

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

In the matter of:

**LEHIGH SOUTHWEST CEMENT  
COMPANY  
SANTA CLARA COUNTY**

**SETTLEMENT AGREEMENT AND  
STIPULATION FOR ENTRY OF  
ADMINISTRATIVE CIVIL LIABILITY  
ORDER**

**ORDER NO. R2-2021-1021**

**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 (Regional Water Board), Prosecution Team and the Lehigh Southwest Cement Company (Lehigh) (collectively, Parties), and is presented to the Regional Water Board or its delegate for adoption as an order by settlement pursuant to Government Code section 11415.60. This Stipulated Order resolves the violation alleged herein by the imposition of administrative civil liability against Lehigh in the amount of **\$60,000**. As a condition of settlement, Lehigh has agreed to complete the study described in Attachment B.

**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. The Regional Water Board reissued waste discharge requirements and NPDES Permit No. CA0030210 for the Facility on July 22, 2019, via Order No. R2-2019-0024. This permit contains prohibitions, limitations, and provisions regulating surface water discharges from the Facility.
3. The Facility discharges process wastewater from cement manufacturing, quarry dewatering, aggregate materials processing, truck washing, and dust control. It also discharges industrial stormwater. These discharges occur at six discharge points described in the permit.
4. The Facility's six discharge points are the only permissible point source discharge locations authorized for process wastewater and industrial stormwater.

5. On March 23, 2020, Lehigh reported an alleged discharge of potable water due to an unplanned overflow from the "Fresh Water Tank" located downstream of Pond 14. The Fresh Water Tank holds potable water from the local water supply agency, San Jose Water, for purposes of providing potable water for Facility consumptive uses.
6. Lehigh learned of the discharge from an unaffiliated contractor performing work at a neighboring downstream property. The Fresh Water Tank is located in a remote portion of the Facility not frequently visited or easily observed from more frequently traveled locations. Lehigh's third-party contractor, who performs Facility inspections, observed flow in the area on March 18, 2020, but did not initially realize it was an unauthorized discharge from the Fresh Water Tank due to recent rains.
7. Lehigh notified the Regional Water Board regarding the discharge on March 23, 2020, via voicemail, and supplemented the notice with written reports on April 1, 2020, and April 10, 2020, and follow up responses to Regional Water Board staff inquiries on June 4, 2020. Lehigh estimated that the discharge took place from March 18, 2020, through March 23, 2020. Although the discharge likely started on March 18, 2020, the precise time is unknown. The total duration is not believed to have exceeded 120 hours (5 days).
8. The Fresh Water Tank overflow was caused by a malfunctioning clayton valve controlling potable water flow into the tank; the clayton valve became stuck in the open position. Lehigh closed the clayton valve and stopped the overflow on the same day that it notified the Regional Water Board. Lehigh has undertaken additional remedial work to ensure proper operation of the clayton valve and systems checks to timely detect changes to potable water flows.
9. Lehigh reported that the discharge likely reached Permanente Creek at least 50 feet downstream of the Fresh Water Tank. Lehigh estimated the discharge volume by calculating water inflow to, and consumption from, the Fresh Water Tank from March 18 through 23, 2020.
10. On March 23, 2020, Lehigh sampled the Fresh Water Tank and Permanente Creek for parameters regulated by the permit, and sampled Permanente Creek for pH and total residual chlorine (TRC). TRC was detected at 0.88 mg/L in the water emanating from the Fresh Water Tank, but it was not detected in the creek. All other parameters were within the permit effluent limits at both locations.
11. While TRC at elevated levels can have deleterious effects on fish and other aquatic biota, Lehigh observed no evidence of harm following the discharge.
12. On January 26, 2021, at a separate location from the Fresh Water Tank, on the entrance road between the guard gate and the Cement Plant, Lehigh discovered that a gate valve along the potable water supply line mechanically failed and potable water traveled overland to the bridge and down the hillside into Pond 14, an off-

channel pond adjacent to Permanente Creek. A small amount of flow was observed re-entering the creek downstream from Pond 14. The leak was detected within approximately five minutes of the occurrence, and Lehigh personnel promptly bypassed the valve, ending the outflow of potable water from the supply line. Sampling was performed and results for Pond 14 and downstream Permanente Creek receiving water results indicated compliance with applicable water quality standards.

