

July 15, 2013

Eric Steger
Assistant Director
Department of Public Works
County of Marin
3501 Civic Center Drive
San Rafael, CA 94903

Re: San Rafael Rock Quarry Request to Modify Surface Mining and Quarrying Permit #Q-72-03

Dear Eric:

As you know, we represent the Point San Pedro Road Coalition. We previously wrote to you on July 1, 2013 stating the legal reasons why: 1) the proposed amendment to the Mining Permit for the San Rafael Rock Quarry ("SRRQ") reversing the express prohibition against importation of asphalt grindings is illegal; and 2) even if it was not illegal, the proposed County action approving such an amendment is not exempt from CEQA.

On behalf of the Coalition, we now further respond to: 1) the Marin County Department of Public Works ("DPW") July 11, 2013 letter to the Marin County ("County") Board of Supervisors ("BOS") recommending approval of the proposed amendment of the SRRQ's Mining Permit; and 2) the July 3, 2013 letter from the SRRQ's attorney to the DPW. Neither provides any sound legal basis in support of the proposed amendment, or even seriously addresses the Coalition's legal argument.

The DPW should be providing full disclosure regarding the relevant legal issues to the BOS. To date, as revealed in this letter, it has not done so, which is a disservice to both the BOS and the residents who live in the vicinity of the SRRQ and depend upon the County to protect them from the SRRQ, a non-conforming industrial use within their residentially-zoned neighborhoods. The Marin County Code (MCC) expressly bars any expansion of uses at the SRRQ. In prior litigation, in which both the County and the SRRQ participated (as adversaries), Judge Sutro of the Marin Superior Court was asked to decide the specific question of whether the importation of asphalt grindings for recycling, the exact same activity that is now at issue, was within the SRRQ's vested rights or was an illegal expansion of the SRRQ's non-conforming use. Judge Sutro ruled it was an illegal expansion and prohibited it. That ruling has a collateral

estoppel effect on both the SRRQ and the County. The nearly complete disregard of these prior legal proceedings by County Staff, and Staff's failure to properly explain them to the BOS in connection with the SRRQ's pending permit amendment application, are disturbing, to say the least. County Staff is recommending that the BOS take illegal action, in plain violation of MCC § 22.112.020. Staff should immediately withdraw its recommended approval of the application, consult further with County Counsel and, having done so, recommend denial of the permit amendment.

Also, we note that the manner in which this Permit Amendment is being rushed through the administrative process, with less than 30 days public notice, and with no notice to impacted residents along Point San Pedro Road, leaving inadequate time for negotiations, and with only a one-week extension of the public hearing granted to allow the County and Quarry to respond to the Coalition's letter, but no further extension to allow the Coalition's attorneys to appear at the scheduled public hearing (which they could have attended had the original hearing date been kept), all apparently because the Quarry wants to make more money sooner, is unseemly and inappropriate at best. Since we are unable to attend the public hearing on July 16, please add this letter to the administrative record regarding this proposed illegal permit amendment.

1. The DPW's July 11, 2013 letter to the BOS.
 - a. the importation of asphalt grindings is an illegal intensification of a non-conforming use.

The DPW's letter is remarkable in its nearly complete disregard for the lengthy litigation that the State of California, the County and the Coalition jointly waged against the SRRQ over vested rights issues at a time when the SRRQ's quarrying and related activities were largely unregulated by the County, allowing the SRRQ to impose unrelenting punishment on the residents of the Point San Pedro Road corridor, giving rise to a generalized public furor. Apparently County staff has forgotten this critical history, as it now appears to be embarked on a course to allow the Quarry to return to a path of illegal expansion of its non-conforming use activities, when the exact opposite path is required under the law. Moreover, to the extent the DPW does acknowledge that litigation, it completely misapprehends and misstates its relevance to the SRRQ's proposed permit amendment.

