biological Monitoring During Construction (for California red-legged frog)	\$50,000	\$100,000
Total	\$860,000	\$1,200,000

^[1] Post construction monitoring and maintenance is excluded from project cost as these activities will occur post-SEP.

Project readiness, including status of CEQA, permits, and landowner agreements.

The Project will be implemented on land already owned by Lehigh. Lehigh will augment the existing draft Supplemental EIR for the Permanente Creek Restoration Project to satisfy CEQA review. Permits from the U.S. Army Corps of Engineers, the State Water Board, California Department of Fish and Wildlife, and the County will be obtained during the period of Project performance.

Expected benefits or improvements to water quality or other beneficial uses.

The Project is expected to remove in-stream man-made structures impeding the natural creek flow, remove sediment stored behind the Pond 22 dam, and improve channel and stream bank stability and ecological/geomorphic function, as well as improve riparian habitat. Aquatic beneficial uses will be better protected and served, and the habitat for federally protected California red-legged frog will be substantially enhanced.

Is the project located within, or does it benefit, and Environmental Justice community, a Disadvantaged Community, or a community that has financial hardship? If yes, describe.

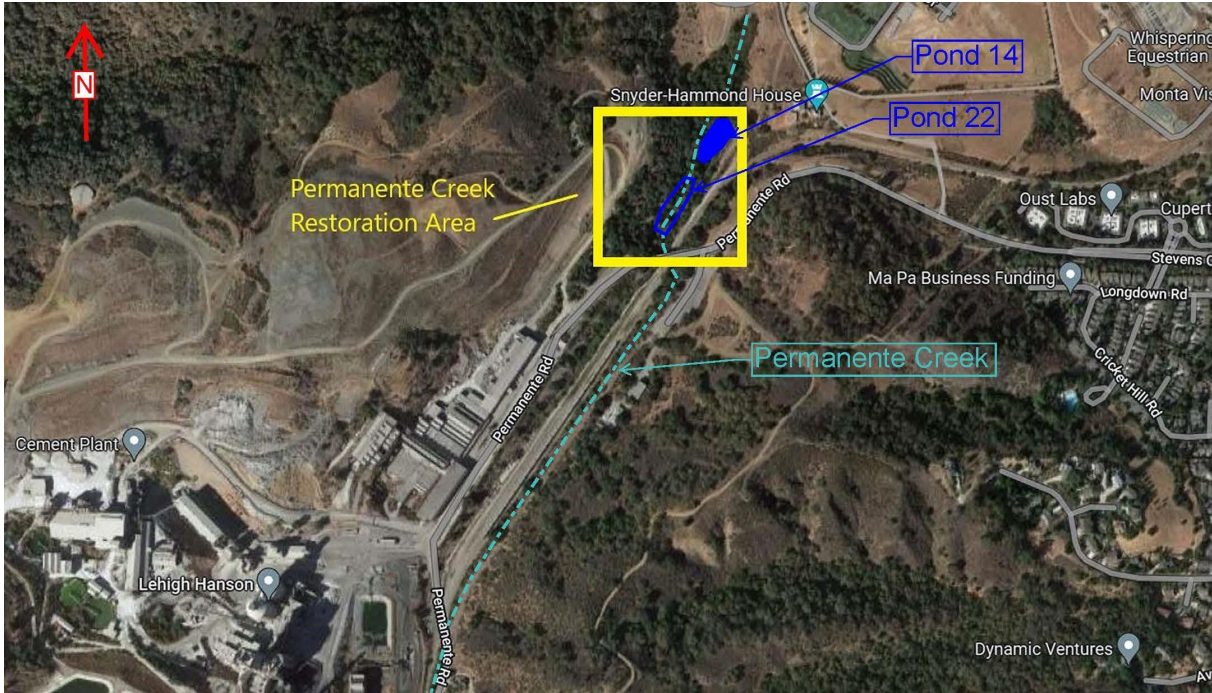
No.

Will this project further the State Water Board's core value of the human right to water? if yes, describe.

The Project will substantially improve local receiving water resources, and is supportive of the human right to water.

Attachment 1

Settlement Agreement and Stipulated Administrative Civil Liability, Attachment B
Lehigh Southwest Cement Company







Pond 22 in-stream concrete retention dam



Outlet of pipe downstream from Pond 22/Permanente Creek