

RO2875



711 Grand Avenue, Suite 220
San Rafael, California 94901
415.460.6770 • Fax 415.460.6771
main@westenvironmental.com

November 25, 2008

Mr. Jerry Wickham, P.G.
Alameda County Health Care Services Agency
Environmental Health Services
1131 Harbor Bay Parkway, Suite 250
Alameda, California 94502

Subject: Offsite Investigation Status
Former Regal Station #120, LOP Case No. RO0002875
3875 Telegraph Avenue, Oakland, California

Dear Mr. Wickham:

West Environmental Services & Technology, Inc (WEST), on behalf of Wickland Corporation (Wickland), is writing to inform that we are unable to perform the offsite investigation activities requested by the Alameda County Health Care Services Agency – Environmental Health Services (ACEH), on the Bay Area Rapid Transit District's (BART) MacArthur Station parking lot for the 3785 Telegraph Avenue property in Oakland, California ("the Site"). The offsite investigation activities cannot be completed as BART is unreasonably withholding access. A summary of the access negotiations is presented below.

BACKGROUND

In August 2007, WEST proposed to conduct investigations at the Site and within BART's MacArthur Station parking lot to characterize the presence of petroleum hydrocarbons in soil and groundwater in accordance with the procedures outlined in the *Preliminary Site Assessment/Soil, Soil Gas and Groundwater Investigation Work Plan* and *Addendum ("Work Plan")*. The *Work Plan* was approved by the ACEH in December 2007. Between March and April 2008, WEST completed the onsite portion of the investigations as outlined in the *Work Plan*. The findings of the Site investigations were summarized in WEST's *May 2008 Preliminary Investigation and Evaluation Report*. In July 2008, the ACEH requested that the offsite investigation activities within the MacArthur Station parking lot be completed as proposed in the *Work Plan*.

BART ACCESS NEGOTIATIONS

In July 2008, WEST submitted an access permit application to BART, which outlined the offsite investigation activities to be conducted within the MacArthur Station parking lot. On October 16, 2008, BART forwarded to WEST a Permit to Enter, which outlined the conditions for access. As a condition of the Permit to Enter (Condition 15), BART required that WEST, as the Permittee, remediate or indemnify BART against all costs incurred by BART for remediation of "any Pre-Existing Environmental Condition that is discovered as a result of Permittee's activities pursuant to this Permit." On November 6, 2008, WEST submitted revisions to the Permit to Enter (attached), striking out Condition 15, as petroleum hydrocarbons had previously been detected on the BART property, i.e., under the Permit to Enter, Wickland and/or WEST would

Mr. Jerry Wickham, P.G.
November 25, 2008
Page 2

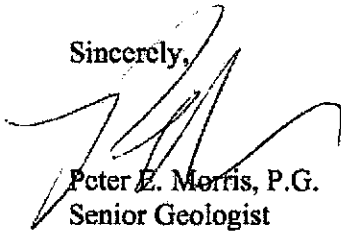


have to agree to remediate the existing conditions whether caused by our activities or not. On November 18, 2008, BART refused to accept WEST's revisions to the Permit to Enter.¹

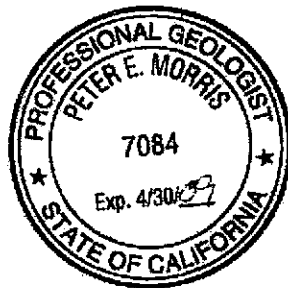
While access has been denied for the proposed investigations, it appears that the City of Oakland has accepted responsibility for addressing the presence of petroleum hydrocarbons in soil and groundwater on the BART property (attached).² Therefore, it does not appear that the collection of the offsite data is necessary to develop a Corrective Action Plan for the releases at 3875 Telegraph Avenue as offsite conditions will be addressed during redevelopment of the BART MacArthur Station.

Please call me at 415/460-6770, extension 206, if you have any questions or wish to discuss this further.

Sincerely,



Peter E. Morris, P.G.
Senior Geologist



Attachments

cc: Dan Hall, Wickland Corporation
Lori J. Gualco, Attorney-at-Law
Julie Rose, Randick O'Dea & Tooliotos, LLP
James Grihi, Grihi Associates

¹ Email communication, Gary Jensen of BART to WEST, November 18, 2008.

² Meeting minutes, December 7, 2006 meeting between representatives of the ACEH, BART and the City of Oakland Redevelopment Agency.



