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**VIA U.S. MAIL**

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**Re: CalAm Monterey Peninsula Water Supply Project Draft EIR, April 2015**

Dear Mr. Barnsdale:

I am submitting this letter on behalf of my client, CEMEX, for consideration by the California Public Utilities Commission (the "Commission") as the lead agency under the California Environmental Quality Act ("CEQA") regarding the Draft Environmental Impact Report (the "DEIR") prepared for California American Water Company's ("CalAm") proposed Monterey Peninsula Water Supply Project (the "Project" or "MPWSP"). If approved by the Commission, the Project would consist of, among other components, ten subsurface slant wells and a desalination plant with capacity to produce 10,627 acre feet per year ("afy") and 9.6 million gallons per day ("mgd") of desalinated water.

CalAm has already constructed a test slant well on a portion of my client's 400-acre property (the "Lapis Site") in the northern part of the City of Marina (the "City"). Importantly, CEMEX has been actively and continuously mining the Lapis Site since 1906 under a constitutionally-protected vested right, which right various agencies have previously recognized. (*See, e.g.*, Lapis Site Reclamation Plan approved by the City of Marina in August 1989.) If the Project is built out, CalAm would construct the remaining subsurface slant wells on the Lapis Site as well. The Project would also include an aboveground electrical control panel and building on the Lapis Site and a source water pipeline to the desalination plant that generally follows CEMEX's access road for the Lapis Site. In other words, CalAm proposes to co-locate a number of critical infrastructure for the Project on the Lapis Site which my client owns and currently uses for active mining operations.

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The failure of this letter to comment on any other DEIR inconsistencies with CEMEX's operational processes and rights and CEMEX's property rights should not be considered agreement by CEMEX with any such misstatements or construed as a waiver of any rights or remedies to which CEMEX may be entitled. In this context I submit the following comments for the Commission's consideration.

**I. The DEIR Should Be Revised to Ensure That Mitigation for Biological Resource Impacts Will Not Interfere With CEMEX's Operations and Obligations**

**A. Mitigation Measures for Biological Resource Impacts Should Be Revised in Coordination with CEMEX**

DEIR discussion for Impact 4.6-1 concludes that impacts due to construction of the subsurface slant wells and the source water pipeline will result in a significant impacts for certain species. (*See Id.* at pp. 4.6-100 to 4.6-106; pp. 4.6-108 to 4.6-109.) The DEIR concludes that these impacts can be reduced to less than significant upon implementation of certain mitigation measures. (*Id.* at pp. 4.6-105, 4.6-106.)

As a general matter, DEIR discussion of these Mitigation Measures does not address whether implementation of the Mitigation Measures are consistent with or otherwise will not interfere with CEMEX's pre-existing mining operations on the Lapis Site. Therefore, CalAm should revise these Mitigation Measures in coordination with CEMEX. At a minimum, the Mitigation Measures for Impact 4.6-1 applicable to construction of the subsurface slant wells and the source water pipeline should be revised to account for CEMEX's pre-existing mining operations on the Lapis Site as follows:

- Avoidance and minimization measures required under Mitigation Measure 4.6-1c (general avoidance and minimization measures) should not affect mining and reclamation activities.
- Seasonal construction limitations under Mitigation Measure 4.6-1d should not interfere with, and should be distinguished from, existing mining operations.
- The habitat mitigation and monitoring plan under Mitigation Measures 4.6-1e (avoidance and minimization measures for special-status plants) and 4.6-1n should be reviewed and developed for consistency with CEMEX's already-existing habitat mitigation and monitoring plan.
- Any habitat restoration efforts under Mitigation Measure 4.6-1f that are proposed to occur onsite at the Lapis Site should be coordinated with CEMEX as CalAm does not

own the Lapis Site and has limited rights with respect to its activities on the Lapis Site and its ability to encumber the site.