As evidence of its disregard for that crucially relevant litigation, the DPW's only reference to that litigation in its affirmative presentation to the BOS states that "[f]ollowing a legal action by various parties...." DPW letter at p. 2. "Various parties"? Why not instead state clearly to the BOS the highly relevant facts that:

- those unnamed "various parties" included the County, the SRRQ and the Coalition, the very same parties at interest now;
- the issue of whether the SRRQ had a vested right to import asphalt grindings was directly addressed in the "vested rights" trial conducted in that litigation, in which County Counsel participated;

- after the 2003 trial, SRRQ conceded that there was no baseline amount of asphalt that was being imported to the quarry for recycling in 1982, an admission that can be used against it again now. SRRQ's Closing Brief at 16:21-24 (see attached);
- Judge Sutro held that as a result of the SRRQ's admission, importation of asphalt grindings by the SRRQ was prohibited as an illegal intensification of a non-conforming use, just as the Coalition had argued;
- in Judge Sutro's April 12, 2004 post-trial Statement of Decision, he found, in relevant part: "E. Importation of Materials. Defendant established that as of 1982, Basalt imported sand for use in the production of asphaltic concrete. It concedes, however, that there is no evidence of the importation of gravel and materials for recycling [i.e. asphalt grindings] as of November 1982, nor is there any evidence of the importation of dredged materials as of that time." (see attached);
- in Judge Sutro's April 19, 2004 post-trial Order, he found, in relevant part:
"1. Defendant SRRQ's industrial use of its property...became non-conforming when the quarry was rezoned by the County on November 9, 1982....The Court further finds that certain activities engaged in by defendant SRRQ on the quarry property exceed the scope of Basalt's use of the quarry property in 1982 and should be enjoined. Because of these findings, the Court finds that defendant SRRQ has exceeded the permissible scope of its nonconforming use in violation of Marin County Code §22.78.010,"...and
"9. Defendant SRRQ is enjoined from importing onto the quarry property the following materials: i) gravel; ii) used asphaltic concrete or concrete for recycling; and dredged non-sand materials." (emphasis added) (see attached);
- Judge Sutro's enjoining of the importation of asphaltic concrete, as a violation of Marin County Code §22.78.010, was incorporated directly into the Mining Permit by the County without objection from the SRRQ.

County Staff appears to be withholding and/or mischaracterizing these highly relevant facts and legal rulings from the BOS. These facts and findings collaterally estop the SRRQ and County from arguing that the importation of asphalt grindings are anything other than an illegal expansion of the SRRQ's non-conforming use requiring denial of the permit amendment.

In the same paragraph of its July 11 letter to the BOS, the DPW notes that "[t]he Quarry Permit conditions of approval do not currently allow importation of asphalt concrete." In fact, the current Mining Permit expressly prohibits importation of asphalt grindings, consistent with Judge Sutro's 2004 Statement of Decision and his Order. Again, this time by its word choice, the DPW shades the facts, and thereby improperly advises the BOS, of the relevant evidence bearing on this permit decision.

The DPW fails to address the relevant legal issue any further in its July 11 letter until addressing our July 1, 2013 letter. There, DPW first makes the disjointed arguments that "[t]he County's response [to Edgcomb Law Group's legal argument] is that the 2004 Court order was superseded by the preparation and certification of the EIR, subsequent approval of the amendment [sic] Surface Mining and Quarrying permit, and a motion by the Court to dissolve the injunction." These shotgun legal assertions by DPW are without substance.

First, it is a *non-sequitur* to argue that a Court order finding that the importation of asphalt grindings was an illegal intensification of a non-conforming use can be “superseded by preparation and certification of the EIR.” It is self-evident that an environmental impact report cannot “supersede” the continuing legal effect of the findings made in a prior order issued by a Superior Court judge.

Second, it makes no sense to claim that the County’s subsequent approval of the amended Mining Permit, which expressly incorporated the Court’s prior findings and expressly prohibited the importation of asphalt grindings, “superseded” the continuing legal effect of the Court’s findings. To the contrary, the approval of that Mining Permit prohibition ratified the Court’s findings.

