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## RESPONSE TO ALAMEDA COUNTY MEMORANDUM ON APPERSON RIDGE QUARRY

### Discretionary approval may still be required

On August 29, 2003, The Alameda County Planning Department issued a memorandum (“County memo”) determining that the Apperson Ridge Quarry project, for which an Environmental Impact Report (“EIR”) was approved in 1984, requires no further environmental review under the California Environmental Quality Act (“CEQA”). Section 15162 (c) of CEQA (misidentified by the County memo as Section 15163 (a) (3) (c) of CEQA) states “once a project has been approved, the lead agency’s role in project approval is completed, *unless further discretionary approval on that project is required*” (italics added). The County memo asserts that “no further discretionary action is required or has been requested by the permittee.” As discussed below, further discretionary approval on the part of the Alameda County Planning Director appears to be required for the Apperson Quarry project, and thus the County’s role as lead agency may not be completed.

Section 15357 of CEQA defines a “discretionary project” as “a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.”

On August 21, 1984, the Board of Supervisors certified the EIR and approved the Surface Mining Permit for the Apperson Quarry project, along with 62 mandatory conditions of approval to be met by the permittee, Oliver DeSilva, Inc.. It is unclear at this point how many of these conditions which were required to be met before commencement of grading, mining operations, or construction activities were actually met by the permittee before the June 2003 County approval of grading plans for the quarry access road (this information has been requested from the County).

If the County’s role as lead agency is not completed due to further discretionary approval required on the project, then the County may be required to prepare a subsequent EIR, as outlined in Section 15162 of CEQA. If the County’s role as lead agency is completed, any public agency which grants a future discretionary approval for the project, such as the Regional Water Quality Control Board, California Department of Fish and Game, or Army Corps of Engineers, would be required to prepare a subsequent EIR under Section 15162 (c) of CEQA. Section 15162 of CEQA is attached as Appendix 1.

## **Discretionary approval for elk mitigation measures**

Condition 45 required that a program for mitigating quarrying impacts on the San Antonio tule elk herd be developed prior to commencement of grading, mining operations, or construction activities. This mitigation program was to be developed in coordination with the California Department of Fish and Game (“CDFG”) and approved by the Planning Director. The program was to cover acquisition of suitable elk habitat, relocation of elk from another part of the state, and monitoring of the new and existing elk herds. Condition 45 required that the permittee “implement the tule elk mitigation program as approved by the Planning Director,” clearly a discretionary approval.

As noted in the County memo, condition 45 was modified at a County Planning Commission hearing in 1995 after a change in CDFG policy concerning elk relocation. The “Supplement to Mitigation Program of August 4, 1986 (SMP-17/Condition 45)” (“Supplement”) was approved by the Planning Commission and became the legal mitigation program under CEQA in fulfillment of condition 45. The replacement condition 45 also required that the permittee “implement the tule elk mitigation program as approved by the Planning Director.” This approval by the Planning Director is clearly a discretionary approval. A document entitled “Apperson Ridge Quarry Tule Elk Mitigation Program Condition 45” was published by the Planning Department in May 2003. It is unclear whether the Planning Director has approved this document as an acceptable tule elk mitigation program.

A 1983 study concluded that the San Antonio tule elk herd is likely to be displaced as a result of the proposed quarry operation on Apperson Ridge. A 1987 tule report conducted on behalf of the permittee acknowledges this unfortunate likelihood. The elk “mitigation” measure does not contradict this, and acknowledges that “elk who are continuously displaced from their home ranges suffer low birth rates and energy loss associated with less than optimal foraging.” Nonetheless, the “mitigation” measure does not require any substantial mitigation for this impact, no acquisition or enhancement of elk habitat elsewhere, and calls only for monitoring the elk herd during and after construction and for construction of fencing and underpasses to allow elk to flee the heavy truck traffic through their rutting and calving grounds and adjacent dynamite blasting.