- Any relocation efforts under Mitigation Measure 4.6-1g that are proposed to occur onsite at the Lapis Site should be coordinated with CEMEX as CalAm does not own the Lapis Site and has limited rights with respect to its activities on the Lapis Site and its ability to encumber the site.

In addition, all biological mitigation measures need to be consistent with CEMEX's usage of existing mine areas and access roads. For example Mitigation Measures 4.6-1d, 4.6-1e, and 4.6-1f all call for restoration of habitat impacted during construction. These Mitigation Measures should be revised in coordination with CEMEX to ensure that any rehabilitation or restoration efforts do not improperly affect the portions of the Lapis Site that CEMEX uses for its active mining operations (*e.g.*, no rehabilitation of the mining access road).

Similarly, the Project Description section of the DEIR states that for site clearing and preparation generally, “[u]pon completion of construction activities, the construction contractor would ... contour the construction work areas and staging areas to their original profile, and hydroseed or repave the areas, as appropriate.” (DEIR, p. 3-46.) CalAm has not consulted with CEMEX regarding the timing, location, or scope of any proposed reclamation or re-contouring of the Lapis Site. The DEIR should be revised to require that, after full construction buildout on the Lapis Site, CalAm must reclaim the Project area to an appropriate end use consistent with CEMEX's existing use or otherwise coordinate with CEMEX regarding its role and share of responsibility/obligations under a reclamation plan amendment. (*See* discussion below.)

#### B. CalAm's Construction Ground Disturbance Will Need to Be Addressed in a Reclamation Plan Amendment

Disturbance of land proposed by CalAm for construction of the subsurface slant wells and the source water pipeline on the Lapis Site will need to be accounted for and addressed by a reclamation plan amendment in effect for CEMEX's mining operations pursuant to the state Surface Mining and Reclamation Act (“SMARA”). (*See* Pub. Res. Code § 3502(d).) The DEIR does not appear to address any aspects of this unresolved issue (*e.g.*, coordination, cost, burden of undertaking). If the Project does impact CEMEX's actual mine reclamation obligations, the DEIR does not specify whether CalAm will undertake reclamation itself on the portions of the Lapis Site which the Project will impact or whether CalAm will simply indemnify CEMEX for the monetary cost of any increase in CEMEX's reclamation obligations.

C. Mitigation for Impacts to Biological Resources Needs to Be Reviewed and Revised for Consistency with the Mine Safety and Health Administration Requirements

The DEIR does not address how CalAm will ensure compliance with the federal Mine Safety and Health Administration's ("MSHA") and the California Division of Occupational Safety and Health (also known as "Cal/OSHA") mine safety requirements.

The proposed siting of the Project on an active mine site requires compliance during construction, operation, and decommissioning with MSHA and Cal/OSHA. The DEIR fails to address site-specific safety issues in any appreciable detail. For example, the DEIR must include a mitigation measure that commits CalAm to chocking tires of parked construction vehicles.

Considering the fundamental importance of safe operations on an active mine site and CEMEX's potential MSHA liability for CalAm's actions relating to the Project, the Commission must ensure through a condition of approval or other legal instrument that CalAm both indemnifies CEMEX for its actions and seek its own Mine Identification Number from MSHA, so that CalAm will be the entity cited for any potential violations it commits, rather than CEMEX.

**II. The 1996 Annexation Agreement Speaks for Itself**

The DEIR states that an "issue to be resolved" and an "area of controversy" regarding CalAm's proposed use of subsurface slant wells to withdraw source water for the Project includes "whether CalAm has the legal right to extract groundwater from the Salinas Valley Groundwater Basin (SVGB)." (DEIR, p. ES-80.)

In turn, this issue implicates the *Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands* (the "Annexation Agreement") executed in 1996 by the Marina Coast Water District ("MCWD"), the Monterey County Water Resources Agency ("MCWRA"), the owners of the Armstrong Ranch, RMC Lonestar ("RMC," CEMEX's predecessors in interest for the Lapis Site), and the City of Marina.