13. Section 301 of the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. §1311) prohibits the discharge of pollutants to waters of the United States, except in compliance with an NPDES permit. A person who violates Clean Water Act section 301 is liable civilly under California Water Code (Water Code) section 13385, subdivision (a)(5). Pursuant to Water Code section 13385, subdivision (c), the above referenced unauthorized discharge is subject to administrative civil liability not to exceed \$10,000 per day of violation and \$10 per gallon discharged and not cleaned up in excess of 1,000 gallons.
14. Lehigh is subject to administrative penalties for this alleged unauthorized discharge. Attachment A describes how the Regional Water Board calculated the administrative penalties for the discharge pursuant to the Enforcement Policy.
15. To resolve the discharge violation occurring in March 2020 and January 2021 by consent and without further administrative proceedings, the Parties have agreed to the imposition of an administrative civil liability of **\$60,000** against Lehigh.
16. The Parties have further agreed to incorporate a Selenium Fish Tissue Monitoring Study into this settlement agreement as an incentive to resolve the matter. Lehigh shall implement the study as described in Attachment B. The study area is geographically distinct from, but complements, a study Lehigh is required to implement in Permanente Creek pursuant to the permit. Specifically, Lehigh will attempt to collect and analyze fish tissue in two additional watersheds. The Regional Water Board and regulated community at large will use the information to evaluate whether Santa Clara Valley waters meet selenium water quality criteria proposed by U.S. EPA and thereby inform ongoing basin planning efforts to ensure protection of beneficial uses. The Study is not a Supplemental Environmental Project or Enhanced Compliance Action because no penalties are being suspended in exchange for completing the study.
17. The Parties have agreed 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 Government Code section 11415.60.
18. The Prosecution Team contends that the resolution of the alleged violation is fair and reasonable, and fulfills all its enforcement objectives; that no further action is

warranted concerning the violation, 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:

1. **Administrative Civil Liability:** Lehigh hereby agrees to the imposition of an administrative civil liability of \$60,000 to resolve the alleged violation as set forth herein.
2. **Selenium Fish Tissue Monitoring Study:** Lehigh hereby agrees to implement the Selenium Fish Tissue Monitoring Study described in Attachment B. If additional time is necessary to perform the study due to environmental (e.g., lack of rainfall/flows) or other conditions (e.g., COVID-19 restrictions), Lehigh may request an extension, which will not be unreasonably withheld by the Regional Water Board.
3. **Payment of Administrative Civil Liability:**
  - a. To resolve the alleged violation identified herein, no later than 30 days after the Regional Water Board or its delegate signs this Stipulated Order, Lehigh shall submit a check for \$60,000 made payable to the "State Water Pollution Cleanup and Abatement Account," referencing the Order number on page one of this Stipulated Order.
  - b. All payments shall be mailed to:  
State Water Resources Control Board Accounting Office  
Attn: ACL Payment  
P.O. Box 1888  
Sacramento, CA 95812-1888
  - c. Lehigh shall provide a copy of the check via e-mail to the State Water Resources Control Board, Office of Enforcement (Julie.Macedo@waterboards.ca.gov) and the Regional Water Board (Habte.Kifle@waterboards.ca.gov).
  - d. **Payment for Selenium Fish Tissue Monitoring Study:** Lehigh is responsible for funding the activities required to implement the Selenium Fish Tissue Monitoring Study described in Attachment B. Lehigh shall be responsible for administrative and oversight costs associated with the Study, other than the Regional Water Board's staff time associated with reviewing deliverables and determining completion of the Study.
4. **Publicity Associated with the Study:** 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.

5. **Regional Water Board Not Liable:** Neither the Regional Water Board, its members, or its staff shall 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 Stipulated Order.
6. **Compliance with Applicable Laws:** Lehigh 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.

7. **Party Contacts for Communications related to this Stipulated Order:**

**For the Regional Water Board:**

Staff:  
San Francisco Bay Regional Water  
Quality Control Board  
Attn: Habte Kifle  
1515 Clay Street, 14th Floor  
Oakland, CA 94612  
[Habte.Kifle@waterboards.ca.gov](mailto:Habte.Kifle@waterboards.ca.gov)  
(510) 622-2300

Counsel:  
Julie Macedo, Attorney IV  
Office of Enforcement  
State Water Resources Control Board  
801 K Street, Suite 2300  
Sacramento, CA 95814  
[Julie.Macedo@waterboards.ca.gov](mailto:Julie.Macedo@waterboards.ca.gov)  
(916) 323-6847