Third, the DPW’s vague reference to a “motion by the Court to dissolve the injunction”, even if true (no copy is provided to the BOS), could not “supersede” the continuing legal effect of the Court’s finding that the SRRQ’s importation of asphalt grindings is an illegal intensification of a non-conforming use. To the contrary, that finding has a *collateral estoppel* effect on those that were party to that litigation, including the County and the SRRQ. *Kelly v. Vons Companies, Inc.*, 67 Cal. App. 4th 1329, 1339 (Cal. App. 2d Dist. 1998) (A prior determination by a Court given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits). Judge Sutro’s finding that the SRRQ has no vested right to import asphalt grindings in his April 19, 2004 Order meets this test.

Next, the DPW makes the absolutely head-scratching claim, without reference to any specific factual or legal basis whatsoever, that “[a]lso, the proposed amendment allows a use that is not an expansion of the nonconforming use....” The DPW’s legal claim is directly refuted by Judge Sutro’s express findings set forth above in both his April 12, 2004 Statement of Decision and his April 19, 2004 Order. In short, the DPW is completely wrong on this point. To the extent that DPW is impliedly relying on the County’s 1992 Planning Department letter to the SRRQ opining that processing recycled asphalt is authorized by the 1972 Quarry Permit, that reliance is entirely misplaced. That letter preceded Judge Sutro’s rulings and does not address the relevant issue: whether the SRRQ was engaged in importation of asphalt grindings in 1982 when the SRRQ became a non-conforming use. That issue was addressed squarely by Judge Sutro in 2004, and as set forth above, he unqualifiedly found that the SRRQ was not so engaged and therefore had no vested right to engage in that activity going forward. Judge Sutro, not the DPW, is the relevant legal authority to which the BOS should look to resolve the legal issue of whether the proposed activity that would be allowed by the permit amendment is legal or not, and he has already ruled that it is illegal. We stand by his decision, and so must the BOS, the DPW’s obfuscation notwithstanding.

In summary, the County is legally bound to continue to enforce the prohibition against the expansion of SRRQ's non-conforming use, consistent with Judge Sutro's 2004 Order, the express prohibition against that use in the current Mining Permit, and MCC § 22.112.020. There is no gray area here. If SRRQ wants to expand its current non-conforming industrial use, its only option is to seek a rezoning of the quarry property to industrial use, and then seek the Mining Permit amendment. Instead, it is asking the BOS to take an illegal action and allow it to expand a non-conforming use, at the expense of its residential neighbors who are forced to live with this non-conforming use in their midst. Such an action, if approved by the BOS, will not stand.

b. The proposed permit amendment does not qualify for a CEQA exemption.

The proposed permit amendment is clearly illegal for the reasons set forth above. But even if it were not, it would be subject to CEQA environmental review. Adding insult to injury to the neighbors, however, the DPW asserts that the proposed permit amendment is entitled to two CEQA exemptions: 1) a Class 1 categorical exemption for activities that do not result in significant environmental impacts and is considered a minor alteration to existing structures or facilities, not expanding the existing use; and 2) the so-called "common sense" objection. Neither applies.

First, the Class 1 categorical exemption does not apply because the importation of asphalt grindings, and production of recycled asphalt pavement, which has never before been produced at SRRQ, are clearly expansions of SRRQ's existing use of its facility. As noted above, Judge Sutro's findings to that effect collaterally estop the County and SRRQ from arguing otherwise. Even the DPW notes in its July 11 letter to the BOS that the proposed importation of asphalt grindings "is a change from current Quarry operations." (*Id.*, p. 4).

Second, the CEQA "common sense" exemption does not apply to the SRRQ's Mining Permit modification request. This exemption is reserved for when "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Cal. Admin. Code, tit. 14, § 15061, subd. (b)(3). Clearly, there is more than a possibility that this new, non-conforming use, located in close proximity to residential neighborhoods, which will be conducting an entirely new operation (importation of asphalt grindings and production of a new type of asphalt), that entails importation of potentially large additional amounts of materials (up to 38,200 tons) to be imported by trucks to the site and stockpiled, and the addition of new materials handling equipment, and new processing operations, increased operation of the asphalt production plant, with associated noise, dust and other air emissions, and increased importation by additional trucks of additional petroleum products, as well as other impacts to be more fully identified in a full CEQA evaluation, all create the possibility for cumulative, significant effects on the environment, which must at least be studied and, as necessary, mitigated. In short, the high threshold that must be met for application of the CEQA's "common sense" exemption ("no possibility" of significant environmental impact) cannot be met.