The DEIR analysis of whether CalAm has the legal right to extract groundwater from the SVGB is in DEIR section 2.7. The DEIR discusses the effect of the Annexation Agreement and concludes that there is no current indication that the Annexation Agreement poses a feasibility issue to the project's use of water. (DEIR, p. 2-48.)

The DEIR need not include what the Commission interprets the Annexation Agreement to say as that Agreement speaks for itself. CEMEX does not consider the DEIR's interpretations to be binding in any way regarding that Agreement.

### **III. The DEIR Should Be Revised to Sufficiently Analyze and Address Project Drawdown Impacts on the Lapis Site**

#### **A. The Groundwater Monitoring Program Should Be Expanded to Account for CEMEX's Water Supply Well**

DEIR discussion for Impact 4.4-3 (“Deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level during operations so as to expose well screens and pumps”) concludes that drawdown of less than 0.2 foot (2.4 inches) will not result in a significant impact to CEMEX’s water supply well (the “CEMEX Well”) because the CEMEX Well is screened in the 400-foot aquifer, whereas “[t]he slant wells would extract groundwater from the offshore portion of the Dune Sand and 180-Foot Equivalent Aquifers and not the 400-Foot Aquifer.” (DEIR, p. 4.4-65.)

The DEIR calculated a 0.2 foot drawdown based on eight months of pumping the one test well at 2,500 gpm and then determined its non-significance conclusion for the CEMEX Well by extrapolating the test results to full buildout and operations of eight (plus two standby) subsurface slant wells. (*Id.*) Despite the non-significance conclusion, the DEIR includes applicant-proposed Mitigation Measure 4.4-3 (groundwater monitoring and avoidance of well damage) to expand an existing regional groundwater monitoring program to include the Dune Sand Aquifer and the 180-Foot Equivalent Aquifer. (*Id.* at p. 4.4-74.)

Although the DEIR suggests that Project impacts to groundwater at the CEMEX Well will be less than significant, CalAm must revise Mitigation Measure 4.4-3 to clarify that the expanded regional groundwater monitoring program includes the 400-Foot Aquifer, in addition to the Dune Sand Aquifer and the 180-Foot Equivalent Aquifer, to ensure anticipated impacts will actually be less than significant during Project operations.

#### **B. DEIR Analysis of Impacts to CEMEX's Dredging Pond May Not Be Sufficient**

##### **1. The DEIR Geologic Description of CEMEX's Dredging Pond is Not Accurate**

The DEIR also analyzed Impact 4.4-3 “to determine whether the proposed project would have an adverse impact on its recharge or on the current sand mining operations.” (DEIR, p. 4.4-76.) As a preliminary matter, the DEIR states that the water level for CEMEX’s dredging pond (the “Dredging Pond”) is influenced by ocean tides and sand mining operations, and is further assumed to be 10 to 20 feet deep. (*Id.* at p. 4.4-77.)

The DEIR geologic description of the Dredging Pond and the smaller washing ponds is not accurate. The depth of the Dredging Pond is allowed to 30 feet, not 10 to 20 feet as assumed in

the DEIR. (*Id.* at p. 4.4-77.) Furthermore, as depicted on Figure 4.4-3 of the DEIR, the entire Lapis Site to at least 50 feet below sea level constitutes either “Dune Sand” or “Older Dune Sand.” (*Id.* at 4-49.)

## 2. The DEIR Does Not Accurately Model Impacts to the Dredging Pond

The DEIR asserts that: “Tidal changes occur in the dredge pond, which are the same as the tidal changes in the ocean.” (DEIR, p. 4.4-77.) However, groundwater level changes due to tidal forces in beach sand are *not* “the same as tidal changes in the ocean.” Groundwater level changes in the Dredging Pond occur near the elevation of the highest tides, attenuate in magnitude with increasing distance from the shore, and have a time delay. This specific issue has been addressed by and within the Hydrogeology Working Group (the “HWG”).