**For Lehigh:**

Lehigh Southwest Cement  
Company  
Attn: Erika Guerra, Environmental  
Director - Environmental and Land  
Resource Development  
24001 Stevens Creek Blvd.  
Cupertino, CA 95014  
[Erika.Guerra@LehighHanson.com](mailto:Erika.Guerra@LehighHanson.com)  
(408) 996-4269

Counsel:  
Nicole E. Granquist  
Downey Brand LLP  
Attorney for Lehigh Southwest  
Cement Company  
621 Capitol Mall, 18<sup>th</sup> Floor  
Sacramento, CA 95814  
[ngranquist@downeybrand.com](mailto:ngranquist@downeybrand.com)  
(916) 520-5369

8. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
9. **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 unauthorized discharges that occurred in March 2020 and January 2021. The provisions of this paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadline

specified above and Lehigh's completion of the Selenium Fish Tissue Monitoring Study described in Attachment B.

10. **Public Notice:** Lehigh 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. Lehigh agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.
11. **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 or the Regional Water Board 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 the procedure and/or this Stipulated Order as necessary or advisable under the circumstances.
12. **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.
13. **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.
14. **If the Order Does Not Take Effect:** If this 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 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 liabilities for the underlying alleged violation, 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. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to, the following:
  - a. 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; or

- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

15. **Waiver of Hearing:** Lehigh has been informed of the rights Water Code section 13323, subdivision (b), provides and hereby waives its right to a hearing before the Regional Water Board prior to the Stipulated Order's adoption.
16. **Waiver of Right to Petition or Appeal:** Lehigh hereby waives its right to petition the Regional Water Board's adoption of the Stipulated Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate court.
17. **Covenant Not to Sue:** Lehigh 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 resolved by this Stipulated Order.
18. **No Admission of Liability:** In settling this matter, Lehigh does not admit to any of the allegations stated herein, or that it has been or is in violation of the Water Code or any other federal, State or local law or ordinance, with the understanding 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).
19. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board under the terms of this Stipulated Order shall be communicated to Lehigh 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 Lehigh of its obligation to obtain any final written approval this Stipulated Order requires.
20. **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.

21. **No Third Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligations on any third party and no third party shall have any right of action under this Stipulated Order for any cause whatsoever.
22. **Severability:** This Stipulated Order is severable; if any provision is found invalid, the remainder shall remain in full force and effect.
23. **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.
24. **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:** March 16, 2021



**By:** \_\_\_\_\_  
Thomas Mumley  
Assistant Executive Officer

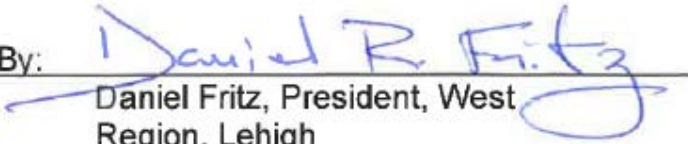
**Approved as to form:**




**By:** \_\_\_\_\_  
Julie Macedo, Attorney IV  
State Water Resources Control Board  
Office of Enforcement

**LEHIGH SOUTHWEST CEMENT COMPANY**

Date: 03/23/2021

By:   
Daniel Fritz, President, West  
Region, Lehigh

Approved as to form:

  
By: \_\_\_\_\_  
Nicole E. Granquist, Attorney  
Downey Brand LLP

## ORDER OF THE REGIONAL WATER BOARD

1. This Stipulated Order incorporates the foregoing sections I through III by this reference as if set forth fully herein.
2. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in Water Code sections 13327 and/or 13385, subdivision (e), and the State Water Resource Control Board's Enforcement Policy, which is incorporated herein by this reference. The Regional Water Board's consideration of these factors and application of the Penalty Calculation Methodology is based upon information obtained by the Prosecution Team in investigating the allegations set forth in the Stipulation 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. Issuance of this Stipulated 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 Lehigh 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.

\_\_\_\_\_  
Michael Montgomery  
Executive Officer  
California Regional Water Quality Control Board  
San Francisco Bay Region

\_\_\_\_\_  
Date

## Attachment A

### **Stipulated Order No. R2-2021-00XX Specific Factors Considered Lehigh Southwest Cement Company Santa Clara County**

For the first discharge event, from March 18 through 23, 2020, Lehigh Southwest Cement Company (Lehigh) allegedly discharged without authorization approximately 5,247,000 gallons of potable water to Permanente Creek, a water of the State and United States, in violation of Clean Water Act section 301.

