BEFORE THE LANE REGIONAL AIR PROTECTION AGENCY

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | STIPULATED AND FINAL ORDER |
| Delta Sand & Gravel Co., | ) | |
| Respondent. | ) | NUMBER 06-2753 |

This Stipulated Final Order ("SFO") is entered into pursuant to ORS 183 and Lane Regional Air Protection Agency's "Rules and Regulations" Titles 13, 14, and 15. The following stipulations are made between Delta Sand & Gravel Co. ("Respondent") and the Lane Regional Air Protection Agency ("LRAPA").

WHEREAS:

A. Respondent is permitted to operate a sand and gravel company in Eugene, Oregon pursuant to Air Contaminant Discharge Permit (ACDP) # 202119. Respondent's said sand and gravel company was in operation in January 2005.

B. On January 11, 2005 and January 13, 2005, an LRAPA investigator observed and photographed track out present on the public roadway that was caused by the Respondent site operations. Said track out was present such that vehicular traffic, primarily from Respondent operations, resulted in fugitive particulate emissions.

C. LRAPA Rules and Regulations Section 48-015(2) and Condition G9 of ACDP #202119 requires that reasonable precautions be used to prevent particulate matter from being airborne.

D. On February 7, 2005, LRAPA issued Notice of Non-compliance (NON) No. 2753 to respondent for alleged violations of LRAPA Rules and Regulations, Title 48-015-2(B) and (G) and ACDP #202119 Condition G9.

E. On March 15, 2005, LRAPA issued Notice of Violation and Notice of Civil Penalty Assessment No. 05-2753 (NCP 05-2784) to Respondent, alleging violation of LRAPA Rules and Regulations, Title 48, Section 48-015-2(B) and (G). For the alleged violation referenced in Paragraphs B and D, LRAPA assessed a civil penalty against Respondent for a single violation of LRAPA Rules and Regulations in the amount of $1,200.

F. On or about January or February 2005, Respondent submitted a letter of appeal and request for hearing to LRAPA Director Brian Jennison, denying that Respondent failed to take reasonable precautions to keep particulate from becoming airborne.

G. On April 6, 2005, Respondent submitted a letter to LRAPA stating, in part: "that under the particular circumstances in effect at the time of the alleged violation, we [Respondent] had in fact taken reasonable precautions to prevent particulate matter from becoming airborne".

H. Respondent's April 6, 2005 letter states that Respondent believes it would be in the best interest of Respondent, LRAPA and the public: " to resolve the base problem of track out at this time, rather than disputing the correctness of the citation".

I. LRAPA and Respondent are entering into this SFO pursuant to Sections 15-020-4-B (3) and 15-040-1 of LRAPA's Rules and Regulations in order to settle the Notice of Violation and Notice of Civil Penalty Assessment referenced in paragraph E of this SFO.

J. Respondent recognizes that LRAPA has the authority to impose a civil penalty and to issue an abatement order for violations of LRAPA's Rules and Regulation or the ACDP.

J. Respondent expressly neither admits nor denies the alleged violations referenced in Paragraphs D and E. This SFO is not intended to limit, in any way, LRAPA's right to proceed against Respondent in any form for any past or future violations not expressly settled herein.

NOW, THEREFORE, it is stipulated and agreed that:

1. LRAPA shall dismiss the Notice of Violation and Notice of Civil Penalty referenced in Paragraph E, contingent upon Respondent satisfying the stipulations set forth herein.

2. Respondent shall, by March 31, 2006, complete modifications that increase the number of nozzles and flow of water at the existing water spray area for truck tires and install and operate a new water spray system at the site exit gate not currently equipped with a water spray system.

3. Upon completion of the City of Eugene clearing out the accumulated track out on Division Street, or by July 31, 2006, whichever is sooner, Respondent shall keep Division Street and the area under the guardrail at the Division Street off ramp free from debris (dirt), and will in no event allow the re-accumulation of track out.

4. In the event the actions referenced in Paragraphs 2 and 3 do not prevent the Respondent from violating of LRAPA Rules and Regulations, Title 48-015-2(B) and (G) and the conditions of ACDP #202119, the Respondent shall, within 30 days of any alleged violation, submit a corrective action plan to achieve continued compliance within 30 days of that alleged violation. That corrective action plan shall include all reasonable measures, including but not limited to upgrading the water spraying of tires to a wheel washer system.

5. Respondent shall comply with all applicable laws and regulations. Nothing in this SFO is intended to relieve Respondent from compliance with any law, regulation, or permit, or to relax any standard contained in any law, regulation or permit. In the event that LRAPA determines that the Respondent is violating said laws or regulations, LRAPA retains the authority under its rules and regulations to take any regulatory action, including assessing civil penalties, for those violations.

6. Respondent hereby waives any and all rights to a contested hearing and judicial review with the respect to the violations referred to in NCP 05-2753.

7. Respondent acknowledges that it has actual notice of the contents and requirements of this SFO. Respondent agrees that failure to fulfill any of the requirements hereof constitutes a violation of the SFO.

8. The undersigned certifies that he has the lawful authority to sign this SFO on behalf of, and to legally bind, Delta Sand & Gravel Co., the Respondent

IT IS SO STIPULATED AND AGREED:

Dated this 29th day of March 2006

Merlyn L. Hough, Director

IT IS SO STIPULATED AND AGREED:

Dated this 30th day of March 2006

George D. Staples, Risk Manager

LRAPA
Lane Regional Air Pollution Authority

№ 2603

1010 Main Street
Springfield, OR 97477
(541) 736-1056

# NOTICE OF NON-COMPLIANCE

***IMPORTANT: PLEASE READ CAREFULLY***

RULES AND REGULATIONS
LANE REGIONAL AIR POLLUTION AUTHORITY

Respondent's Name: GEORGE STAPLES

Address: _____

Acting on behalf of: DELTA SAND & GRAVEL

Address: 999 DIVISION AVE
EUGENE, OR 97404

On the 30th day of SEPTEMBER, 2003, at about 5:00 a.m. / (p.m.) you violated the following provision: LRAPA TITLE 48, SECTION 48-015-2 "No person shall cause, suffer allow ... or a road to be used, Constructed ... or any equipment to be operated without taking reasonable Precautions to prevent Particulate matter from becoming airborne

Violation description: Delta Sand & Gravel has a construction project to upgrade Irvington Rd in Eugene, OR and on September 30, 2003 failed to take reasonable precautions to prevent particulate matter from becoming airborne.

