

**CALIFORNIA STATE
LANDS COMMISSION***Established in 1938***EXECUTIVE OFFICE**
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202**JENNIFER LUCCHESI, Executive Officer**
(916) 574-1800 Fax (916) 574-1810
California Relay Service TDD Phone 1-800-735-2929
Voice Phone 1-800-735-2922

May 16, 2017

Sent Via Electronic Mail and Regular U.S. Mail

Eric Wittmann
Regional President, West Region
CEMEX
929 Gessner Road, Suite 1900
Houston, Texas 77024

Mike Egan
Executive Vice President and General Counsel
CEMEX
10100 Katy Freeway, Suite 300
Houston, Texas 77043

Subject: Activities of concern at CEMEX Lapis Plant, Marina, California

Dear Mr. Wittmann and Mr. Egan:

The California State Lands Commission (Commission) is continuing to evaluate the relationship between CEMEX's Lapis Plant and the state's Public Trust interests along the coast. As you are likely aware, CEMEX's predecessors at the Lapis plant, Pacific Cement and Aggregates, Inc., paid royalties to the Commission under a 5-year lease issued August 18, 1964 (Lease No. PRC 3183.1). Subsequently, the plant changed its method of sand removal from a dragline to the current dredge pond. Historical photos and Commission surveys indicate that the pond's dimensions, its location on the beach, and its relationship to the mean high tide line continue to vary over time.

Conversion of State Minerals

Scientific research in the past decade has clarified that sand mined at the Lapis plant comes from offshore and that the dredge pond takes advantage of area wave patterns and beach topography to function as a vacuum, siphoning sand from below the mean high tideline, and trapping it in the dredge pond.¹ In other words, the dredge

¹ E.g., Thornton et. al., *Temporal and Spatial Variations in Sand Budgets with Application to Southern Monterey Bay, California* (2016) 382 *Marine Geology* 56, 64; Philip Williams & Associates, Ltd., et al., *Coastal Regional Sediment Management Plan for Southern Monterey Bay* (November 2008), p. 43, 86-87.

pond performs the same function as the prior dragline operation, removing a mineral resource from sovereign land subject to the Public Trust. Currently CEMEX, like prior operators, then processes and sells these mineral resources for private commercial gain. However, unlike the dragline operation, a lease was not obtained by prior operators or CEMEX for these sovereign lands nor was a royalty paid for the use of this Public Trust resource since the expiration of the lease in 1969.

The commercial exploitation of a Public Trust resource without compensation to the State constitutes an expropriation of public property that is prohibited by the California Constitution (Cal. Const., art. XVI, § 6). Conversion of state minerals, including sand, is subject to civil liability and treble damages (Cal. Pub. Resources Code, § 6224.2).

Nuisance

In addition to the financial and resource loss to the State, the intensity of sand extraction at the Lapis operation causes environmental damage, public and private property damage, and loss of economic benefit through beach erosion, as indicated in recent studies (e.g., Thornton, *supra*, at p. 64). Longstanding California Supreme Court mining case law holds that, when the customary and previously legitimate activities of a business develop into a condition that threatens public and private rights, such a customary activity is no longer reasonable and may be found to be a nuisance. (*People v. Gold Run Ditch and Mining Company* (1884) 66 Cal. 138, 150-151. See also *Pacific Gas & Electric Co. v. Scott* (1938) 10 Cal. 2d 581, 585.) The California Supreme Court has also concluded that the State's ongoing Public Trust oversight power "precludes anyone from acquiring a vested right to harm the public trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 436, 452.) Moreover, as with any resource located on or extracted from sovereign lands, the State Lands Commission has an affirmative obligation to consider and protect the Public Trust on behalf of the State and its citizens. The Lapis operation has been identified in several studies as the primary contributor to beach erosion in the littoral cell in which it is located.² This impacts Public Trust resources downcoast that the Commission is charged with protecting.

The statements in this letter are made without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information come to our attention. This letter is not intended, nor should it be construed as, a waiver of any right, title, or interest by the State of California in any lands or resources under its jurisdiction.

² E.g., Thornton, *supra*, at pp. 64-66; Philip Williams & Associates, Ltd., et al., *supra*, at p. 87; Hapke, Cheryl J., David Reid, et al., *National Assessment of Shoreline Change Part 3: Historical Shoreline Change and Associated Coastal Land Loss Along Sandy Shorelines of the California Coast*, U.S. Geological Survey, Open File Report 2006-1219, pp. 45, 47, 49-50, and 67.

Eric Wittmann
Mike Egan
May 16, 2017
Page 3

In consideration of the state resources being converted by CEMEX's operation, CEMEX must immediately submit a lease application to the Commission for its consideration or CEMEX must cease dredge pond operations at the Lapis plant. The Commission may require environmental review pursuant to the California Environmental Quality Act as part of the lease application review and analysis and, as with all applications for the use of state Public Trust lands and resources, will consider whether any proposed lease is consistent with the common law Public Trust Doctrine and in the best interest of the State of California. Please contact me at (916) 574-1800 if you have any questions.

Sincerely,



JENNIFER LUCCHESI
Executive Officer

cc: John Ainsworth, Executive Director, California Coastal Commission
Andrew Vogel, Deputy Attorney General