



MEMORANDUM

Date: August 18, 2008

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to read "CH Huckelberry", is written over the printed name of the County Administrator.

Re: **Empire Mountain Quarries of Arizona Portland Cement Company on State Trust Lands
- Issuance of Floodplain Use Permit**

This memorandum is to inform you that Pima County will be issuing a Floodplain Management permit for the crossing of Davidson Canyon Wash by the Arizona Portland Cement Company for the Empire Mountain Quarries. We will be issuing this permit because the applicant has complied with all applicable Floodplain Management Ordinance Requirements and has provided us with other pertinent information on compliance with the Clean Water Act including their storm water pollution prevention plan for the proposed construction activities for the Arizona Department of Environmental Quality (ADEQ) water quality regulations and information for issuance of a Section 404 permit by the federal U.S. Corps of Engineers.

It appears, based on the attached July 21, 2008 letter, that the applicant has or will meet all Clean Water Act requirements for the Corps' 404 permit and ADEQ's Section 402 permit.

Even though the quarries and haul roads will cause significant ground disturbance, disturbing 61.73 acres, the regulatory permit scopes are limited to only the 4,750 lineal feet of roadway construction for the Section 402 permit. For the Section 404 permit, only 5 wash crossings of less than one-tenth of an acre per crossing, for a total disturbance of 0.155 acres, are affected. While simple logic would indicate that there would be a significant difference in water quality impacts associated with a surface mine as opposed to maintaining an existing paved roadway, the reality is that what appears as a significant impact is not a regulated activity under this application of the Clean Water Act by the Corps or ADEQ.

In January 2007, the United States District Court for the District of Columbia overturned the Corps of Engineers rule on incidental fallback from excavation. The court held that because Tulloch II rule exceeds the authority granted by the Clean Water Act, it is invalid. Incidental fallback from excavation cannot be regulated under the Clean Water Act; other redeposits which are a discharge of dredged materials can. (National Association of Homebuilders v. U.S. Army Corps of Engineers. 2007 U.S. Dist. Lexis 6366;64ERC(BNA)2050;37ERL20028.)

In Arizona, 410 Certification by the Arizona Department of Environmental Quality is automatically granted for quarrying, crushing and screening of nonmetallic mineral in ephemeral waters if all of the conditions of the Nationwide Permit Number 44 are met.

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The application of the Clean Water Act for mining activities can vary enormously depending on the type of mining. For example, Nationwide Permit 21 for Surface Coal Mining Operations and the Corps Memorandum of Understanding with the Office of Surface Mining are used to allow mountain top leveling and valley floor fill operation. Fortunately, for hard rock mining the Nationwide Permit 44 for Mining Activities is more restrictive, limiting each individual discharge to one-half acre or less, otherwise an individual permit is required. Still, certain activities such as overburden piles, storm water control berms, and roadways may be allowed or may be permitted as separate activities from the "mining operations."

The permitting of the Empire Mountain Quarries highlights the inequities in regulatory application to differing uses associated with encroachment or discharge into waters of the United States. For the purposes of the Clean Water Act, the only activity causing a discharge or fill to Waters of the United States is roadway access construction. The quarries are not covered because the activity is an excavation, and all processing of the material is off site at the Rillito Cement Plant.

The purpose of this memorandum is to inform the Board that mining activities within Davidson Canyon have met local floodplain management permitting conditions.

CHH/jj

Attachment

c: John Bernal, Deputy County Administrator - Public Works
Suzanne Shields, Regional Flood Control District Director
Harlan Agnew, Deputy County Attorney, Civil Division



21 July 2008

Ms. Marjorie Blaine
U.S. Army Corps of Engineers
Regulatory Branch, Tucson Project Office
5205 E. Comanche Street
Davis-Monthan Air Force Base
Tucson, Arizona 85707

VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED
No. 7008 0150 0000 7676 4535

RE: Empire Mountain Quarries, Pima County, Arizona

Dear Marjorie:

Our firm is legal counsel to California Portland Cement ("CPC") and its subsidiary, Arizona Portland Cement ("APC"), in connection with the Empire Mountain Quarries in southeastern Pima County, Arizona. As you know, these quarries were the subjects of a Department of the Army permit application that was originally submitted by APC on 1 August 2007, but later withdrawn. During the pendency of the application, Fred Brost of Mining & Environmental Consultants, Inc. was acting as APC's agent. CPC subsequently retained SWCA Environmental Consultants, Inc. ("SWCA") and our firm to re-evaluate regulatory compliance options for the APC quarries. All communications regarding this matter should be directed to my attention.