2. The SRRQ's attorney's July 3, 2013 letter to the DPW.

The Coalition set forth its legal argument why the County cannot legally grant the SRRQ's request to modify its Surface Mining and Quarrying Permit ("Mining Permit") in its July 1, 2013 letter and again above. It is the same argument as set forth above. The SRRQ's attorney responded to the Coalition's letter, but failed to show that the County can legally grant the SRRQ's request.

The SRRQ's letter is notable for the fact that it fails to seriously address the Coalition's legal argument. Like the DPW, the SRRQ fails to acknowledge that both the SRRQ's post-trial admission and Judge Sutro's order collaterally estops the County and SRRQ from arguing the issue of whether the importation of asphalt grindings was a vested right or an illegal expansion of a non-conforming use. The Court held it is an illegal expansion of a non-conforming use and therefore barred it. That ban was imported directly into the existing Mining Permit and thereby ratified. The SRRQ actively litigated that issue with the Coalition and lost. The SRRQ fails to address this legal issue because it has no valid legal response.

Instead, the SRRQ weakly asserts that because the BOS already approved operating conditions in the Mining Permit that "potentially" exceed the scope of SRRQ's use of the property as a legal non-conforming use, that it can approve the current request to expand its non-conforming use. Even if true, which the Coalition does not concede, this contention carries no legal weight. It appears the SRRQ is arguing that because it got some rights in the Mining Permit from the County that were not vested, *the Coalition* has waived all rights to ever object to any future illegal expansion of the SRRQ's non-conforming use, such as the amendment the SRRQ now seeks. Moreover, by the SRRQ's logic, the County can now allow the SRRQ to intensify its non-conforming use in any other way it wants, without regard to the express prohibition against any such expansion in MCC § 22.112.020. These are ludicrous arguments on their face. They are certainly not supported by any citation to any legal authority by the SRRQ. In fact, there is no such legal authority, which is why the SRRQ does not cite to any. There has been no open-ended waiver given to the SRRQ or the County from the prohibition on the expansion of non-conforming uses set forth in MCC § 22.112.020, or any waiver of rights by the Coalition to object if the SRRQ and County violate MCC § 22.112.020.

Again, the outcome of the relevant legal issue is not subject to dispute: 1) the SRRQ is a non-conforming use; 2) the SRRQ admitted it was not importing asphalt grindings at the time the County became a non-conforming use; 3) as a result, the Marin Superior Court found that the SRRQ has no vested right to import asphalt grindings; 3) this legal finding was incorporated directly into the SRRQ's Mining Permit; 4) MCC § 22.112.020 prohibits the expansion of non-conforming uses; 5) the proposed amendment to the SRRQ's Mining Permit allowing the importation of asphalt grindings would be an expansion of the SRRQ's non-conforming use and is therefore prohibited by MCC § 22.112.020. County Counsel should be advising County Staff and the BOS of these elementary legal principles and the resulting conclusion that the proposed permit amendment is illegal.

The SRRQ's July 3, 2013 letter also makes a number of unsubstantiated factual claims, including that importation of grindings will not increase production levels or truck trips, will not create a new stockpile and will be a net reduction in emissions, and that no health risk issues are associated with importation of asphalt grindings. These facts, whether true or not, are completely irrelevant to the non-conforming use issue, which is purely legal, has already been determined, and must result in a denial of the requested permit amendment.