The DEIR next explains that in September 2014 CalAm simulated test slant well pumping for eight months at 2,500 gpm and determined a one-foot drawdown at the Dredging Pond. (DEIR, p. 4.4-77.) The localized model “simulates the response of the Dune Sand Aquifer in its second, third, and fourth vertical layers,” and the DEIR asserts the depth of the Dredging Pond falls within the second and third layers. (*Id.*) Based on measured results, the DEIR suggests: “There is a possibility that additional drawdown would occur in the pond during operation of [] all of the proposed slant wells, which would operate at the combined pumping rate of 24.1 mgd or about 16,736 gpm. However, when compared to the daily tidal fluctuations in the dredge pond water levels of up to eight feet throughout the year, the decline in the water surface of any depth would be masked by the consistent recharge from the ocean.” (*Id.*)

Table 4.4-10 of the DEIR shows the layers of the localized model, but does not list the thickness of the layers, so it is not possible to verify which layers correspond to a depth of 10 to 20 feet (the DEIR’s assumed depth of the Dredging Pond). Although the DEIR states that the depth of the Dredging Pond corresponds to the second and third layers, suggestions were made in HWG meetings that the Dredging Pond may be better assigned to the first layer (“Ocean Floor”). Modeling to date has focused on the aquifer response instead of attempting to accurately model the Dredging Pond response. Maximum drawdown in the larger Project-wide model is more than five feet at the Dredging Pond location and CalAm has not provided the localized modeling results, despite multiple requests by the HWG for CalAm to provide the data.

As shown on the DEIR Figure 4.4-13, the maximum modeled drawdown at the Dredging Pond location is more than 30 feet. Furthermore, tidal fluctuations in the Dredging Pond are *not* eight feet. Eight feet represents the maximum amplitude of the open ocean tide. Discrepancies such as these call into question the DEIR correlation of the Dredging Pond with the modeled layers.

The DEIR next states that CalAm simulated another test in April 2015 by constantly discharging the test slant well for five days which, considered with water level transducer data collected since

March 2015: “indicat[ed] that the water level in the CEMEX pond is not being influenced by the pumping of the test slant well. This also indicates that as the pond is dredged, the water levels quickly recover with seawater seeping through the loose sand on the beach.” (*Id.* at pp. 4.4-77, 78.) The DEIR ultimately concludes that Project drawdown impacts on the Dredging Pond are less than significant and “would not inhibit sand mining operations by depleting available water supplies to the pond.”

If, as the DEIR states, the Dredging Pond water levels are not influenced by test slant well pumping, this does not accord with the prior statement in the DEIR that test slant well pumping has resulted in a one-foot drawdown (*see* DEIR, p. 4.4-77), or else the pumping has not continued long enough to identify the drawdown.

Finally, the DEIR concludes that drawdown impacts to the Dredging Pond will be less than significant based on a drawdown of one foot resulting from eight months of pumping at one test slant well at 2,500 gpm extrapolated across eight slant wells operating at full buildout with a combined pumping rate of 16,736 gpm. It is not clear that the measured results of operating one slant test well for eight months and discharging the slant test well for five days is scalable to eight slant wells operating 24 hours per day, 365 days per year. (*Id.* at p. 3-51.) In other words, the DEIR has not presented the localized modeling results for full-scale pumping, but has only alluded to modeling for the test slant well. The modeling results to date do not accurately represent the situation at the Dredging Pond.

The DEIR does not explain on what basis it can conclude that the fully built-out drawdown response will not “inhibit sand mining operations.” CalAm has not discussed with CEMEX’s plant operators whether full operational drawdown – whether one foot or five feet – will inhibit CEMEX’s sand mining operations. At a minimum, CEMEX recommends that the groundwater monitoring program required by Mitigation Measure 4.4-3 be extended to the Dredging Pond to ensure that Project operations going forward will not result in significant impacts. Specifically, Mitigation Measure 4.4-3 states: “Seven clusters of monitoring wells were recently completed on and near the CEMEX property. These well clusters monitor various depths within the Dune Sand Aquifer, the 180-Foot Aquifer, and the 400-Foot Aquifer and shall be included in the monitoring network.” (DEIR, p. 4.4-75.) This provision should be revised to also include ongoing monitoring of the water level transducer in the Dredging Pond.