## **Discretionary approval for red-legged frog mitigation measures**

Condition 50 required that a program for mitigating quarrying impacts on the red-legged frog be developed prior to commencement of grading, mining operations, or construction activities. This condition was to be developed as recommended by a “qualified expert” and approved by the Planning Director, clearly also a discretionary approval. A document entitled “Apperson Ridge California Red-legged Frog Avoidance Program (Condition of Approval No. 50)” was published by the Planning Department in May 2003. It is unclear whether the Planning Director has approved this document as an acceptable red-legged frog mitigation program.

Although Mitigation measure 50 attempts to avoid any direct or indirect take of individual frogs through avoidance and establishment of buffer areas, it allows destruction of frog breeding sites if the frogs are not present (page 5 - “if the potential breeding area is dry at the time of construction or use of the area, the buffer may be entered following pre-construction surveys for the RLF.”). As frog breeding ponds can dry up in the summer months after frogs have dispersed from the pond to uplands estivation habitat, and frogs are only present in breeding ponds during the wet season, this will allow known breeding habitat to be destroyed throughout most of the year. Mitigation measure 50 makes no attempt to mitigate what will likely be the approved loss of much of the known frog breeding habitat on the project site. There is also no

discussion whatsoever of maintenance of migration corridors, maintenance of suitable and sufficient uplands habitat, or the possibility of frogs being crushed or excavated in burrows. Mitigation measure 50 inspires no confidence that a viable red-legged frog population will survive the quarrying project and offers no substantive mitigation in terms of habitat avoidance or replacement.

### **Unanalyzed and unmitigated endangered species impacts**

The County memo implies that impacts to sensitive wildlife species have been adequately analyzed and “appropriately” mitigated. This is far from true.

Under CEQA Section 15062, a lead agency is required to prepare a subsequent EIR if “substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects” or there is “new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete.”

Due to the documented presence of at least two species recently federally listed as threatened and one species currently proposed for listing as threatened, on or immediately adjacent to the project site, these conditions have been met.<sup>1</sup> The California red-legged frog (*Rana aurora draytonii*) was federally listed as a threatened species in May 1996. The Alameda whipsnake (*Masticophis lateralis euryxanthus*) was federally listed as a threatened species in December 1997. The California tiger salamander (*Ambystoma californiense*) was proposed for federal listing as a threatened species in May 2003. Some potential direct and indirect impacts of the Apperson Ridge Quarry on these species were analyzed in 1984, well before the listing of these species. The original EIR did not analyze nor mitigate for take of listed species, which is almost guaranteed to occur. Additionally, substantial and significant new information regarding the life history, habitat requirements, and suitable mitigation measures for these species has been developed within recent years, well after the 1984 EIR.

This information includes knowledge about the importance of upland estivation habitat for the red-legged frog, the necessity for maintenance of dispersal corridors to and from breeding ponds, and the importance of maintaining viable meta-populations of frogs to help re-colonize drainages after local extirpation events. This new information is contained in “Amphibian and Reptile Species of Special Concern in California,” published in 1994 by the CA Department of Fish and Game; “Proposed Endangered Status for the California Red-legged Frog” and “Determination of Threatened Status for the California Red-legged Frog,” published by the U. S. Fish and Wildlife Service in 1994 and 1996; and “Final Recovery Plan for the California Red-Legged Frog” published by USFWS in 2002.

It also includes knowledge about the importance of upland estivation habitat for the tiger salamander, the necessity for maintenance of dispersal corridors to and from breeding pools, and the impacts of roads in fragmenting habitat and causing road-kill of dispersing adults. This new information is contained in “Status Report: The California Tiger Salamander” and “Amphibian

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<sup>1</sup> The 1984 EIR reported that red-legged frogs were present in a pond along the eastern border of the quarry site and were probably present in ponds and/or seeps within the quarry site and access roads. The 1984 EIR acknowledges the potential for the tiger salamander and Alameda whipsnake to occur on site. There are numerous occurrences of the tiger salamander and the whipsnake on or adjacent to the project site documented in the California Natural Diversity Database maintained by the California Department of Fish and Game.

and Reptile Species of Special Concern in California,” published by the CA Department of Fish and Game in 1993 and 1994; “Habitat Use and Migration Behavior of the California Tiger Salamander,” published by the Journal of Herpetology in 1996; and “Listing of the Central California Distinct Population Segment of the California Tiger Salamander,” published by the USFWS in 2003.