With regard to CEQA, the SRRQ cites to legal authority in an attempt to justify the County's intention to apply a CEQA categorical exemption to the proposed permit amendment. In that regard, the SRRQ cites to *Committee for a Progressive Gilroy v. State Water Resources Board*, 192 Cal. App.3d 847, 863-65 (1987). That citation is misplaced. In *Gilroy*, a wastewater treatment plant was approved for certain levels of wastewater discharge after a CEQA review. The plant later had to reduce discharge levels at the regional water board's instruction. The plant then was able to return to the discharge limits it was previously permitted for without going through another CEQA review. The Court found that the reestablishment of discharge requirements within previously approved levels was not a new project subject to another CEQA review and that it was also exempt under the "existing facility" categorical exemption to CEQA. The reestablishment of discharge requirements within previously approved levels was categorically exempt from CEQA because CEQA guidelines provide that "the operation, repair, maintenance, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that previously existing is exempt from further CEQA review. Cal. Admin. Code. tit. 14, § 15301, subd. (b)." (Emphasis added). Further, the CEQA guidelines list specific categories that fit into this exemption including "Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services." Cal. Admin. Code. tit. 14, § 15301, subd. (b). Since the wastewater treatment plant was already permitted for and already functioned at the discharge levels, and it fit into a specific CEQA exemption category, the court found that no further CEQA review was required.

The current situation is easily distinguished from *Gilroy*. Here, quite unlike in *Gilroy*, the SRRQ is requesting to perform a new activity that was not previously permitted and that was not considered in the CEQA review for the Mining Permit. In fact, it was, and remains, expressly prohibited in the Mining Permit. Further, the SRRQ does not fit into a specific category of facilities identified as qualifying for a CEQA exemption, as the water treatment plant in *Gilroy* did. Therefore, even if the SRRQ's recycled asphalt production remained within the permitted production limits in its Mining Permit, those limits did not consider nor provide for the importation of asphalt grindings since the Marin Superior Court expressly found that the SRRQ did not have a vested right to import asphalt grindings.

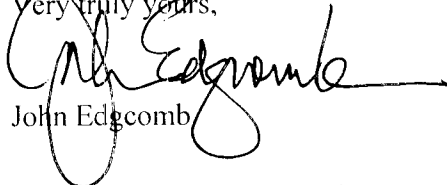
The SRRQ also cites to *Bloom v. McGurk*, 26 Cal.App.4th 1307 (1994) in arguing that a modification of its Mining Permit to allow for the importation of asphalt grindings, a new activity that was not considered during the CEQA review for the Mining Permit, should be

categorically exempt from CEQA. In *Bloom*, the Department of Health Services issued a medical waste treatment facility a renewed permit. The Court found that the renewed permit was exempt from CEQA review because there had been no change in the facility's operations incident to renewal of the permit. Here, that is not the case at all. The proposed permit modification would allow an activity (importation of asphalt grindings) that represents a substantial change in the facility's operations since the prior CEQA review by allowing an activity that the Mining Permit currently expressly prohibits. As such, *Bloom* is also easily distinguishable and provides no support for the application of a categorical exemption under CEQA to the proposed permit amendment.

The SRRQ also weakly argues that the CEQA "common sense" exemption also applies to its Mining Permit modification request. The Coalition addresses the inapplicability of this exemption above and will not repeat that analysis here.

In sum, the SRRQ's request to the County to reverse the express prohibition against the importation of asphalt grindings in its Mining Permit is, in effect, a request for the County to approve an illegal expansion of the SRRQ's non-conforming use in violation of MCC § 22.112.020. Moreover, even if it could be legally permitted, which it cannot, the County's proposed approval of the Mining Permit amendment without CEQA analysis, based on inapplicable CEQA exemptions, is also a violation of law. Worse, the DPW's support of this proposed amendment represents a return to the days when the County turned a blind eye toward the SRRQ's illegal actions, resulting in intolerable impacts upon their quality of life. The SRRQ cannot have it both ways: being a non-conforming use, and at the same time being allowed to expand that use. It must either seek re-zoning to the industrial use that it is, or suffer the continuing legal consequences of remaining a non-conforming use—a use prohibited from expanding in any way, meant to fade away over time to allow the property's use to become consistent with the surrounding residential use. Accordingly, because approval of the proposed Mining Permit amendment would allow the expansion of a non-conforming use in clear violation of MCC § 22.112.020 and CEQA, the BOS must reject the requested permit amendment.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Edgcomb", written over a circular stamp or seal.

John Edgcomb

cc: Marin Board of Supervisors
Chris Locke