

**BINGHAM MCCUTCHEN**

Marie A. Cooper  
 Direct Phone: (925) 975-5367  
 Direct Fax: (925) 975-5390  
 marie.cooper@bingham.com  
 Our File No.: 22729950024

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**Via Facsimile**

Bingham McCutchen LLP  
 Suite 210  
 1333 North California Blvd.  
 PO Box V  
 Walnut Creek, CA  
 94596-1270

925.937.8000  
 925.975.5390 fax

bingham.com

Boston  
 Hartford  
 London  
 Los Angeles  
 New York  
 Orange County  
 San Francisco  
 Silicon Valley  
 Tokyo  
 Walnut Creek  
 Washington

John Russo, Esq.  
 City Attorney  
 City of Oakland  
 One City Hall Plaza  
 Oakland, CA 94612

Marcel Uzegbu, P.E.  
 Project Manager, Facilities Planning & Development Division  
 City of Oakland  
 Public Works Agency  
 250 Frank H. Ogawa Plaza, Suite 4314  
 Oakland, CA 94612

**Re: Leona Quarry**

Dear Mssrs. Russo and Uzegbu:

I am writing on behalf of the DeSilva Group, and in response to a letter dated January 14, 2005 from the Natural Heritage Institute, written on behalf of the Millsmont Homeowners Association (HOA), and directed to the Army Corps of Engineers and the Regional Water Quality Control Board. The HOA apparently contends that the Leona Quarry project will disturb wetlands.

The HOA is again merely attempting to revisit the results of the extensive analysis, investigations, approvals and litigation this project has already undergone, long after the time for doing so has passed. DeSilva will be responding separately to the Corps and to the Regional Board. I am writing to advise that the City has already investigated this issue and determined that no wetlands will be disturbed by the Leona Quarry project, and that its determination is now beyond challenge or reconsideration.

When the City first evaluated the potential impacts of the Leona Quarry project in the original EIR, it of course evaluated whether the project has a potential to disturb wetlands. The EIR explained, more than two years ago, that the ongoing quarrying operations made the existence of wetlands unlikely, that the project

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would not disturb wetlands, that the only potentially jurisdictional creek has been diverted years earlier to an underground pipe, and that the project would not impact Chimes Creek in any manner requiring a Section 404 permit.

The EIR's analysis was based in part upon a wetlands delineation performed by Wetlands Research Associates according to the standards established by the Corps. Wetlands Research Associates' analysis concluded that "[a]ll of the man-made basins within the quarry are not subject to Corps jurisdiction because they are settling basins and/or function as drainage and/or water quality control systems and are part of the ongoing quarry operations. . . . No areas considered to be jurisdictional wetlands were observed on site." WRA, *Delineation of Potential "Waters of the United States" (Section 404 of the Clean Water Act), Leona Quarry Site*, June 2001 at page 8. Accordingly, the EIR concluded, at page V.B-12:

No wetlands under the jurisdiction of the Corps or [California Department of Fish and Game] will be filled by the project. Chimes Creek is subject to Corps jurisdiction as "waters of the United States" under Section 404 of the Clean Water Act. However, all of the project construction activities would take place more than 100 feet from Chimes Creek and would not result in any fill within the creek or any indirect impact to its flow. The grading to reconstruct the berm near the base of Chimes Creek will not result in any fill within the creek or any indirect impact to its flow. Thus, a Corps permit should not be required for construction of the proposed project.

This conclusion was not challenged in comments on the EIR, or in the subsequent lawsuit regarding stormwater drainage and whipsnake issues. It was likewise not questioned when the City prepared an SEIR on hydrology aspects of the project. As the HOA notes, the Regional Board did submit a comment letter dated December 4, 2003, which included a boilerplate statement that *if the project proposed work in jurisdictional waters, then it could likely require permit*. The SEIR's response to that comment explained and concluded, at page IV.E- of the Final SEIR:

The original Leona Quarry EIR (page IV.B-10), included an assessment of wetlands and other waters of the United States. None of the man-made basins in the Lower Development Area meet all three criteria of the federal wetland definition as constructed settling ponds, and are excluded from regulation under Section 404 of the Clean Water Act. Other depressions will not be disturbed. Therefore, no wetlands under the

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jurisdiction of the Army Corps of Engineers or California Department of Fish and Game (CDFG) will be filled as part of the proposed project. Although Chimes Creek is subject to Corps jurisdiction as "waters of the United States" under Section 404, proposed project construction would take place more than 100 feet from Chimes Creek and not result in any fill within the creek or any indirect impact to its flow. Nothing in the revised hydrologic analysis presented in the SEIR affects these findings.

The Regional Board never disputed this response. The City Council adopted the SEIR's response when it certified the SEIR. The Alameda County Superior Court upheld this conclusion when it issued its Final Judgment adjudicating that the City has fully complied with the requirements of the California Environmental Quality Act. . . ." That decision has long been final and binding.

Thus, the Council has twice determined that no wetlands will be disturbed and has twice approved the Leona Quarry project without imposing any conditions or other requirements relating to wetlands. The City's decision has been upheld in the Court's Final Judgment. The law would not permit any new conditions delaying final map until the Corps or Regional Board acted, or otherwise accommodating the HOA's untimely and unwarranted claims. The City's investigation revealed that there is no basis for any concerns about wetlands, as the site has been perpetually disturbed by quarrying operations, and the creek has been diverted to an underground pipe. Also, mass grading was well underway before the HOA submitted its claims to the Corps and Regional Board. There is no legal or factual basis for any further action by the City regarding wetlands.

Sincerely yours,



Marie A. Cooper

cc: Claudia Cappio  
Heather Lee  
James Summers  
David Chapman  
Richard Roos-Collins  
R. Christopher Locke  
(all via facsimile)