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
 300 Lakeside Drive, P.O. Box 12688
 Oakland, CA 94604-2888
 (510) 464-6000

2008

WEST ENVIRONMENTAL SERVICES & TECHNOLOGY PERMIT NO. C-02.2-009-OK
711 Grand Avenue, Suite 220
San Rafael, CA 94901

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 PRESIDENT

Thomas M. Blalock, P.E.
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 7TH DISTRICT

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 8TH DISTRICT

Tom Radulovich
 9TH DISTRICT

PERMIT TO ENTER (WORK)

Subject to the following covenants, terms, conditions and restrictions, the San Francisco Bay Area Rapid Transit District (hereinafter "District" or "BART") hereby grants permission to West Environmental Services & Technology (hereinafter "Permittee") (collectively, the "Parties") to perform two (2) soil borings to collect soil and groundwater samples, (hereinafter the "Work") upon BART property located in the parking lot of the MacArthur BART Station and in the City of Oakland, County of Alameda, (hereinafter "Premises"), as shown on Exhibit "A." (Aerial Photo titled: Site Plan and Sampling Location, 3875 Telegraph Avenue, Oakland, California, Figure 2-1, dated August 2008) attached hereto and incorporated herein by this reference.

1. Subject to Section 17 below, the term of this Permit shall commence on October 22, 2008, and end on December 31, 2008, provided, however, that at any time during the term, the Permit may be terminated by either party upon thirty (30) days prior written notice to the other party. Said notice shall be sent certified mail, return receipt requested, to:

West Environmental Services & Technology
 711 Grand Avenue, Suite 220
 San Rafael, CA 94901
 Attn: Peter Morris

or

Real Estate Department
 San Francisco Bay Area Rapid Transit District
 300 Lakeside Drive, 22nd Floor
 Oakland, California 94612

Attention: Laura Giraud, Manager

The notice period shall begin to run upon receipt of said notice.



2. The fee for this Permit shall be calculated pursuant to the attached Fee Schedule in effect when staff time is expended, pursuant to the policy adopted by the BART Board of Directors in Resolution No. 4805. An application fee pursuant to such Fee Schedule shall be paid prior to issuance of this Permit. Fees to reimburse BART for plan review and inspection will be billed to Permittee upon completion of the Work and shall be paid to BART within thirty (30) days of the invoice date. A 10% late fee will be assessed on the balance if payment is not received within said 30 days of the invoice date. The late fee will be increased to 20% on the original balance if payment is not received within 60 days of the invoice date. BART reserves all rights to pursue all appropriate remedies to collect outstanding payments and penalties that have not been paid by Permittee within 90 days of the invoice date.

3. Permittee's right to use this area shall be non-exclusive and non-transferable, and shall be for the sole purpose of performing the Work. In no event shall BART's property be deemed to be a public right-of-way. Overnight parking is prohibited on BART's property.

4. Conditions of Use:

4.a Permittee shall have Underground Service Alert and an independent utility locator service mark out the boring locations prior to digging.

4.b Permittee shall barricade a portion of the parking lot after 8:00 p.m. the ~~Friday~~ night before the scheduled soil boring work. *

4.c Permittee shall take care not to damage BART's underground utilities. Underground utilities such as electrical circuits in conduits of parking lot lighting, irrigation pipes, drain line and telephone lines shall be repaired immediately by the contractor before the end of the day. Repair shall be inspected, tested and approved by the resident engineer on site before backfilling.

4.d Attached for reference are Sheet Nos. CT-105 and EE115 from Contract No. IR0011. The as-built drawings showing the conduit routes and schematic only. The as-builts provided here are for reference only and do not represent all utilities in the area. The accuracy of the as-builts is not guaranteed.

4.e Permittee shall take extreme care when drilling the bores due to adjacent conduits carrying lighting circuits.

4.f Permittee shall submit for BART approval a health and safety plan for this work. The health and safety plan shall describe Permittee's site control and air monitoring. Permittee shall provide perimeter air monitoring results to show that they are not exposing patrons that use this lot. (Readings from a portable meter noted in a log would be sufficient.) A copy of the report will need to be sent to:

Gary C. Jensen, REA; Principal Engineer; Environmental, Health, and Safety Division
300 Lakeside Drive, 18 Floor, Oakland, CA 94612; (510) 464-7552 (fax)

4.g Permittee shall patch the bore holes with concrete when the work is complete.

4.h Any change in the scope of this permit is subject to a separate amendment.