Location of violation: Irvington Rd. Eugene, OR

Actions required to correct the violation: Use reasonable precautions to prevent particulate matter from becoming airborne

Time for compliance (optional): Immediately

This is an initial notification that a violation of LRAPA Rules has occurred. The facts of the violations will be reviewed to determine if further enforcement actions are justified.

I certify that I served a copy of this Notice of Non-Compliance on the respondent:

Thomas A. Freeman
(Signature)

10/1/03
(Date)

I acknowledge receipt of a copy of this notice of violation: (Signature is not an admission of guilt)

_____
(Signature)

10-1-03
(Date)

LRAPA
Lane Regional Air Pollution Authority

1010 Main Street
Springfield, OR 97477

phone (541) 736-1056
fax (541) 726-1205
1-877-285-7272
www.lrapa.org
E-mail: lrapa@lrapa.org

# NOTICE OF VIOLATION

# NOTICE OF CIVIL PENALTY ASSESSMENT NUMBER 03-2602

# NOTICE OF OPPORTUNITY FOR HEARING

**Issued in accordance with provisions of ORS 183, 468, 468A and Lane Regional Air Pollution Authority Rules Titles 13, 14, and 15**

**Issued To:** Delta Sand and Gravel
999 Division Avenue
Eugene, Oregon 97404

) RESPONDENT

**Complaint:** It is alleged that on September 30, 2003 Delta Sand & Gravel, Inc. (DSG) failed to take reasonable precautions to prevent particulate matter from becoming airborne from operations conducted on an upgrade of Irvington Road in Eugene (Site). Failure to take reasonable precautions to prevent particulate matter from becoming airborne is a violation of LRAPA's Rules and Regulations, Title 48, Fugitive Emissions.

**Regulations Violated:** LRAPA Rules and Regulations, Title 48, Section 48-015-2

> Section 48-015-2 states: "No person shall cause, suffer, allow or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne..."

**Discussion of Violation:** On September 30, 2003 LRAPA inspected a construction project on Irvington Road in Eugene, Oregon (Site). The construction project was being conducted by Delta Sand & Gravel of Eugene, Oregon. The construction project involved upgrading Irvington Road and installing underground services.

LRAPA had received several complaints concerning fugitive dust and the lack of taking precautions to prevent particulate matter from becoming airborne. Follow up on previous complaints indicated that the project had been watered to minimize fugitive dust.

At about 4:30 pm, on September 30, 2003, LRAPA staff received a telephone call from an individual living on Irvington Road, to complain about the lack of watering. The complainant stated that Irvington Road had not been watered at all on that day (September 30, 2003).

LRAPA responded immediately to Irvington Road and found it to be dry and dusty. It did not appear to have been watered in the recent past.

On October 1, 2003, LRAPA issued Notice of Non-Compliance No. 2603 (NON 2603) to Delta Sand & Gravel for failing to take reasonable precautions to prevent particulate matter from becoming airborne.

**Penalty Imposed:** Failure to take reasonable precautions to prevent particulate matter from becoming airborne is a Class 2 Moderate violation. A civil penalty is imposed pursuant to ORS 183.090, ORS 468.135 and LRAPA Title 15 for violation of failing to take reasonable precautions to prevent particulate matter from becoming airborne. A civil penalty in the amount of *one thousand two hundred dollars ($1,200)* is imposed for violation of LRAPA rules. The penalty is based on a matrix formula which includes a number of factors including prior violations, economic benefit, potential environmental effects, magnitude of violation and other relevant factors.

This civil penalty is due and payable to "Lane County" in care of Lane Regional Air Pollution Authority, 1010 Main Street, Springfield, Oregon 97477.

**Notice of Opportunity for Hearing/Answer Required:** This Notice of Civil Penalty Assessment is issued pursuant to ORS 183.090(10), ORS 183.415, and LRAPA Titles 14 and 15. Within *twenty-one (21) days* from the date of *SERVICE/RECEIPT* of this notice, you must respond in one of the following ways:

1. You may pay the civil penalty. The facts set out in this notice will be presumed to be admitted. A record of the violation will be kept by the Authority.

2. You may seek a hearing on the violation and assessed penalty by filing an answer and request for hearing. The answer should admit or deny the facts alleged in the notice and allege any defenses you might have.

A hearing will be set before a hearings officer. You will receive notice of the time for the hearing. The hearing will be conducted under the procedures set out in Title 14 of LRAPA Rules and Regulations. A copy of these rules is attached. You may be represented by legal counsel. LRAPA will be represented by legal counsel.

3. You may admit the violation but seek a reduction of the penalty. Any additional pertinent information you wish to submit with the request will be considered. If you seek a reduction of the penalty in this way, you admit the violation and waive your right to a hearing on the violation and penalty.

   A Final Default Order will be issued which will state the penalty. You must pay this penalty within ten (10) days of the date of service/receipt of the default order. If the civil penalty is not paid within ten (10) days of the date of service/receipt of the Final Default Order, it constitutes a judgment and will be filed, as such, with the Lane County Clerk, as provided in ORS 468.135(4).

**Failure To Respond:** If you do not pay the penalty, or request a hearing, or file an answer within twenty-one (21) days of the date of service/receipt of this notice, a Final Default Order will be issued.

**Final Order:** If the civil penalty is not paid within ten (10) days of the date of service/receipt of the Final Default Order, it constitutes a judgment and will be filed, as such, with the Lane County Clerk, as provided in ORS 468.135(4).

**Date of Mailing:** November 3, 2003

Brian L. Jennison, Ph.D., Director
Lane Regional Air Pollution Authority

PAZC
ORD PA1238
Date 01-08-07
Exhibit No. 274

January 8, 2007

Hutchinson Cox Coons DuPriest, Orr & Sherlock P.C.