It also includes knowledge about the importance of dispersal corridors for the Alameda whipsnake, their sensitivity to human noise and disturbance, and the importance of the Sunol-Cedar Mountain population to the overall recovery of the species. This new information is contained in “Habitat Requirements, Distribution, and Current Status of the Alameda Whipsnake,” published by the USFWS in 1992; “Determination of Threatened Status for the Alameda Whipsnake,” published by the USFWS in 1997; and “Draft Recovery Plan for Chaparral and Scrub Community Species East of San Francisco Bay, California,” published by the USFWS in 2002.

None of this information was known or discussed in the 1984 EIR nor the 1992 periodic review for the Apperson Quarry project. Neither the 1984 EIR nor the conditions of approval require any substantive avoidance, mitigation, or replacement of habitat for these imperiled species, other than the inadequate measures for the red-legged frog discussed above.

The Alameda Creek Alliance also informed the County in a letter of August 12, 2002, that there is potential for a number of other species of concern to occur on or adjacent to the quarry site. These include the federally endangered callippe silverspot butterfly (*Speyeria callippe callippe*), the federally threatened Bay checkerspot butterfly (*Euphydryas editha bayensis*), the foothill yellow-legged frog (*Rana boylei*) and the western pond turtle (*Clemmys marmorata*), both federal species of concern, and the California horned lizard (*Phrynosoma coronatum frontale*), a state species of concern. The potential to occur on the project site, analysis of the potential impacts of the project, and suitable mitigation measures were not conducted for these species under the original EIR.

### **High Potential for illegal take of listed species**

The construction and operation of the Apperson Quarry project, including the access roads, has a high potential to also cause take<sup>2</sup> of whipsnakes, red-legged frogs, and tiger salamanders, through crushing, blasting, or excavation of individuals in uplands habitat, road-kill, interference with essential behaviors such as breeding, feeding, or migration, and harassment through noise, vehicle traffic, and human activity. Unless an Incidental Take Permit is acquired from the U. S. Fish and Wildlife Service, any take of any listed species would be a violation of federal law, for which Alameda County could be held liable as the lead agency for the project. An ITP is not issued by the USFWS without a Habitat Conservation Plan or a Section 7 Consultation on a federal permit, with sufficient avoidance and mitigation measures to ensure the conservation of the species. For this reason, lead agencies for a project that has a high potential for take should consult with the USFWS during the environmental review for the project to make sure all potential impacts to listed species are analyzed and suitably mitigated. This has not been done by Alameda County for the Apperson Quarry project.

As the Apperson Quarry project appears to impact streams and jurisdictional waters of the U. S., further permits for the project will likely be required by the Regional Water Quality Control Board, California Department of Fish and Game, or Army Corps of Engineers, with

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<sup>2</sup> “Take” as defined by the Endangered Species Act includes harassing or harming, as well as killing, listed species.

consultation and permits likely required from the U. S. Fish and Wildlife Service. Additionally, the Quarry may be subject to a County-wide vote under Measure D, as all the permits necessary for the quarrying operation to move forward were not in place before Measure D became law. For example, condition 49 of the project requires the permittee to acquire a permit for potential disturbance of nesting golden eagles in the vicinity of the project area, and to date no state, federal, or regional water board permits have been obtained for the project.

## Appendix 1

### CEQA Section 15162. Subsequent EIRs and Negative Declarations

(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subsection (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.

(c) Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subsection (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

(d) A subsequent EIR or subsequent negative declaration shall be given the same notice and public review as required under Section 15087 or Section 15072. A subsequent EIR or negative declaration shall state where the previous document is available and can be reviewed.