5. The cost of repair and any and all losses caused by Permittee's damage to any BART property or facility, or resultant loss of service, shall be at the sole expense of Permittee. Any damage to BART property or facilities shall be repaired or remedied by Permittee or BART, at BART's discretion, and at Permittee's sole cost and expense. Permittee agrees to reimburse BART promptly for any such damage.

6. Permittee shall have the duty and hereby agrees to exercise reasonable care to properly maintain BART's property pursuant to this Permit, including but not limited to, removing debris dumped or placed on the Premises during the term of this Permit, from any source, and to exercise reasonable care inspecting for and preventing any damage to any portion of BART's property.

7. Permittee acknowledges that said Work constitutes an encroachment upon BART's property and agrees to perform said Work in accordance with and subject to the

provisions of this Permit, applicable provisions of the "General Terms and Conditions Relating to Utility Permits," attached hereto as Exhibit "B" and incorporated herein by reference, and all applicable state and local laws. Where there is a conflict between the provisions of this Permit and the "General Terms and Conditions Relating to Utility Permits," this Permit shall prevail.

8. Permittee agrees to notify BART's Construction Liaison, Edwin Kung/John Fu at (510) 464-6445, at least ~~15~~² calendar days prior to any use of the Premises. Should Permittee require any utility hook-ups, Permittee must obtain any and all necessary permits and pay all fees in connection therewith. Permittee shall not perform any work on BART property until all necessary permits, licenses and environmental clearances have been obtained.

9. Permittee shall not (a) use, generate, or store, or allow its employees, contractors or agents to use, generate, or store any Hazardous Materials on the Premises, except for those materials required to perform the Work permitted under this Permit and in compliance with all federal, state and local laws and regulations for the protection of the environment, human health and safety, as now in effect or hereafter amended (hereinafter "Environmental Laws"); or (b) release or dispose of, or allow its employees, contractors or agents to release or dispose of, any Hazardous Materials on the Premises. "Hazardous Materials" are those materials now or hereafter (a) defined as hazardous substances or hazardous wastes pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. section 9601 et seq.) or the Resource Conservation and Recovery Act (42 U.S.C section 6901 et seq.); (b) listed in the Hazardous Substances List, Title 8, California Code of Regulations, G.I.S.O. Section 337-339, or those which meet the toxicity, reactivity, corrosivity or flammability criteria of the above Code; (c) characterized, regulated or subject to permitting or warning requirements as hazardous or toxic materials, substances, chemicals, pollutants, contaminants or wastes, or as materials for which removal, remediation or disposal is required, under any Environmental Laws; or (d) otherwise posing a present or potential hazard to human health, welfare or the environment.

10. BART shall at all times have the right to go upon and inspect the Premises and the operations conducted thereon to assure compliance with any of the requirements in this Permit. This inspection may include, but is not limited to, taking samples of substances and materials present for testing.

11. Permittee shall be responsible for and bear the entire cost of removal and disposal, in compliance with Environmental Laws, for all Hazardous Materials and non-hazardous wastes introduced to the Premises during Permittee's use and possession of the Premises. Permittee shall also be responsible for any remediation on or off the Premises necessitated by such Hazardous Materials or non-hazardous wastes. As used herein, "remediation" includes any investigation or post-cleanup monitoring that may be necessary in compliance with Environmental Laws. ~~For purposes of disposal, Permittee shall be the generator of any such Hazardous Materials and shall provide a generator identification number on manifests for such disposal as required by Environmental Laws.~~ X

12. To the extent that any New Environmental Condition is caused by, or any Pre-existing Environmental Condition is contributed to or exacerbated by, Permittee's acts or omissions (including those of its employees, contractors and agents) during its use and possession of the Premises, Permittee shall, at BART's discretion, either (a) perform remediation of such New Environmental Condition or Pre-Existing Environmental Condition, at Permittee's cost and expense, in compliance with Environmental Laws and subject to the approval of a governmental agency with jurisdiction; or (b) indemnify BART against all costs incurred by BART in performing remediation of such New Environmental Condition or Pre-Existing Environmental Condition. A "New Environmental Condition" is defined as the release or threatened release of Hazardous Materials on, about, under or emanating from the Premises as of the commencement date of this Permit. A "Pre-Existing Environmental Condition" is defined as the release or threatened release of Hazardous Materials on, about, under or emanating from the Premises prior to the commencement date of this Permit.