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*Experienced Advice in a Complex World*

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Patrick L. Stevens

VIA HAND DELIVERY

Lane County Board of Commissioners
and Eugene City Council
c/o Stephanie Schulz, Planner
Lane County Land Management Division
125 E. 8th Avenue
Eugene, OR 97401

Re: PA 05-6151/Delta Sand and Gravel Plan Amendment/Rezone
Our Clients: Joel & Therese Narva
Our File No. 6274/9064A

Dear Commissioners and Councilors:

This letter is submitted on behalf of our clients Joel and Theresa Narva. Our clients respectfully request denial of the Delta application for the reasons previously stated, plus the reasons set forth below, which largely reply to points made by the applicant at the joint hearing.

A. THE APPLICANT HAS FAILED TO DEMONSTRATE THAT THE QUALITY AND QUANTITY OF AGGREGATE RESOURCE COMPLIES WITH THE GOAL 5 RULE'S REQUIREMENTS

1. Mr. Reed Has Reviewed The Applicant's Recent Submittals Regarding Quality and Quantity Of The Aggregate Resource And Again Concludes The Applicant Has Not Met Its Burden Of Proof.

By separate cover, Mr. Reed is submitting a report, dated 1/8/07, in which he finds:

a. ODOT did not take the samples it tested, Delta did.
b. ODOT could not, and did not, claim the samples it tested were representative of aggregate deposits on-site.
c. The samples tested by ODOT were not representative.
d. DOGAMI did not find the aggregate resource to be significant.
e. There has been no demonstration that the aggregate in the existing pit, or the proposed expansion area, meet the Goal 5 rule's quantity and quality requirements.

f. Mixing, crushing, sieving, washing and sorting rock to make a sample is inconsistent with the requirement of testing representative samples.

g. The applicant has not demonstrated compliance with OAR 660-023-0180.

2. Mr. Reed's Professional Credentials Are Impressive

At the December hearing, Mr. Cornacchia made an issue of Mr. Reed's professional credentials and appeared to question whether it is proper for Mr. Reed to offer geological testimony in this proceeding. He claimed that Mr. Reed "isn't an expert under Oregon law." Similar questions were raised by the applicant in the Wildish Sand and Gravel case, heard by the County a few years ago. Such criticism is completely unwarranted.

Mr. Reed earned a Ph.D. in Geology from the University of California at Berkeley in 1977. He is a Professor in the Department of Geologic Sciences at the University of Oregon where he has been teaching since 1979. The U of O website lists his areas of concentration as including "mineral deposits" (see copy of the web page enclosed). Mr. (or Dr.) Reed's professional credentials are impressive.

In 2003, the Oregon Legislature adopted the following provision:

> "A person does not publicly practice or offer to publicly practice geology solely because the person testifies or prepares to testify in a public proceeding." ORS 672.525(9).

So, by law, Mr. Reed is expressly authorized and entitled to testify in this proceeding on matters of geology consistent with Oregon law concerning the registration of practicing geologists. He has better credentials than many of the applicant's experts.

The applicant's attorney mistakenly confuses licensure, with qualification and expertise. One can be a well-qualified expert without being licensed. For example, a number of eminent law professors at the University of Oregon School of Law are not members of the Oregon State Bar.

In short, Mr. Reed is extremely well qualified to render the geological opinions he has provided to the City and the County in this case. We urge the City and County to take his testimony seriously, despite the aspersions cast upon him by the applicant.

3. The So-Called "ODOT" Samples Were Collected By Delta's Crushing Supervisor Mark Slenker, Who Has An Understandable Interest In The Outcome Of This Proceeding. SO The "ODOT Samples" Are Really "Delta's Samples".

At the hearing, the applicant's representatives made repeated reference to the ODOT samples. The use of this term is potentially misleading. If one examines the material data sheet that ODOT received (along with the samples), it reveals that the person who collected the sample was "M. Slenker."

Mark Slenker (or Slinker) has submitted his own letter in support of this application. That letter reveals that he is an employee of Delta. In fact, he is a relatively high-level employee, being Delta's Crushing Supervisor.

This calls into question the results of ODOT's testing and evaluation as the sampling was performed by an employee of the applicant who has a significant financial incentive in a favorable outcome in this proceeding.

4. Delta's Technique Of Mixing Samples From Different Depths Makes It Impossible To Determine Whether Sufficient Aggregate Meets The State Quality And Quantity Thresholds.

The Goal 5 rule for aggregate requires that the applicant show that it has a sufficient quantity of **quality** aggregate in order to have the aggregate classified and treated as a Goal 5 aggregate resource. This is an initial threshold question. The burden to show compliance is on the applicant. Designating an aggregate deposit as a "Goal 5 resource" provides it various preferences and protections that other aggregate or rock deposits do not have. The City and County should exercise a high level of care not to designate aggregate as a "Goal 5 resource" unless it has been unequivocally established as meeting the quality and quantity standard.

Delta's methodology is to sample some high quality rock from higher deposits and then mix it with lower quality rock from lower deposits. In this fashion, Delta can add enough of the good rock so that the combined sample meets the required standards.

This makes it impossible to know the quantity of good quality rock, which is part of what Delta needs to prove. The City and County have insufficient data to find compliance with this threshold criterion.

Councilor Bettman's question to Mr. Christenson as to why would Delta pick a sampling and mixing method that is so easily subject to challenge

by the neighbors is right on point. One does wonder what proper sampling and lack of mixing materials from distinct soil horizons would reveal. While Mr. Christenson said they did use the "highest standard", that is demonstrably incorrect. The highest standard is to sample distinct types of material separately. That has not been done here.

The fact that it may now be profitable for Delta to mix different grades of rock, process them and then sell them for use in road projects, does not mean that the deposit in the proposed expansion area meet theGoal 5 rule's quality and quantity standards.

**B. ART NOXON'S ATTACHED REPORT DETAILS HOW THE NOISE STUDY PERFORMED FOR DELTA BY DSA CONTAINS NUMEROUS ASSUMPTIONS AND ERRORS THAT UNDERSTATE THE NOISE THAT THE EXPANSION WOULD PRODUCE. NOXON CONCLUDES DELTA HAS NOT MET ITS BURDEN OF PROOF TO DEMONSTRATE THAT ITS NOISE WOULD COMPLY WITH STATE STANDARDS.**

See materials attached.

