

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of Application 31468

CEMEX, Inc.

ORDER APPROVING ISSUANCE OF PERMIT

SOURCE: San Vicente Creek, Mill Creek, and Unnamed Stream

COUNTY: Santa Cruz

WHEREAS:

1. RMC Pacific Materials (RMC) filed water right Application 31468 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) on December 1, 2003 to divert water from: (1) San Vicente Creek tributary to Pacific Ocean, (2) Mill Creek tributary to San Vicente Creek, and (3) Unnamed Stream tributary to Pacific Ocean. The application requests authorization to collect 14.9 acre-feet per annum in an existing reservoir located on the Unnamed Stream throughout the year. Water will be used for fish and wildlife preservation, including maintenance of existing habitat at the reservoir for the endangered California red-legged frog (*Rana aurora draytonii*) (CRLF), and for fire protection.
2. On March 1, 2005, RMC was purchased by CEMEX Inc. The application was reassigned to CEMEX (Applicant) on February 8, 2007.
3. The Applicant diverts water from the San Vicente Creek watershed pursuant to a pre-1914 appropriative claim of right. The Division has investigated the diversion pursuant to the pre-1914 claim and has issued a finding regarding documented diversions under the claim of right. (see 262.0 (44-18-01); Statements of Water Diversion and Use 8350 and 8351.) The existing reservoir was constructed post-1914 and an appropriative water right is required for this facility. Application 31468 was filed to establish a basis of right for the reservoir.
4. Application 31468 was noticed on July 28, 2006. Five protests were timely filed. The protests filed by David Kossack, Department of Fish and Game (DFG), Ventana Chapter of the Sierra Club, Coastal Advocates for Small Towns (COAST), and Coast Dairies and Land Company (Coast Dairies) are unresolved. The protests raise the following issues:
 - a. Potential adverse impacts to coho salmon, (*Oncorhynchus kisutch*), steelhead (*O. mykiss*) and CRLF due to diversion of San Vicente Creek and/or Mill Creek.
 - b. Waste and unreasonable use due to diverting excess water not required by the cement plant from the San Vicente Creek watershed.
 - c. Request for the quantification of natural flow entering the storage reservoir from the Unnamed

Stream. If flow from the Unnamed Stream is capable of filling the storage reservoir from December through March, then using the reservoir to store water from July through October may interfere with the natural wet season/dry season water cycle of the CRLF. The reservoir should be filled using only the Unnamed Stream as a source, rather than diversion from San Vicente and Mill Creeks.

- d. Request for clarification on why the Applicant requires domestic fire fighting water, and why the reservoir should be used for this purpose. Information was requested on how reservoir habitat will be protected in the event of a fire, when water is taken from the reservoir.
 - e. Application form was incorrectly filled out.
 - f. Potential injury to Coast Dairies, because two of the points of diversion are located on Coast Dairies lands. On January 9, 2007, the land ownership issue was addressed and protest issue was not accepted.
 - g. Issues related to the claimed pre-1914 appropriative right. The Division has previously analyzed the extent of the pre-1914 appropriative right (see 262.0 (44-18-01)). This issue is unrelated to processing of Application 31468 and should be rejected. On May 12, 2010, the Applicant agreed to remove Mill Creek and San Vicente Creek as sources of water for Application 31468. The pre-1914 right is for diversion from the San Vicente Creek watershed. Inasmuch as these sources have been removed from the application, the protest issue is resolved.
5. The fishery issues are solely related to Mill Creek and San Vicente Creek, not the unnamed stream. The unnamed stream outlets over a cliff to the Pacific Ocean, resulting in a lack of anadromy. (see January 19, 2007 Gallery & Barton response to DFG, Exhibit C - photograph.) Accordingly, protest issues (a) and (b) are resolved.
6. Protest issue (c) requests an evaluation of the quantity of natural flow entering the storage reservoir from the Unnamed Stream. If flow from the Unnamed Stream is capable of filling the storage reservoir from December through March, then using the reservoir to store water from July through October may interfere with the natural wet season/dry season water cycle of the CRLF. The protest also asserts that the reservoir should be filled using only the Unnamed Stream as a source.

The Applicant's October 15, 2009 water availability analysis (WAA) for the unnamed stream documents that there is sufficient water in this source to fill the reservoir. The Division will condition any permit issued to limit refilling of the reservoir to water lost due to seepage and evaporation, except when water is used for fire fighting purposes. The Applicant will be required to bypass the February median flow of 0.25 cubic foot per second whenever water is being collected to storage. The WAA documents that minimal flows occur during the July through October period. Bypassing of the February median flow should eliminate collection of water to storage during the July through October time period.

This protest issue has been resolved by: (a) bypassing the February median flow, and (b) elimination of San Vicente and Mill Creeks as sources.

7. Protest issue (d) requested clarification on why the Applicant requires domestic fire fighting water, and why the reservoir should be used for this purpose. Information was requested on how reservoir habitat will be protected in the event of a fire, when water is taken from the reservoir.