#### **IV. CEMEX Disagrees With the DEIR’s Characterization of Jurisdictional Water Features on the Lapis Site**

The DEIR states: “The CEMEX dredging pond and settling ponds are located approximately 250 and 30 feet north of the western end of the CEMEX access road, respectively, and are mapped as freshwater ponds by the NWI [National Wetlands Inventory]. Additionally, three drainage features mapped as freshwater emergent wetlands by the NWI are located approximately 600,

1,000, and 1,200 south of the CEMEX access road.” (DEIR, p. 4.6-21.) The DEIR further states: “A potential wetland, mapped as freshwater emergent wetland by the NWI, occurs approximately 250 feet west of Lapis Road and 1,300 feet north of the CEMEX access road near the proposed Source Water Pipeline.” (*Id.*)

However, the DEIR also acknowledges: “*A formal wetland delineation has not been conducted for the project*” (*Id.* at p. 4.6-159 (emphasis added)) and later characterizes these features as “*potential* waters of the U.S. and/or waters of the State” (*Id.* at pp. 4.6-160 to 4.6-162 (emphasis added)). CEMEX disagrees with any implication in the DEIR that these areas are wetlands and with the DEIR’s overall characterization of waters on the Lapis Site as jurisdictional. In addition, the DEIR statements regarding the water features on the Lapis Site are unwarranted because none of the described water features are within the Project’s construction/ground disturbance footprint. (*See* DEIR Figure 4.6-1a, p. 4.6-6.)

In any case, the DEIR concludes that impacts to all described features would either be less than significant or reduced to less than significant following implementation of mitigation measures. (*See generally* DEIR Impact 4.6-3, pp. 4.6-160 to 4.6-162.)

#### **V. CEMEX Disagrees With the DEIR’s Characterization of Structures on the Lapis Site as Significant Cultural Resources**

The DEIR states that the direct and indirect area of potential effects (“APE”) for the source water pipeline encompasses the Lapis Sand Mining Plant Historic District (the “Mining District”), which the DEIR considers a significant cultural resource. (*See* DEIR, pp. 4.15-39, 4.15-40.) CEMEX disagrees with the premise set forth in the DEIR that the Mining District is a significant cultural resource for purposes of CEQA. All pre-existing structures co-exist with CEMEX’s ongoing mining operations at the Lapis Site. CEMEX does not believe that the site is properly considered a historic district, especially considering that it has been a working facility up to the present and modified over time.

#### **VI. Any Plans Required as Mitigation Must Be Approved Prior to Construction**

As currently drafted, measures specified in the DEIR requiring implementation of a mitigation plan are not written in a way as to be sufficiently enforceable prior to construction buildout of the Project on the Lapis Site.

For example, Mitigation Measure 4.4-3 (groundwater monitoring and avoidance of well damage) for Impact 4.4-3 (“Deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level during operations so as to expose well screens and pumps”) states: “Immediately following project approval, the project applicant, working with the MCWRA, shall



fund and develop a groundwater monitoring and reporting program that expands the current regional groundwater monitoring network to include the area near the proposed slant wells.” (DEIR, p. 4.4-74.)

Given the ambiguously-drafted language of Mitigation Measures such as 4.4-3, the DEIR must be revised to ensure that CalAm not only develops and submits all requisite plans prior to Project commencement, but that the requisite agency also **approves** the submitted plans prior to Project commencement.

Thank you for your consideration of these comments.

Sincerely yours,

MITCHELL CHADWICK, LLP



Patrick G. Mitchell

cc: Michael Egan  
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