**C. THE EXTENT OF TRAFFIC, NOISE, DUST AND OTHER OFF-SITE IMPACTS ARE NOT ADEQUATELY OR SUFFICIENTLY RESTRICTED BY THE TERMS OF DELTA'S CURRENT LRAPA PERMIT.**

Delta has argued that it would only be doing in the future what it is doing now, except in a different location, and the extent of its activities are governed by its air quality emissions permit. This approach has multiple flaws, among which are:

1. Conducting mining and hauling activities close to residences will have more severe impacts than operating them at a distance. Delta fails to give any credence to the buffering impact of the currently undeveloped area in mitigating its current impacts. According to Delta's DOGAMI operating permit application for the expansion area, the nearest structure not owned by the applicant is only 90' to the North of the proposed expansion. Exhibit 1 (j), page 4.

2. Delta understates the impacts its past and current operations have. Neighbors of the Delta quarry describe the level of impacts quite differently than does Delta.

3. Delta's LRAPA permit is designed for the limited purpose of addressing air emissions for the activities specified in the permit only. It is not designed to address issues other than air quality.

4. Even with respect to air quality, Delta's current LRAPA permit for the relocation of the haul road does not cover any activities within the expansion area itself. For example, the permit will need to be amended to add the new haul roads that would be built in the expansion area.

5. Since Delta would need to modify its LRAPA permit to authorize and accommodate its expanded and modified activities, that permit does not serve as any limit of future impacts at all. Delta is treating its LRAPA permit as being static, when in fact it is dynamic. Delta is representing that its LRAPA permit is a limitation on activities, when it is in fact only designed to limit impacts from the existing site.

6. Delta mistakenly argues that by having a valid LRAPA permit for its existing operation, Delta has shown that its relocated operation meets all applicable air quality standards. The evidence shows LRAPA does not have the resources to investigate all complaints made. This means that violations of air quality standards occur that the agency is not able to address due to its staffing and funding limitations. An apt analogy is speed limits. Just because there are speed limits on highways does not mean they are conscientiously observed. The mere existence of speed limits and a policing agency does not establish full compliance with the applicable standard.

7. There is no guarantee LRAPA will continue to function in its current form. There have been recent suggestions from local elected officials that LRAPA should be disbanded.

8. Alan Babb testified at the elected officials' hearing that economics dictates the number of trucks. Mr. Babb is correct. During times of economic expansion, the number of trucks and amount of traffic would increase. Since this expansion area, if approved, would be used by Delta for decades, it is not sufficient to think of traffic impacts in terms of this year or next year or the next five years. Delta's time horizon for evaluating traffic impacts is far too short.

**D. THE APPLICANT FAILS TO DEMONSTRATE THAT ITS PROPOSED EXPANSION WILL NOT CAUSE SEVERE ADVERSE HEALTH EFFECTS.**

Dr. Stephen Kimberley, M.D. submitted substantial and un-refuted evidence at the planning commission hearing on January 17, 2006 demonstrating the adverse health effects neighbors of the proposed expansion could due to the increase in air pollution. Specifically, Dr. Kimberley introduced evidence that short or long-term exposure to increased concentrations of particulate matter (like the increased levels of dust that would be released into the subdivisions surrounding the expansion area)

result in increased incidence of respiratory illnesses, heart disease, asthma symptoms and acute and chronic bronchitis.

Dr. Kimberley's testimony reflects that the heart and lung-related ailments caused by increased levels of particulate matter result in observed higher rates of hospitalizations, and emergency room visits and ultimately higher rates of death. Infants and children (who would be at risk of permanent lung damage), the elderly and persons with pre-existing heart or lung disease would be at greatest risk from Applicant's proposed expansion.

Based on her own research, the un-refuted testimony of professional Air Quality Consultant Ms. Camille Sears reflects that residential neighborhoods to the west of Delta's Existing Operations stand receive doses of "**inhalable particular matter** and fallout dust over 60% of the time during the drier months and about 50% of the time over the entire year." Item No. 47; Ex. 33(b), p. 2 (Emphasis added). This is a serious public health and safety issue.

1. Dr. Hendrickson Does Not Dispute Dr. Kimberley's Conclusions Regarding Adverse Health Effects.

Lane County Public Health Officer, Dr. Sarah Hendrickson, M.D., testifying on behalf of the applicant[1], did not dispute these findings in her testimony submitted on November 1, 2006:

> "Yes, too much inhaled dust **can make preexisting lung disease worse. Folks with asthma and other chronic lung diseases are more sensitive to dust and irritants. Too much inhaled dust even in a healthy person will cause lung problems.**" Ex. 224.

~~Unfortunately, Dr. Hendrickson's analysis of the risks posed by the quarry~~ essentially ends there. Dr. Hendrickson assumes that:

> "the proposed expansion that you are considering tonight **seeks only to maintain the current amount of production**. **The crushing facility that is the source of the rock dust** would remain where it has been for decades. From a medical point of view there does not appear to be any increased risk either to workers or to residents of surrounding neighborhoods as a result of such expansion." Ex. 224.

[1] It is unclear from Dr. Henderickson's testimony whether she was speaking as a individual or "[a]s Lane County's public health officer." If the latter, we question the propriety of a Lane County public official speaking on behalf of a private applicant for an application that is pending before Lane County.

As will be addressed in greater detail in the next section, Dr. Hendrickson's assumptions – i.e. that the proposed expansion will not result in an increase in levels of productions, that the crushing facility is the sole source of dust, and that the existing levels of dust are safe – have not been substantiated and are demonstrably wrong.

2. The Applicant Has Not Limited Production to Existing Levels.

First, there has been no commitment (by condition or otherwise) that the applicant will not increase production once it has the additional aggregate in the expansion area. To the contrary, Alan Babb, testifying on behalf of the applicant before the Planning Commission stated exactly the opposite. He indicated that economics would dictate the levels of production at the site. Hence, there was no basis for Dr. Hendrickson to assume that production would not increase, nor is there any substantial reason for the City or County to assume that the dust problem would not become worse as a result of expanded production.