This protest element is a request for information, rather than a protest issue. The Division will condition the water right to require that the Applicant not injure threatened or endangered

species. The Applicant will also be required to obtain a determination from DFG whether any restrictions on reservoir drawdown during fire fighting efforts are required in order to comply with the non-injury requirement regarding CRLF. Accordingly, this protest element is resolved.

8. Regarding issue (e), protestant David Kossack asserts that the application was incompletely and incorrectly filled out. The Applicant responded on January 19, 2007 that the form was correctly filled out. The Division has reviewed the application form and finds that it was completely filled out. The identified inaccuracies are addressed below, with the Division's response in italic. This issue is resolved.

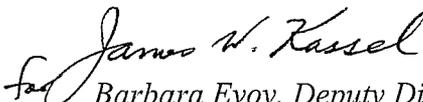
- Diversion of 0.25 cubic foot per second from San Vicente Creek is a waste and unreasonable use of water. *This source has been eliminated from the application.*
- The amounts requested are not justified for industrial use. *Industrial use is not a requested purpose of use.*
- There is no description of how this water would be available for the community of Davenport in the event of a major fire. *The application form does not require that the method of transport of fire protection water be identified, nor does the form require justification of the quantity requested for fire protection.*
- The description of the diversion is rather obscure. *All of the required information was provided. Under the revised project, the Applicant will collect water to storage from the unnamed stream in the existing onstream reservoir.*
- The Applicant does not claim an existing water right for the water sought by Application 31468. *The Division has previously found (see 262.0 (44-18-01) that the Applicant lacks a valid right for storage in the reservoir. Consequently, the form was correctly filled out.*
- The project description fails to describe the full breadth necessary to maintain CRLF and sustain downstream riparian communities in the San Vicente Creek watershed. *Diversions from the San Vicente Creek watershed are no longer part of the application.*
- Under the section titled Governmental Requirements, the Applicant indicated that no other agency is preparing an environmental document for the project. The Protestant asserts that this is inaccurate, because it ignores: (a) the Dome Project raw materials preparation and storage facility and related Habitat Conservation Plan for CRLF, (b) actions associated with the water right complaint, (c) proposed expansion of the limestone quarry; (d) production increases at the Davenport cement plant, and (e) industrial logging in the upper San Vicente Creek watershed. *The Applicant recently closed the cement plant; therefore, it can be concluded that there are no expansion plans at this facility. (February 24, 2010 Santa Cruz Sentinel.) With removal of diversions from the San Vicente Creek watershed from the project, there is no need to consider environmental documents being prepared for projects in the San Vicente Creek watershed. Ongoing collection to storage from the unnamed stream for maintenance of the existing reservoir for fish and wildlife protection and enhancement and fire fighting purposes is exempt from the California Environmental Quality Act (CEQA).*
- The impacts to vegetation are listed as not applicable, but removal of water from the San Vicente Creek watershed will have impacts. *Diversions from the San Vicente Creek watershed are no longer part of the project.*
- The Applicant indicated that there are no known typical species of fish in the water sources.

However, San Vicente Creek has steelhead and is the southern limit of coho salmon and has habitat for CRLF. *Diversions from the San Vicente Creek watershed are no longer part of the project.*

9. The water will be diverted and used without injury to any lawful user of water. There are no other water users on the unnamed stream between the reservoir and the Pacific Ocean.
10. The water will be diverted and used without unreasonable effect upon fish, wildlife, or other instream beneficial uses. The Applicant plans to maintain the reservoir because it supports an existing population of CRLF. The Applicant will be required to bypass the February median flow, to maintain riparian habitat downstream of the reservoir.
11. The intended uses are beneficial. The Applicant intends to use the reservoir for fish and wildlife maintenance and enhancement, because the reservoir supports an existing population of CRLF. As necessary, water will be used for fire fighting purposes.
12. Environmental review began on December 1, 2003. The reservoir was constructed prior to the start of environmental review, and there will be no expansion in project facilities or water use beyond that existing on the date environmental review began. Pursuant to the provisions of the CEQA, the State Water Board issued a Notice of Exemption (NOE) based on an Existing Facilities Exemption, pursuant to Title 14, California Code of Regulations, section 15301, Class 1.
 - The project will not cause significant adverse impacts on any sensitive environment and will not result in significant cumulative impacts.
 - No new facilities will be constructed beyond those existing prior to the start of the Lead Agency's environmental review and the project does not involve an expansion in use beyond that which existed at the time the Lead Agency began its environmental review.
13. In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audobon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].) There is no evidence that approval of the revised application, with the inclusion of a bypass flow regime and a reservoir drawdown restriction (if determined necessary by DFG), will have any adverse impacts on public trust resources.

NOW, THEREFORE, IT IS ORDERED THAT A PERMIT IS ISSUED FOR APPLICATION 31468, subject to the conditions of the enclosed permit.

STATE WATER RESOURCES CONTROL BOARD


Barbara Evoy, Deputy Director
Division of Water Rights

Dated:

to refill if emptied for necessary maintenance or repair. Such right shall be exercised only during the authorized diversion season.