As discussed below, we believe that the vast majority of APC's activities consist of excavation that does not require a permit under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. The access road for the West Quarry will cross three ephemeral washes delineated as jurisdictional by the Corps in June 2006 (File No. 2004-01399-MB). Each of these three separate crossings will impact less than 1/10th acre and may be constructed in full compliance with the terms and conditions of Nationwide Permit 14, including all general and regional conditions. Accordingly, we believe that it will be unnecessary to submit pre-construction notifications ("PCNs") for these crossings. The same can be said for the ultimate extension of that access road into the East Quarry, which also entails four separate crossings of less than 1/10th-acre each. In addition, the improvements associated with utilization of the existing at-grade crossing of Davidson Canyon Wash are outside of the ordinary high water mark and beyond the scope of CWA jurisdiction.

CPC is certainly aware that the Empire Mountain Quarries remain a subject of public discussion and debate. For this reason, CPC elected to advise the Corps of its plan to achieve CWA compliance and explain the basis for its position. CPC

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welcomes the opportunity to discuss any questions or concerns the Corps may have after reviewing these materials.

In addition to this letter, we are also providing the following materials prepared by SWCA: (1) a technical memorandum with an overview of the NWP qualifications and the existing Corps jurisdictional delineation ("JD"); (2) a Biological Evaluation ("BE") that covers the entirety of the western and eastern leases; and (3) a cultural resource survey that also covers the entirety of the western and eastern leases.

I.

THE EMPIRE MOUNTAIN QUARRIES—RELEVANT BACKGROUND

A. Location of the West and East Quarries and the Related State Leases

The Empire Mountain Quarries consist of two quarries—the West Quarry and the East Quarry—each of which is capable of existing as a stand-alone project with independent utility. Generally speaking, the quarries are located approximately 30 miles southeast of Tucson and seven miles south of I-10 near the Old Sonoita Highway. More specifically, the quarries are approximately 0.8 miles north of the intersection of Old Sonoita Highway and State Route 83, near Vail. See SWCA Tech Memo, Figs. 1 and 2.

The West Quarry will ultimately contain approximately 28 acres of mined pit area within two State Leases acquired by CPC: #11-111605 and #11-34966.¹ The East Quarry will contain approximately 18 acres of pit area within State Lease #11-111606. See SWCA Tech Memo, Fig. 2. The East Quarry may be expanded northward to encompass certain federal Bureau of Land Management Claims (the "BLM Claims"), but APC will mine the State Leases in the West and East Quarries irrespective of whether or not CPC is able to acquire the BLM Claims and obtain the related approvals.²

B. The Corps' 2006 JD

In 2004, APC made application to the Corps for a delineation of jurisdictional waters within the areas covered by the western and eastern leases. That JD, which was verified in 2006, delineated approximately 20 ephemeral washes and two livestock tanks as jurisdictional under the CWA.³ See SWCA Tech. Mem. At p.4 and

¹ A portion of the West Quarry was mined several years ago by another owner/operator.

² CPC holds the leases, and APC will operate the Empire Mountain Quarries.

³ At least as of last month, these livestock tanks were completely dry.

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Apdx. D. As a pre-*Rapanos* JD,⁴ the Corps was not required to perform an analysis to determine if these washes have a “significant effect” on the “chemical, physical and biological integrity of a [downstream] traditional navigable water.”⁵ As the Corps post-*Rapanos* guidance states, “[a]s the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.”⁶ We also note that, with the lone possible exception of Davidson Canyon Wash, the ephemeral washes within the West and East Quarries appear to fit the description of the kind of erosional features that, according to the Corps guidance, are generally not considered waters of the United States.⁷

We’re aware that the Los Angeles District has withdrawn a memorandum designating two reaches of the Santa Cruz River as a “traditional navigable water” (“TNW”) for § 404 regulatory purposes. However, even if the District’s prior designation were to be reinstated—or a federal court were to ultimately conclude that the Santa Cruz is a TNW—the washes within both the West and East Quarry areas are at least 43 miles away from the Santa Cruz. Given the distance, the low flow conditions and other factors, we believe as a legal matter it would be difficult to establish that these washes have a significant nexus to a downstream TNW under current law.