3. The Crushing Facility is Not the Sole Source of Dust On the Site.

Second, the crushing facility is not the sole source of dust on the site. Indeed, as effectively demonstrated by the recent LRAPA permit to relocate the existing haul road on the existing site, there are significant levels of dust (measured in **tons per year**) that would be generated by hauling the gravel from the excavation site across the existing pit.[2] *See e.g.* Item No. 241; Ex. 218, Attachment A. Moreover, as will be addressed in greater detail below, complaints by neighboring property owners reflect that past excavation activities have contributed significant amounts of visible dust to the air, that appear to bear no relationship to crushing activities on the site. Moreover, Dr. Hendrickson does not account for the change in mining practices on the site, which will limit the natural groundwater entering the site and create more dust during excavation and be much closer to residences.

[2] The LRAPA report reflects that a significant amount of dust from the relocated haul road would be deposited on a largely agricultural area to the north of the property. Despite unrefuted testimony from OSU/Lane County Extension Horticulture Agent Ross Renhallegon in the record concerning the severe impacts of high rates of dust deposition on agricultural crops, the Applicant has failed to demonstrate that these high levels of dust will not have a significant effect on or significantly increase the costs of farming practices on these parcels. Accordingly, its application should be denied. See OAR 660-023-0180(5)(b)(E).

4. Dr. Hendrickson's Testimony Does Not Demonstrate that Dust Levels Generated By the Current Levels of Production Are Safe Or Comply With Applicable Law.

Finally, although Dr. Hendrickson complains that Dr. Kimberley speaks "only generally" about health effects[3], Dr. Hendrickson has made no particular investigation of the site, taken no particular measurements, and cannot specifically describe whether existing levels of dust produced on the site are safe. Item No. 247; Ex. 224. Nor does she demonstrate that the levels of dust produced at the site are complying with the Mine Safety Health Administration[4] or Lane County Regional Air Pollution standards. Hence, Dr. Hendrickson's testimony does not demonstrate that existing or proposed levels of dust are safe or conform to the state and federal air quality requirements.

Dr. Hendrickson may dislike the fact that Dr. Kimberley is a "paid medical expert," but the fact of the matter is that neither she, nor any of the applicant's witnesses refute the evidence of adverse health effects presented by Dr. Kimberley. This is not an academic issue.

5. Dust Released from the Site Would Have Substantial Adverse Health Effects.

Our client, Therese Narva, is particularly susceptible to the rock dust that would be generated by the proposed expansion. She was diagnosed with asthma approximately 10 years ago. She is presently only able to manage her illness with the use of a nebulizer twice daily and carries a rescue inhaler for emergency episodes. According to Dr. Hendrickson's analysis,

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[3] Dr. Hendrickson also complains that Dr. Kimberley is not "an expert in lung disease." Item No. 247; Ex. 224. Dr. Kimberley's resume reflects that he was the Medical Director from the international nonprofit group "Alliance for Lung Cancer." Item No. 47; Ex. 33(b).

[4] The applicant recently submitted a report from the SAIF Corporation's Industrial Hygiene Services regarding a site visit in June of 2000. Item No. 246; Ex. 223. However, this seven-year-old site visit does not demonstrate present compliance. It was also limited to activities at the "screening plant" and does not indicate whether there were mitigating factors (dust masks or venting, for instance) to limit the worker's exposure. Moreover, the Department of Labor's Mine Safety and Health Administration respirable exposure limit is an occupational standard that is not designed to implement the Clean Air Act protections guaranteed to the general public. *See e.g.* OAR 340-202-0060(DEQ limits on suspended particulate matter); 340-202-0110 (DEQ limits on particle fallout rate). Hence, this limited, and out-dated letter does not demonstrate that levels of dust generated at the site are safe for the general public.

she is among those "[f]olks who are more sensitive to dust and other irritants" and who would stand to have "lung problems" as a result of an increase in dust.

Mrs. Narva, however, stands to have a significant special risk due to the location of the Narva's home - due South of the proposed expansion area. As will be addressed in greater detail in the next section, professional Air Quality Consultant Ms. Camille Sears stated that the prevailing northerly winds during the dry summer months, when construction activity is at its high and "wet mining" would be difficult on the site, would blow significantly high doses of particulate matter south onto the Narva's property approximately 60% of the time. Item No. 47; Ex. 33(b), p. 2. This would jeopardize Mrs. Narva's health and seriously interfere with her quality of life by effectively confining her to her home during the pleasant summer months. Nor is it entirely clear that merely closing her doors and windows would be enough. Neighbors south of the Delta Sand and Gravel's operations complain of dust entering their homes at a distance as great as half a mile even with their doors and windows closed.

Moreover, Mrs. Narva is not alone. Indeed, a review of the maps of submitted by the applicant reflects that there are approximately 100 residences (and likely hundreds of people – including the aged, ill, and very young) due South and within 1500 feet of the proposed expansion. Item No. 1; Application Exhibit (f), Figure 3. Dr. Kimberley's testimony identifies how activities on the Applicant's site could quickly have serious negative health consequences for Mrs. Narva and others similarly situated in the surrounding residential development.

6. Applicant Fails to Quantify the Impacts of Its Dust or Address Health Effects.

Applicant does not refute the evidence of serious health effects. It has not demonstrated that particulate matter associated with the proposed development will not cause these adverse health effects, nor does the Applicant demonstrate that particulate matter that would be produced by the proposed extraction would not reach the surrounding residential neighborhoods at dangerous levels. Instead, Applicant attempts to discredit Dr. Kimberley and ignore the work on Ms. Sears in order to pretend that that air pollution is not an issue, and attempts to have the City and County ignore the health problems that its proposed expansion can been expected to create.

Since Applicant does not quantify or mitigate the serious adverse health effects and the risk of higher death rates associated with its proposed expansion, its application is deficient and should be denied.

## E. THE APPLICANT'S DUST IMPACTS ARE UNQUANTIFIED AND UNMITIGATED.

### 1. The Applicant Proposes To Operate A Half a Mile Closer To Residences Than It Presently Does, And Claims, Without Any Basis To Do So, That Its Dust Impacts Won't Be More Severe Later Than They Are Now.

Applicant proposes to operate, including stripping off dry layers of topsoil and excavating gravel, approximately ½ mile closer to neighboring houses, but claims that its dust impacts won't be worse. Bridgewater Response, p. 1 ("The quantity of dust emissions from the DSG site after the expansion will be about the same as existing levels.") It provides no evidence to support this bald assertion or explain why homes should not expect a higher dose of dust from operations only a few hundred feet from their door rather than operations ½ mile away.

