



November 24, 2015

California Coastal Commission
c/o Mr. Dan Carl
Deputy Director
Central Coast/North Central Coast Districts
VIA EMAIL TO: Dan.Carl@coastal.ca.gov

California Coastal Commission
c/o Ms. Lisa Haage
Chief of Enforcement
VIA EMAIL TO: lhaage@coastal.ca.gov

City of Marina
c/o Mr. Bruce Carlos Delgado
Mayor
VIA EMAIL TO: bdelgado62@gmail.com

City of Marina
c/o Mr. Justin Meek
Senior Planner
City of Marina Planning Division
VIA EMAIL TO: jmeek@ci.marina.ca.us

Re: Cemex Pacific Lapis Sand Mining Plant In Violation of Coastal Act for Operating Without a Coastal Development Permit.

Dear Honorable Coastal Commission Staff and City of Marina,

On behalf of the Monterey Chapter of the Surfrider Foundation, we are writing to express our serious concerns with respect to the CEMEX Pacific Lapis sand mining plant, in Marina, California. The Surfrider Foundation is a non-profit 501(c)(3) organization that is dedicated to the protection and enjoyment of our oceans, waves and beaches through a powerful activist network, and towards this mission, the Surfrider Foundation Monterey Chapter is very engaged in protecting central California's coastline, and safeguarding it from activities which promote coastal erosion and jeopardize its well-being. Surfrider Foundation provides this letter memorandum to the Commission and City of Marina in order to share the information and analysis which supports our belief that CEMEX is violating the



Coastal Act. We hope that this will assist the Commission with its investigation into the matter,¹ and help to inform the City with respect to this matter and potential courses of action.

To Surfrider Foundation's knowledge, CEMEX has operated the Pacific Lapis sand mining plant since 2005, and the plant was previously operated by Pacific Concrete and Aggregates and Lone Star Industries between 1965 and 2005. As detailed below, to Surfrider's knowledge, present day operations involve mining approximately 200,000 cubic yards of sand a year (and perhaps more), from a self-made pond on the beach, which is double the amount of sand initially mined prior to the Coastal Act.

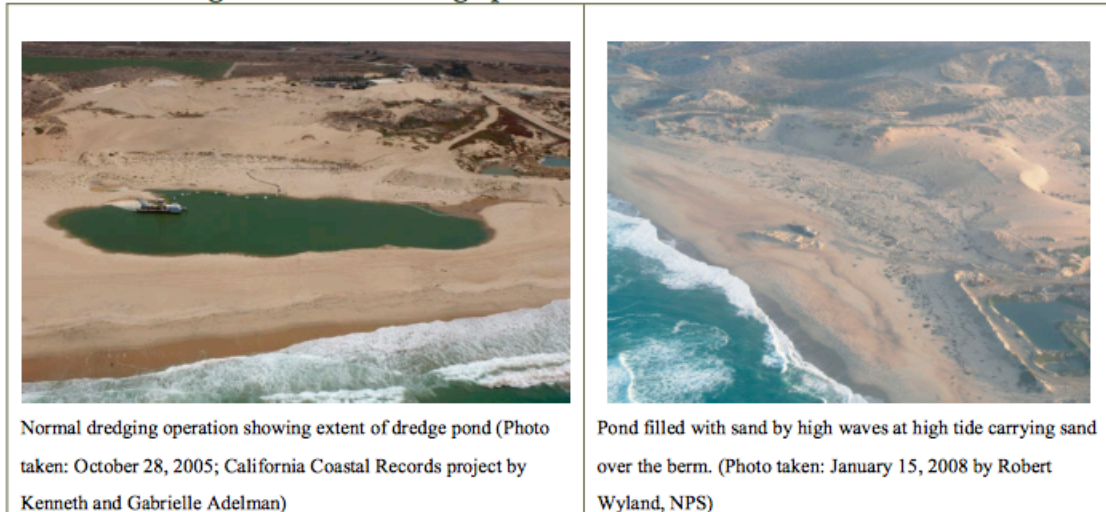
CEMEX Activities Are Within the Coastal Zone

The plant is located on and between Lapis Road and the Pacific Ocean in Marina, California, and sits squarely within the Coastal Zone. (Pub. Res. Code §§ 30103, 30160(a).) The plant's sand mining activities occur at this site, landward of the mean high tide line, as indicated in the photograph below. Therefore, this matter is within the Commission and City of Marina's jurisdiction. The City of Marina has a Local Coastal Program, certified by the Commission in 1982, and therefore generally has current CDP permitting authority.² However, pursuant to Coastal Act Section 30601, a CDP must also be obtained from the Commission for "[d]evelopments *between the sea and the first public road paralleling the sea* or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance. (Pub. Res. Code § 30601(1)(emphasis added).) Further, as explained in more detail below, both the City and the Commission have enforcement authority to abate CEMEX's unpermitted activities.