Although CPC specifically reserves the right to challenge Corps jurisdiction over these washes, it nevertheless determined that its activities could be conducted in compliance with the CWA even if the JD were to remain legally valid. Put another way, even if a court were to conclude that those washes are jurisdictional, APC believes that its activities will be in compliance with the CWA.

II.

EXCAVATION ACTIVITIES AND SECTION 404 OF THE CLEAN WATER ACT

A. Legal Background

The scope of the Corps’ authority to regulate activities that consist only of excavation has been heavily litigated. In 2007, a federal court enjoined the Corps

⁴ The JD appears to have been verified by the Corps on 13 June 2006.

⁵ *Rapanos* Guidance at 8-10.

⁶ *Id.* at 10.

⁷ *Id.* at 11.

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from further application of the rule utilized to regulate excavation because it exceeded the scope of authority granted by the CWA. Following is a brief review of the legal background.

In 1986, the Corps and EPA issued a regulation defining the term of "discharge of dredged material" to mean "any addition of dredged material in the waters of the United States," but expressly excluding "de minimis, incidental soil movement occurring during the normal dredging operations." *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed.Reg. 41206, 41232 (Nov. 13, 1986). In 1993, the Corps and EPA issued the rule amendments commonly known as "Tulloch I," which removed the de minimis exception provided in the 1986 definitions. 58 Fed. Reg. 45,008 (Aug. 25, 1993). Thus under Tulloch I, if during the course of *removing* material from waters of the United States, some of the removed material fell back to the place from which it was taken, it then became an *addition* and subject to Corps' regulation. Since Tulloch I broadened the Corps' authority to include incidental fallback, virtually all excavation fell under CWA Section 404 regulations.

In 1998, the D.C. Circuit invalidated Tulloch I and enjoined the Corps from enforcing its provisions. *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). The D.C. Circuit rejected the Corps' interpretation that all redeposits are considered an "addition of dredged material in the waters of the United States." This interpretation was found to be a disingenuous interpretation of "addition," and impermissibly broadened the scope of the Corps' authority beyond the intended limits of the CWA.⁸ In 2001, the Corps and EPA revised the regulations in response to the *National Mining* case by issuing what came to be known as Tulloch II. *Further Revisions to the Clean Water Act Regulatory Definition of Discharge of Dredged Material; Final Rule*, 66 Fed. Reg. 4550 (Jan. 17, 2001). Tulloch II did two things: First, it established a rebuttable presumption that the use of mechanized earth-moving equipment results in an "addition of dredged material in the waters of the United States." Second, it defined "incidental fallback" to mean "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal." Thus under Tulloch II, excavation may not be regulated if it is demonstrated that only incidental fallback will result from the activity.

Last year, however, Tulloch II met the same fate as Tulloch I when a federal district court in Washington D.C. held that the rule was an invalid interpretation of

⁸ Craig M. Douglas, *Partial Deregulation of Excavation and Dredging in Wetlands After National Mining v. U.S. Army Corps of Engineers: Reconsideration of the Regulatory Boundary*, ENVIRONMENTAL LAWYER (Feb. 1999)

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the agencies' authority under the CWA and enjoined the Corps and EPA from attempting to enforce its provisions. *National Association of Homebuilders v. U.S. Army Corps of Engineers*, 2007 WL 259944 (D.D.C. 2007). The court rejected the notion that volume is relevant in determining whether a material qualifies as "incidental fallback" and concluded that in order for any attempt to re-define "incidental fallback" to be consistent with the statute, it must (1) address how long the material is held before being re-deposited and (2) the distance between the location of the collection of material and the location of its redeposition.⁹ The court also noted that the Corps' attempt to establish a presumption that mechanized earth-moving equipment will result in a discharge while denying that the presumption effectively shifted the legal burden "reflects a degree of official recalcitrance that is unworthy of the Corps."¹⁰

To date the Corps has not issued a new definition of "incidental fallback" nor has it addressed whether or how it will attempt to regulate excavation activities under the Clean Water Act. Nevertheless, some certainty can be derived from the caselaw. First, there is no longer a rebuttable presumption in favor of a regulated discharge. Second, it is highly unlikely that excavation activities constitute regulated discharges as long as (a) any redeposition incidental to excavation—irrespective of volume—occurs relatively contemporaneously with the extraction; and (b) the distance between the location of original extraction and the location of incidental redeposition is also relatively short.