However, regardless of how Applicant justifies this assumption to itself in the absence of any evidence, frankly it misses the point. Saying that operations will have no greater adverse impacts is meaningless, because Applicant has not bothered to quantify or establish the amounts of air pollution caused by its existing operations.

It does not matter if Applicant's operation will be no worse than it is now if its operations are already creating unacceptable levels of hazardous air pollution. Thus, to conclude that operations will be no worse, does not provide substantial evidence that it will create no conflicts, especially in light of the severity of the health impacts from particulates identified by Dr. Kimberley, and the risk to our client's life and health.

### 2. The Applicant Has Failed to Perform Air Dispersion Modeling

Nearly a year ago, on January 17, 2006, professional Air Quality Consultant Ms. Camille Sears observed that:

> "**Air dispersion modeling, similar to that performed in 2001 to verify compliance for Eugene Sand and Gravel's particulate air emissions,** must be prepared to provide the necessary information to decision makers on the nature and extent of DS&G's dust impacts. Currently, decision makers lack any information on the following key issues, each of which must be addressed in an appropriate air dispersion modeling analysis:

- The **particulate emission rates** from existing particulate matter sources at DS&G;
- A table showing all the **potential new emission sources** associated with the proposed expansion area, including excavators, front-end loaders, haul and dump truck routes, and increased emissions at the existing processing facility from the project expansion;
- The **emission rates of particulate matter [from] these additional air pollution sources at DS&G;**
- A presentation of how the expansion are emissions are released into the air including hours of operation;
- Verifying whether **offsite $PM_{10}$ and $PM_{2.5}$ air concentrations are mitigated to levels below applicable ambient air quality standards;**
- Verifying whether the **peak offsite dust deposition rate is below the LRAPA standard of 3.5 g/m$^2$ –month, for all offsite areas** (including agricultural areas)." Item No. 47; Ex. 33(b), p. 4(Emphasis added).

The Applicant still has not performed the necessary air dispersion modeling.

The Bridgewater Group, which Applicant retained for its "Air Quality Evaluation", make no attempt to refute Ms. Sears' research and, despite Ms. Sears comment that Applicant must perform dust dispersion modeling in order to give the City and County some reliable quantitative description of the impacts that would be created by the proposed expansion and some basis for mitigation, the applicant has still failed to provide a quantitative evaluation for all proposed impacts.

One wonders what Applicant is afraid to disclose to the City and County about the impacts of its existing and proposed operations on surrounding neighborhoods, homes and families.

Instead, Applicant provides the City and County a few pieces of evidence regarding aspects of its proposed and existing operations – a DVD, a "Haul Road Analysis" for its existing operation and part of the expansion area, and a conclusory and non-quantitative assessment from "Environmental Assessments, Inc." – and then claims that there is not a dust issue. Clearly, the applicant has failed to establish that this is the case.

*a. The DVD.*

With regard to the DVD, the Applicant produced a video of excavation on the existing site designed to show that dust was not created by the

excavation. Not surprisingly, this video did not include sound, as the Applicant has also failed to demonstrate that it will not have severe noise impacts on surrounding properties.

In any case, it bears repeating that **Applicant designed this demonstration**. It selected the time, place and manner in which the excavation would occur and be filmed. Moreover, if ever there was a time to ensure that all watering and other mitigation was attended to, it was certainly when the project was being taped for the hearing. Unfortunately, as reflected by the variety of complaints that LRAPA has received over the years from neighboring property owners, it is clear that Applicant is not always so careful in its work. In fact, in the past it has gone so far as to deliberately disobey directives from LRAPA. *See* Item No. 79; Ex. 65 ("**Applicant has two past violations where it disregarded specific directives from LRAPA.** See Notice of Violation 2753 (refusing to water roadway on January 13, 2005 after being instructed to do so by LRAPA on January 11) and Notice of Violation 1938 (failure to cover of water truck load of fine material despite warning based on similar violation the preceding week)

Moreover, **the video does not reflect the excavation as it would actually occur in the expansion area**. As reflected in the video, groundwater is currently migrating across the site and pouring into the excavation in "waterfalls" from the pit walls. However, with the proposed aquaclude in place, this flow would be interrupted and the excavated material in the expansion area would be off substantially drier materials, especially during the drier summer months when the neighbors to the south of the proposed expansion (including our clients) would be experiencing the greatest dust deposition.

Furthermore, some of the most significant dust impacts to surrounding neighbors would be those that are **invisible on the DVD**. Indeed, Dr. Kimberley's testimony reflects that some of the most harmful dust is the dust which is invisible to the naked eye, and which are inhaled by persons without interference from the body's natural defense mechanisms. Indeed, the U.S. EPA and Oregon Department of Environmental Quality impose special limits on Particulate Matter that is 10 micrometers in diameter ($PM_{10}$) and between 10 and 2.5 micrometers ($PM_{2.5}$) in size precisely because they can pass through the nose and throat and enter the lungs. The Applicants video does not demonstrate that these extremely hazardous small particles are absent.

*b. The Haul Road Analysis.*

The Haul Road Analysis that the Applicant provided at the last hearing provides some measure of quantifiable impacts from activities on the

existing site. Indeed, it is the first, and to our knowledge, the only measure of quantifiable impacts that the applicant has provided. However, it does not demonstrate that the Applicant's proposed expansion is safe or will meet standards.

Instead, the Haul Road Analysis is related to a road that will **only cross a part of the proposed expansion area.** A comparison of the mapped portion of the relocated haul road and the existing site reflects that the proposed relocated haul road terminates approximately **halfway across** the proposed expansion area. *Compare* Item No. 241; Ex. 218, p. 3 *with* Item No. 1(e), Figure 6. Applicant is not proposing to limit its mining activities to halfway across the proposed expansion area. Moreover, the evaluation of dust impacts was limited to the $PM_{10}$ concentrations and did not address the $PM_{2.5}$ limits. Hence, this "Haul Road Analysis" does not account for all of the dust impacts from the Applicant's proposed haul road, much less all of the dust impacts from the proposed expansion.