¹ To our knowledge, the Commission has been investigating CEMEX since 2009, and has previously anticipated completing the investigation and likely issuing a [statement of findings, in late 2013 or early 2014, based on the following articles, investigated-state-examining-claims-that-cemex-in-marina-mining-more-than-permitted, <http://www.montereyherald.com/general-news/20130826/sand-plant-investigated-state-examining-claims-that-cemex-in-marina-mining-more-than-permitted>.](http://www.montereyherald.com/general-news/20130826/sand-plant-investigated-state-examining-claims-that-cemex-in-marina-mining-more-than-permitted)

² See <http://www.ci.marina.ca.us/documentcenter/view/5278>.

Figure 20. Aerial Photographs of the Beach at Marina Sand Mine



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CEMEX Activities Constitute “Development”

CEMEX’s sand mining activities squarely fall within the definition of “development” requiring a Coastal Development Permit (CDP).

“Development” is defined to include “[...] *on land, in or under water*, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; *grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land* [...], construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility [...]” (Pub. Res. Code § 30106.)

The operations of a company extracting sand falls within the literal definition of “development” in Pub. Res. Code § 30106 (removing, dredging, mining, or extraction of any materials on land or under water), thus requiring CDPs under Pub. Res. Code § 30600(a) for development in the coastal zone. (*Monterey Sand Co. v. California Coastal Comm.*, 191 Cal.App.3d 169, 176. (“*Monterey Sand Co.*”))

³ Phillip Williams and Associates, 2008, Coastal Regional Sediment Management Plan for Southern Monterey Bay, Prepared for Association of Monterey Bay Area Governments, at 43; available at http://www.dbw.ca.gov/csmw/pdf/SMontereyBay_CRSMP_3Nov2008.pdf.



Since 2005, CEMEX has mined approximately 200,000 cubic yards of sand a year, from the beach site in Marina, and since at least between 1965 and 1970, CEMEX's predecessors mined approximately 68,000 to 98,000 cubic yards of sand a year from the same site. (Phillip Williams and Associates, 2008, Coastal Regional Sediment Management Plan for Southern Monterey Bay, Prepared for Association of Monterey Bay Area Governments, at 44, A-1, and A-2.) Thus, CEMEX and its predecessors are and have been engaging in "development" under the Coastal Act.

Neither CEMEX Nor Its Predecessor(s) Have Obtained a Required Vested Rights Determination from the Commission

Given that the plant engaged in sand mining operations prior to the implementation of the 1976 Coastal Act, arguably it might have obtained vested rights to its sand mining operations, such that it would not be required to obtain a CDP for those activities. (Pub. Res. Code § 30608). However, operators are not merely grandfathered in automatically, but instead must apply for and obtain a vested rights determination from the Commission, pursuant to the Commission's regulations (*See, e.g.,* 14 Cal. Code of Regs. §§ 13200-13204, 13207; *Billings v. California Coastal Com.* (1980) 103 Cal App 3d 729.) This process includes filing a claim of vested right, on a form acceptable to the Commission, and substantiating that claim in a proceeding before the Commission, where the claimant bears the burden of proof. (14 Cal. Code of Regs. §§ 13200 - 13202.) Commission action on a claim of vested right must be substantiated by findings of fact. (14 Cal. Code of Regs. § 13205.)⁴

To our knowledge, neither CEMEX, nor its predecessors Pacific Concrete and Aggregates and Lone Star Industries, have ever filed a claim for or obtained a vested rights determination from the Commission. Therefore, CEMEX has no right - grandfathered or not - to continue its sand mining operations at the Marina plant,

⁴ And note, case law holds that in view of the comprehensive scheme of the Coastal Act for protecting and preserving the natural and scenic resources of the coastal zone and insuring that any development which occurs within the zone will be consistent with that overall objective, any substantial doubts regarding the meaning and effect of Pub. Res. Code Section 30608 exempting persons having "vested rights" from the Act's CDP requirement, should be resolved *against* the person seeking exemption. (*Urban Renewal Agency v. California Coastal Zone Conservation Com.* (1975) 15 Cal. 3d 577.)



and is and has been violating the Coastal Act every day that it is mining sand without a CDP.

Even if CEMEX Had a Vested Rights Claim, Operations Have Undergone Substantial Expansion and Necessitate a Coastal Development Permit

Further, even if CEMEX had vested rights to some sand mining operations, which it does not, a vested rights determination only affords a person the right to continue its operations within the same scope. “[N]o substantial change may be made in any such development” without receiving prior approval through a CDP. (Cal. Pub. Res. Code § 30608; 14 Cal. Code. Regs. § 13207; see also *Monterey Sand Co.*, at 176 (operations for which there are vested rights must be carried out “within the scope of the preexisting authorization for use of the coastal resource in question.”))