B. Excavation Activities at the Empire Mountain Quarries

APC and SWCA estimate that 0.396 acres of wash will be excavated in connection with the development of the West Quarry (reaches C [0.039 ac.], E [0.298 ac.] and J [0.059 ac.]). Development of the East Quarry entails excavation of approximately 0.221 acres of wash (reaches A [0.059 ac.], A1 [0.011 ac.], A2 [0.055 ac.] and B1 [0.096 ac.]).

Excavation will be accomplished by traditional limestone mining methods. The access road, as described below, will be constructed first. Operations in the pit will then commence with the removal of any existing overburden, which is confined to areas outside the washes. This will be followed by bench preparation and initial blasting in areas below the delineated washes. This will enable APC to excavate gradually from the bottom elevation of the initial extraction, essentially collapsing

⁹ *Id.* at 4.

¹⁰ *National Association of Homebuilders*, 2007 WL 25994 at 3-4.

the area in front of it, then immediately loading and hauling off site. No limestone processing will occur at either the West or East Quarries.

III. ACCESS ROAD CROSSINGS

A. Use of Nationwide Permit 14

NWP 14 authorizes "activities required for the construction, expansion, modification, or improvement of linear transportation crossings" in waters of the United States. To qualify for Nationwide Permit 14, the crossing must be a "single and complete crossing" and not result in the discharge of greater than 1/2-acre of waters of the United States. *Reissuance of Nationwide Permits; Notice, 72 Fed. Reg. 11092, 11183 (March 12, 2007)*. Where a project transverses a single waterbody several times at separate and distinct locations, each crossing will be considered a "single and complete project." 33 CFR 330.2(i). A PCN is automatically required if the jurisdictional discharge exceeds 1/10 of an acre.

B. Crossings for Empire Quarries Do Not Require Submission of PCN

As described in the SWCA Technical Memorandum, each of the proposed crossings qualifies for authorization under NWP 14. According to the 2006 JD, the four crossings traverse different waterbodies, and thus each crossing constitutes a single and complete crossing. Each crossing will result in less than 1/10th-acre of impact as follows:

Table 1. Summary of 2006 Delineated Drainages and Road Crossings Impacts

Jurisdictional Drainage ID	Total Length in Project Area (ft)	Average Width (ft)	Total Jurisdictional Area (ac)	Area Impacted by Access Road (ac)
B	400	5.0	0.046	0.007
B1	900	6.0	0.124	0.008
C	650	4.5	0.067	0.017
E	1520	11.0	0.383	0.061
J	800	5.0	0.091	0.002
Total			0.711	0.155

In addition, SWCA's resource reviews establish that the crossings also satisfy general and regional NWP terms and conditions including (without limitation) General Conditions 17 and 18. Specifically, the crossings will have no effect on listed threatened or endangered species or designated critical habitat (see Appendix B to

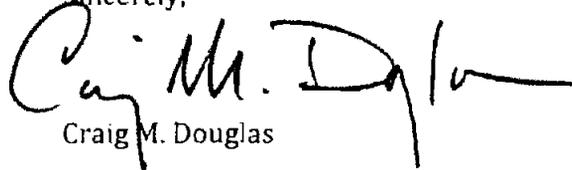
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SWCA memo), and will have no impact on cultural resources (see Appendix C to SWCA memo).

In closing, I hope this information is helpful to the Corps. If you have any questions or would like to meet to discuss the Empire Mountain Quarries, please let me know. Thank you for your time and attention to this matter.

Sincerely,



Craig M. Douglas

Enclosures

Cc: Mr. David Castanon (Corps of Engineers, Los Angeles) *(w/o enclosures)*
Ms. Cindy Lester (Corps of Engineers, Phoenix)
Mr. Edward Harrison (Chief Mining Engineer, CPC)
Renee Benjamin, Esq. (Senior Counsel, CPC)
Mr. Ken Houser (SWCA/Phoenix)
Mr. Russell Waldron (SWCA/Tucson)
Brooke Marcus, Esq. *(Firm)*