What the Haul Analysis does reflect is that substantial amounts of dust (approximately 5 tons per year and 5 pounds per hour for the $PM_{10}$) were released from the site by the haul road alone even when fully mitigated by watering truck operations, and that these dust amounts would radically increase if the applicant failed to water to approximately 39 tons per year and 37 pounds per hour. This study does not account for the additive effect of other operations for the site, but it does show what a profound impact Applicant's failure to conduct its operations in accordance with its permit would have. As will be addressed in greater detail below, the applicant has a history of failing to water or using deficient watering mechanisms is violation of LRAPA standards. *See* Item No. 79; Ex. 65, May 17, 2000 e-mail from John Morrissey to Brian Jennison/Grecia Castro regarding Notice of Noncompliance 1906 ("DS purportedly waters the facility yard...paved areas in the plant site were **completely dry**...DS purportedly waters public roadways...the public roadway was **completely dry**)(Emphasis added) *and* Notice of Violation 2603 (failure to water construction activities on Irvington Road for an entire day).

Moreover, these impacts would only become more severe as the haul road more closely approached the boundaries of the excavation area and the densely populated residential areas. It is little wonder, then, that the Applicant does not account for all of its dust impacts in this Analysis.

*c. Report by Environmental Assessments, Inc.*

The report by Environmental Assessments, Inc., submitted by the Applicant, also fails to demonstrate that the Applicant's proposed expansion

will conform to DEQ or LRAPA standards. In fact, includes no air dispersion modeling for the proposed expansion, and fails to address the quantitative standards imposed by the DEQ and LRAPA.

Instead, Mr. Ruth's testimony focuses on LRAPA and suggests that the City and County can substitute LRAPA's oversight for an analysis of the dust impacts from the proposed expansion area. This approach is problematic for a variety of reasons, not the least of which being that it is contrary to law.

OAR 660-023-0180(5)(b) and (c) provide, in part, that:

> "local governments shall determine existing or approved land uses within the impact area that will be adversely affected by proposed mining operations and shall specify the predicted conflicts"; and then
>
> "local government shall determine reasonable and practicable measures that would minimize the conflicts identified under subsection (b) of this section."

Here, Mr. Ruth is putting the cart before the horse. **He is emphasizing minimization without having even identified the extent of the conflict.** At this point, the un-refuted evidence in the record is that the proposed expansion will create significant amounts inhalable dust substantially closer to residential homes (which could cause significant adverse health impacts and higher death rates among neighbors), and that an air dispersion model is necessary to assess all of the impacts of the proposed expansion.

Since the Applicant consistently refuses to undertake this necessary step, it has not provided the necessary evidence to address OAR 660-023-0180(5)(b) and there is no substantial evidence to support approval of the proposed expansion.

Moreover, Mr. Ruth apparently misunderstands how to "minimize a conflict" under OAR 660-023-0180(5)(c). While it is correct that one may "minimize a conflict" under the rules by "ensur[ing] conformance to the applicable standard" including local, state, and federal standards (OAR 660-023-0180(1)(g), merely pointing to the existence of a permitting and enforcement agency does not "ensure conformance to the applicable standard."

By analogy, the fact that the State of Oregon maintains both a State Highway Patrol and a Department of Motor Vehicles, does not mean that one can assume that speed limits are obeyed on the freeway system, no matter how capable both agencies are. Thus, Mr. Ruth's testimony that "[a]ll

potential dust emissions from the site are addressed and regulated by the operating permit issued by the Lane Regional Air Pollution Authority (LRAPA)" is misdirected, and does not demonstrate minimization of the conflict.

This is especially true in light of two facts: (1) LRAPA is a complaint-based regulatory authority; and (2) Applicant has a history of violating LRAPA standards, on-site and off-site.

Mr. Ruth may well be correct that "[o]ne of the highest priorities of LRAPA is responding to citizen complaints," this does not substitute for regular monitoring of the site to ensure conformance with DEQ or LRAPA standards. Item No. 240; Ex. 217. First, it is readily apparent that LRAPA does not, and perhaps cannot, take action on all complaints or observations concerning fugitive dust or particulate matter. *See* Item No. 79; Ex. 65 (Notice of Violation 2603 ("LRAPA had **received several complaints concerning fugitive dust and the lack of taking precautions to prevent particulate matter from becoming airborne**.") Second, LRAPA follow-up on complaints may depend a great deal on timing (Morrissey e-mail: "[i]t appeared that there had been a water truck pass on the public roadway at some time after my earlier observations"), or who responded to the complaint (Violation 1908: "LRAPA had spoken with a Delta Sand and Gravel representative about a similar violation observation the previous week.") Furthermore, it is entirely likely that not all complaints (or potential violations) are made to LRAPA due to the fact that many would-be complainants may not know who to call, may not wish to lodge a formal complaint, or may not know the source of the dust. Thus, while LRAPA may be trying its best to address all complaints, it simply may not have the time or manpower to do so.[5] In any case, LRAPA's responding to some complaints in the area by no means guarantees consistent monitoring to ensure that all applicable standards for air pollution are met.

Furthermore, the Applicant has a history of violating LRAPA standards. Both Mr. Ruth and the Applicant's attorney have attempted to ignore or dismiss this history. Mr. Ruth, by stating that "[e]xamination of the complete LRAPA files for Delta Sand & Gravel did not show any complaints from residents to the southwest, west, or northwest of the existing operation." This is merely a repackaging of Applicant's attorneys' prior statement that:

> "Delta has a proven track record of compliance over the life of its LRAPA permits. No evidence has been placed into the record to refute

[5] This would be especially true if it were disbanded, as has been suggested by some members of the local government.

> that reality or to refute the assertion that Delta will continue to perform all of its requirements and obligations under the LRAPA discharge permit as it mines the expansion area." Item No. 68; Cover letter from Steve Cornacchia, p. 4.

Unfortunately, **Mr. Ruth's statement** is just as untrue. First, the statement, of course, **ignores residents to the south or southeast of the site** who have lodged complaints. Second, it ignores a petition filed by some twenty persons who own homes in the area between Skip Court and Formac Avenue **southwest of the existing operation**. We are enclosing letters from some of these same residents demonstrating that the levels of visible dust impacts persist to this day.