Here, evidence greatly suggests that CEMEX and its predecessors’ operations have undergone substantial change. When operations began, between 1965 and 1970, the plant was extracting sand at a rate of 68,000 to 98,000 cubic yards per year. (Philip Williams and Associates, at 44, A-1, and A-2.) Further, it appears from an October 16, 1969 memorandum, that on August 28, 1969 the State Lands Commission (SLC) had authorized a lease extension, which limited the maximum amount of sand extracted to only 80,000 cubic yards per year. (See Exhibit A, attached hereto, State Lands Division 1969 Memo).

The last reported value of 98,000 cubic yards, to the California State Lands Commission, was in 1970 and is conservatively used as the estimate for the amount dredged until the mid 1980s when the operation started using an improved larger dredge. It is assumed that the amount of sand extracted from the beach increased using the larger dredge, and that the mine further increased their extraction after other mines in the region closed in 1990, to meet consumer demand. (Phillip Williams and Associates, at 44 and A-1.)⁵

To Surfrider’s knowledge, the total amount of sand sold annually between 1998 and 2008 (and presumably, today) from the plant was between 225,000 and 280,000 tons, or approximately 167,000- 207,000 cubic yards per year, based on an approximate density of 1.35 tons per cubic yard, as reported by Cemex. (Id., at pp. 44, and A-1.) Commonly reported estimates are that the plant currently mines approximately 200,000 cubic yards of sand a year. (Id., at A-2) In fact, the amount presently mined could be higher, as CEMEX stated publicly in 2006 that it was

⁵ Available at

http://www.dbw.ca.gov/csmw/pdf/SMontereyBay_CRSMP_3Nov2008.pdf



mining as much as 300,000 tons (or approximately 222,222 cu yards) of sand annually at that time. (See Exhibit B, attached hereto, 2006 email correspondence from CEMEX employee to Monterey County Weekly, at 2).

This substantially increased – more than *doubled* - rate is not within the scope of the plant’s pre-1976 Coastal Act sand mining activities, but instead constitutes a substantial change which requires obtaining a CDP.

Further, there is no argument that this activity – either pre-Coastal Act or now – constitutes “repair or maintenance” exempt from the Coastal Act’s CDP requirement (See Pub. Res. Code § 30610(d)(providing exemption for “repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities.”)) Instead, sand is dredged and carried away from the property for sale, repairing and maintaining nothing, and instead is suspected to be a primary cause of beach and dune erosion in southern Monterey Bay. (See, e.g., Phillip Williams and Associates, at E-7 and 87-88, “As other mines closed, the ongoing operation at Marina increased its extraction to 200,000 yd³/year today. This is similar to the annual sand volume eroded from the dunes. Erosion rates at Marina increased after 1985, and are believed to be related to an increase in sand extraction at the Marina sand mine in the mid 1980s, 1990s, and 21st century.”) Due to a persistent rise in sea level, changes in sand availability, and previous unsustainable public and private development practices, the southern Monterey Bay beaches and coastal dunes south of the Salinas River, in close proximity to the CEMEX plant, are eroding, on average, at the fastest rate in California (Hapke et al., 2006). (Id., at 1.)

This is in contravention of Coastal Act policies, including Section 30253 (“New development shall [...] [a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area [...],” and operations may even be prohibited by Section 30233, which limits the kinds of dredging and sediment movement projects which can be carried out in the coastal zone.

Conclusion

In conclusion, Surfrider Foundation believes that CEMEX and its predecessors’ sand mining operations are likely violating the Coastal Act by undertaking development in the coastal zone without a CDP or a vested rights determination. Further, even if there had been a vested rights determination, CEMEX would not be exempt, since its operations vastly exceed the scope of its pre-Coastal Act sand mining activity. Further, the operations appear to conflict with Coastal Act policies, particularly



Sections 30253 and 30233. Surfrider Foundation respectfully requests that the Commission diligently continue and complete its investigation into CEMEX's activities.

We also ask that the Commission and City of Marina take all appropriate actions based on the outcome of the Commission's investigation and/or the City's findings, which may include issuing a notice of violation and cease and desist order pursuant to Coastal Act Section 30809, and seeking declaratory and equitable relief to restrain CEMEX's Coastal Act violations pursuant to Coastal Act Section 30803. We respectfully remind the City and Commission, that pursuant to Coastal Act Section 30809, the executive director of the Commission may issue a cease and desist order to enforce requirements of a certified local coastal program where the local government requests the Commission to assist with or assume primary responsibility for issuing a cease and desist order; or where the Commission requests and the local government declines to act or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

We hope that the foregoing information is helpful to the Commission and City, and welcome the opportunity to assist both as you address this matter. Please share this with any other appropriate City and Commission staff members, and I ask that you please cc me so that we know the appropriate individuals to correspond with on this matter. Please also keep us abreast of any updates on the Commission's investigation, and feel free to contact me for further discussion.

Sincerely,

A handwritten signature in cursive script that reads "Staley Prom".

Staley Prom, Esq.
Legal Associate
Surfrider Foundation

A handwritten signature in cursive script that reads "XW" followed by a flourish.

Ximena Waissbluth
Monterey Chapter Chair
Surfrider Foundation