(0000040M)

8. This permit is subject to the continuing authority of the State Water Board to reduce the amount of water named in the permit upon a finding by the Board that the amount is in excess of that reasonably needed to be held in storage for the authorized use. No action will be taken by the Board without prior notice to the owner and an opportunity for hearing.

(0000042)

9. Permittee shall install and maintain an outlet pipe of adequate capacity in the dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Board, in order that water entering the reservoir which is not authorized for appropriation under this permit can be released. Before storing water in the reservoir, permittee shall furnish evidence which substantiates that the outlet pipe, or alternative facility, has been installed in the dam. Evidence shall include photographs showing completed works or certification by a registered Civil or Agricultural Engineer.

(0050043B)

10. For the protection of fish and wildlife, permittee shall bypass a minimum of 0.25 cubic foot per second. The total streamflow shall be bypassed whenever it is less than the designated amount.

The permittee shall submit a compliance plan, satisfactory to the Deputy Director for Water Rights, which describes how the bypass flows required by the conditions of this permit will be measured and maintained.

(0140060)

11. Within six months of permit issuance, permittee shall obtain a determination from the Department of Fish and Game whether any restrictions on reservoir drawdown during fire fighting efforts are required to protect California red-legged frog (*Rana aurora draytonii*). Permittee shall provide the written determination to the Deputy Director for Water Rights, and thereupon comply with any applicable restrictions.

12. Permittee shall install a device, satisfactory to the State Water Board, which is capable of measuring the bypass flows required by the conditions of this permit. Said measuring device shall be properly maintained.

(0060062B)

13. The right to use water for fire protection purposes authorized by this permit is limited to that quantity normally necessary for actual fire fighting and to maintain an adequate reserve for fire protection.

(0000116)

14. For the protection of habitat for the Red-legged frog (*Rana aurora draytoni*) and to allow for the growth of riparian vegetation, Permittee shall:

- a. establish and maintain, undisturbed, a **150-foot-wide** strip of natural upland vegetation around the water storage reservoir;
- b. obtain approval of the U.S. Fish and Wildlife Service and the California Department of Fish and Game prior to any reservoir dredging operations;
- c. refrain from disturbing the fringe of emergent (wetland) vegetation in the reservoir during dredging operations; and
- d. restrict cattle and domestic stock access to the reservoir to a maximum of 10 percent of the shoreline or construct outlet pipes to watering troughs.

These requirements shall remain in effect as long as water is being diverted by Permittee (or successors-in-interest) under any permit or license issued pursuant to Application 31468.

(0000205)

15. Should any buried archeological materials be uncovered during project activities, such activities shall cease within 100 feet of the find. Prehistoric archeological indicators include: obsidian and chert flakes and chipped stone tools; bedrock outcrops and boulders with mortar cups; ground stone implements (grinding slabs, mortars and pestles) and locally darkened midden soils containing some of the previously listed items plus fragments of bone and fire affected stones. Historic period site indicators generally include: fragments of glass, ceramic and metal objects; milled and split lumber; and structure and feature remains such as building foundations, privy pits, wells and dumps; and old trails. The Deputy Director for Water Rights shall be notified of the discovery and a professional archeologist shall be retained by the Permittee to evaluate the find and recommend appropriate mitigation measures. Proposed mitigation measures shall be submitted to the Deputy Director for Water Rights for approval. Project-related activities shall not resume within 100 feet of the find until all approved mitigation measures have been completed to the satisfaction of the Deputy Director for Water Rights.

(0000215)

16. Permittee shall maintain the existing outlet pipe through the dam in proper working order.

(000000S)

ALL PERMITS ISSUED BY THE STATE WATER RESOURCES CONTROL BOARD ARE SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

- A. The amount authorized for appropriation may be reduced in the license if investigation warrants. (0000006)
- B. Progress reports shall be submitted promptly by permittee when requested by the State Water Board until a license is issued. (0000010)
- C. Permittee shall allow representatives of the State Water Board and other parties, as may be authorized from time to time by said State Water Board, reasonable access to project works to determine compliance with the terms of this permit. (0000011)
- D. Pursuant to California Water Code sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the State Water Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the State Water Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest; and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

- E. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Board if, after notice to the permittee and an opportunity for hearing, the State Water Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the State Water Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(0000013)

- F. This permit does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050 - 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 - 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)

- G. Permittee shall maintain records of the amount of water diverted and used to enable the State Water Board to determine the amount of water that has been applied to beneficial use pursuant to Water Code Section 1605.

(0000015)

- H. No work shall commence and no water shall be diverted, stored or used under this permit until a copy of a stream or lake alteration agreement between the State Department of Fish and Game and the permittee is filed with the Division of Water Rights. Compliance with the terms and conditions of the agreement is the responsibility of the permittee. If a stream or lake agreement is not necessary for this permitted project, the permittee shall provide the Division of Water Rights a copy of a waiver signed by the State Department of Fish and Game.

(0000063)

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

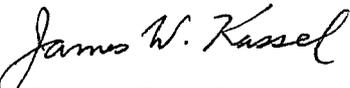
Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent

public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

STATE WATER RESOURCES CONTROL BOARD

For 
Barbara Evoy, Deputy Director
Division of Water Rights

Dated: **MAY 18 2011**