In fact, as reflected in the complaints attached to our March 17, 2006 submission to the planning commissions, Applicant has a track record of complaints by neighbors and violations with LRAPA. Item No. 79; Ex. 65. These include failure to conduct adequate watering activities.

For instance, in January 2005, **Applicant failed to water Division Avenue for several days despite repeated requests from LRAPA to do so.** Notice of Violation 2753 (noting that Applicant refused to water roads from January 11 to January 27, 2005). LRAPA requested this action because Applicant's trucks were tracking out particulate matter from its site to such an extent that "**the P[articulate] M[atter] becoming airborne was akin to that generated from vehicular traffic on unpaved roadways** ." *Id* at p. 2 (Emphasis added). See also Notice of Violation 2603 (Irvington Road not watered); Notice of Noncompliance 1908 (yard dry and public roadway dry). Indeed, instead of immediately correcting the problem, Applicant pointed to a truck tire wash as justification for its inaction was described as "akin to a residential sprinkler setup" and, due to its location, required trucks to travel through paved and unpaved portions of the yard after washing until the paved portions were indistinguishable from the unpaved. *Id* at 3. Applicant was fined $1,200 for this violation.

Applicant's attorney attempts to spin these violations by claiming that most of them have occurred off of the site, or that they have been "resolved" with LRAPA. However, neither of these statements is sufficient justification to believe that Applicant has minimized the dust conflict because it allegedly has a proven track record of compliance, which it does not have.

The Applicant cannot expect the City and County to believe that it is more trustworthy simply because most of its violations are offsite, and not onsite. Indeed, in all likelihood, the fact that most of the complaints come from offsite neighbors likely reflects the relative isolation of the existing site –

an isolation that will be lost when the applicant moves a half-mile closer to the surrounding residential neighborhoods.

Moreover, even if the Applicant has been able to negotiate modest fines in the past, the "resol[ution]" of these prior cases does not protect the public. This is especially true in light of the fact that the prior violations reflect deficiencies in the Applicant's system (a residential sprinkler used to water truck tires that increased track-out, and failure to water the yard of the operation), that undermine its claim that it would minimize its impacts by watering. Given the increase in dust that would be occasioned by similar failures in the future and the severity of the health impacts that can be expected, the applicant's track record is not one that should warrant approval of the application.

3. Dust From Excavation

One issue that none of the Applicant's materials accurately addresses is the impacts of dust from excavation. Indeed, Applicant would like the City and County to believe that no dust will be caused by its excavation activities, despite the fact that it will be stripping topsoil and excavating gravel only a few hundred feet from homes. In fact, according to the Applicant's DOGAMI permit application, the nearest structure that it does not own is only 90' away from the proposed excavation. Item No. 1(j).

It points to its present "wet mining" operations as being sufficient to keep down dust on the site, but at the same time points to the efficacy of its aquaclude at keeping groundwater out of the site. It is unclear how Applicant proposed to conduct "wet mining" while at the same time barring most of the water intrusion into the pit, especially during the dry summer months when there is little rainfall and hot and dry winds blowing across the exposed face of the pit walls and toward neighboring residences.

Moreover, as reflected by conversations with nearby property owners, past excavation activities on the southwest portion of the site impacted properties approximately ½ mile away from the pit. See attached Memorandum. However, once excavation activities ceased in this area, much of the dust issues decreased (but did not disappear). There is no evidence that the crusher (which the applicant has touted as the main source of dust) moved. Instead, the only change would appear to be the fact that the excavation on the southwest portion of the site ceased, and, as a result, neighbors a half-mile or greater to the south saw less of the large particles of dust drifting from the pit. This demonstrates that there is a substantial amount of visible dust (and likely many times that in the smaller invisible

particles) that is created by excavation alone, which the applicant has not accounted for, and for which there is no proposed mitigation.

Accordingly, this application fails to conform to applicable state law, and should be denied.

4. As A Result Of The Proposed Expansion, More Residences Would Become Located South and Downwind Of The Delta Expanded Operation. The Applicant's Dust Impacts Exceed Its Impact Boundaries.

Delta's experts said that in the dry summer months, the wind is primarily (though not exclusively) from the north. If you look at a map of the expansion area, you will see that there are existing houses that now lie west of Delta's pit, that in the future would also be south of the expanded pit.

The air quality impacts on the expansion on these homes would be significant. The record contains unrefuted testimony that residential neighbors locate ¼ to ½ mile south of Delta's quarrying have experienced serious exposure to dust. Since Delta says that, except for the aquaclude, it intends to keep doing in the future what it has done in the past, this does not bode well for local residents.

OAR 660-023-0180(5)(a) requires an "impact area" which encompasses all conflicts including "[c]onflicts due to noise, dust, or other discharges." Nevertheless, the applicant has limited its impact area to within 1,500 of the proposed expansion. The generic 1,500 impact boundary is only applicable to mining operations where there is no "factual information indicat[ing] significant potential conflicts beyond this distance."

Here, there is substantial factual information in the record reflecting that neighbors of the existing operation as far away as ½ mile from the pit receive substantial amounts of dust. *See* Letter from Edith Neilson, 1780 Copping Street ("There is **often so much dust that it comes into the house even when my doors and windows are closed.**"); Lillian Christiansen, 365 Skip Court ("In the summer's dry weather, **everything is covered with dust.**")

In any case, there is substantial and un-refuted evidence in the record that impacts from dust generated at the site extend well beyond the 1,500 impact boundary. Since the Applicant only addresses impacts within the 1,500 area, its application is insufficient and should be denied on this basis as well.

5. The Applicant Fails To Address Dust Impacts From The Aquaclude De-Watering Aggregate To Be Removed.

The applicant's proposed aquaclude is designed to significantly decrease the amount of water entering the area to be excavated. Currently, Delta is not using an aquaclude. So, in the future, with the aquaclude in place, one could reasonably expect dust from excavation to meaningfully increase. Delta has failed to address this factor and had failed to meet its burden of proof to prove conformance with State law.

Thank you, in advance, for your careful consideration of these comments.

Respectfully submitted,

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DMD/arc
Enclosures

cc: Steve Cornacchia
Clients