San Francisco Bay Regional Water Quality Control Board (Regional Water Board) prosecution staff and Lehigh have considered each factor listed in the Enforcement Policy as presented below. Water Code section 13385 and the Enforcement Policy allow the Regional Water Board to choose whether to pursue enforcement based on the number of days of violation or the volume discharged or both. The proposed penalty is based on the number of days of violation. The discharge is believed to have started on March 18, 2020, but the precise time is unknown, and the discharge duration is not believed to have exceeded 120 hours. Therefore, the proposed penalty is based on 5 days of violation.

<b>Factor</b>	<b>Selection</b>	<b>Rationale</b>
Toxicity	3	The chlorine concentration of the water prior to discharge, 0.88 mg/L, exceeded known risk factors for aquatic life. According to U.S. EPA's 1984 <i>Ambient Water Quality Criteria for Chlorine</i> ( <a href="https://www.epa.gov/sites/production/files/2019-03/documents/ambient-wqc-chlorine-1984.pdf">https://www.epa.gov/sites/production/files/2019-03/documents/ambient-wqc-chlorine-1984.pdf</a> ), aquatic life can be harmed if exposed to 0.013 mg/L for one hour.
Harm	1	Based on the characteristics of the discharge, short-term harm to Permanente Creek aquatic life was possible, but the discharge traveled at least 50 feet before reaching Permanente Creek, no chlorine was detected in Permanente Creek, and no harm was observed (e.g., no dead fish were found).
Susceptibility to Cleanup	1	The discharge commingled with Permanente Creek waters and was not susceptible to cleanup.
Deviation from Requirement	major	The discharge was a major deviation from requirement because it was not authorized by any State or federal permit. The Clean Water Act and California Water Code require dischargers to apply for and obtain permits prior to discharge.
Per-Day Factor	0.15	As specified in the Enforcement Policy, the Per-Day Factor is based on the total Potential for Harm score of 5 (3+1+1) and the major Deviation from Requirement.

Attachment A  
 Administrative Civil Liability Order  
 R2-2021-00XX

<b>Initial Liability</b>	<b>\$7,500</b>	The initial liability is \$10,000 per day times 5 days times 0.15.
Degree of Culpability	1	A neutral assessment is warranted because Lehigh acted in a reasonable and prudent manner. The discharge was accidental. The tank was in a remote location and could not have been expected to fail.
History of Violations	1.1	Lehigh has a history of violations, although previous violations were not related to the current violation.
Cleanup and Cooperation	1	A neutral assessment is warranted because, although the discharge was not quickly discovered due to precipitation, Lehigh responded in a reasonable and timely manner upon discovery. Lehigh collected samples, but it could not recover the discharge.
<b>Total Base Liability</b>	<b>\$8,250</b>	The total base liability is the initial liability times the Degree of Culpability, History of Violations, and Cleanup and Cooperation factors (\$7,500 x 1 x 1.1 x 1).
Economic Benefit	<i>de minimus</i>	Because Lehigh could not have readily anticipated the discharge, Lehigh enjoyed little economic benefit from the violation. Prosecution staff estimates Lehigh's economic benefit was <i>de minimus</i> . In fact, Lehigh incurred costs related to replacing a valve and implementing other remedial measures.
Other Factors as Justice Requires	increase to \$50,000	For a large corporation like Lehigh (and similarly situated dischargers), a penalty of \$8,250 would be an insufficient deterrent against similar future violations. A more just penalty would be \$50,000, the maximum daily penalty based on 5 days of violation. This higher penalty is expected to deter similar violations and more than accounts for the Regional Water Board's investigation and enforcement costs.
Minimum and Maximum Liabilities	<i>de minimus</i> to \$52.5 million	According to the Enforcement Policy, the minimum liability is the economic benefit plus ten percent. The maximum liability Water Code section 13385 allows is \$10,000 per day of violation and \$10 per gallon discharged and not cleaned up in excess of 1,000 gallons, or about \$52.5 million based on the 5 days of violation and 5,247,000 gallons discharged.
Ability to Pay	no change	Lehigh has the ability to pay \$50,000 and continue in business.
<b>Final Liability (for March 2020 discharge)</b>	<b>\$50,000</b>	The proposed penalty recovers any economic benefit, is a just deterrent against repeat violations, and is within the minimum and maximum liabilities allowed by law.

For the second discharge event on January 26, 2021, the Regional Water Board utilized the same methodology as set forth above to impose an additional statutory maximum per day violation of \$10,000, bringing the total liability proposed for both events to \$60,000.

**Attachment B**

**Selenium Fish Tissue Monitoring Study**