13. Permittee agrees to assume responsibility and liability for, and defend, indemnify and hold harmless BART, its directors, officers, agents and employees from all claims, demands suits, losses, damages, injury, and liability, direct or indirect (including any

and all costs, fees and expenses in connection therewith) arising from the introduction on the Premises of any Hazardous Materials or non-hazardous wastes by Permittee (including its employees, contractors and agents) or from any New Environmental Condition caused by, or any Pre-existing Environmental Condition contributed to or exacerbated by, the acts or omissions of Permittee (including those of its employees, contractors and agents) during its use and possession of the Premises.

14. Permittee agrees to assume responsibility and liability for, and defend, indemnify and hold harmless BART, its directors, officers, agents and employees from all claims, demands, suits, losses, damages, injury, and liability, direct or indirect (including any and all costs, fees and expenses in connection therewith), caused by acts or omissions of Permittee, its employees, contractors and agents in connection with the Work done pursuant to this Permit, except to the extent such losses are caused by the gross negligence or willful misconduct of BART. Permittee agrees at its own cost, expense and risk to defend any and all actions, suits, or other legal proceedings brought or instituted against BART, its directors, officers, agents and employees arising from the acts or omissions of Permittee, its employees, contractors and agents in connection with the Work done pursuant to this Permit, and to pay and satisfy any resulting judgments, settlements or other expenses associated therewith.

15. ~~To the extent that a governmental agency with jurisdiction requires remediation of any Pre-Existing Environmental Condition that is discovered as a result of Permittee's activities pursuant to this Permit, and is not contributed to or exacerbated by the acts or omissions of Permittee, its employees, contractors or agents, Permittee shall, at BART's discretion, either (a) perform remediation of such Pre-Existing Environmental Condition, at Permittee's cost and expense, in compliance with Environmental Laws and subject to the approval of a governmental agency with jurisdiction, or (b) indemnify BART against all costs incurred by BART in performing remediation of such Pre-Existing Environmental Condition.~~



16. Permittee agrees that no easement, lease or other property right is acquired by Permittee through this Permit.

17. Upon any use of BART property by Permittee other than that authorized by this Permit, or upon failure of the Permittee to conform to any of the terms and conditions of this Permit, BART may terminate this Permit immediately.

18. Insurance shall be provided by Permittee as stated in Exhibit "C." attached hereto and incorporated herein by reference.

SAN FRANCISCO BAY AREA
RAPID TRANSIT DISTRICT

By _____
Laura Giraud
Manager, Real Estate Department

Date _____

ACCEPTED
WEST ENVIRONMENTAL SERVICES & TECHNOLOGY

By _____

Date _____

Title _____

C 02 1000 0A pt-11 x

Subject: Re: Wickland.Oakland Access Permit edits and Insurance Certificates - Permit No. C-02.2-009-OK
From: GAnders@bart.gov
Date: Tue, 18 Nov 2008 12:24:47 -0800
To: Peter Morris <peterm@westenvironmental.com>
CC: LFrelig@bart.gov, LGiraud@bart.gov, Elow@bart.gov

Peter,

BART's Legal Department has reviewed the below edits and will only allow taking out "friday" in 4.b. The language proposed to be deleted provides protections to the District. If you have any questions please give me a call.

Gary Anderson
San Francisco Bay Area Rapid Transit District
Real Estate Department
300 Lakeside Drive, 22nd Floor
Oakland, CA 94612
E-mail: ganders@bart.gov
Phone: (510) 464-6676 Fax: (510) 464-7583

Peter Morris <peterm@westenvironmental.com>

To GAnders@bart.gov

cc

11/06/2008 01:19 PM

Subject Wickland.Oakland Access Permit edits and Insurance Certificates - Permit No. C-02.2-009-OK

Gary:

Please find attached WEST's markup of the access permit and a copy of the insurance certificates from Gregg Drilling.

I will forward to you our next drilling date once it becomes available.

Please call me at 415/460-6770, extension 206, if you have any questions.

Peter Morris

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Peter E. Morris, P.G.
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Wickland.Oakland BART Permit No. C-02.2-009-OK (redlined).pdf

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Content-Encoding: base64

BART MacArthur Station Meeting

Thursday, December 07, 2006, 2PM
Alameda County Environmental Health
1131 Harbor Bay Parkway, Room 201
Alameda, CA

AGENDA

- I. Introductions
- II. BART Presentation - *No opinion by BART*
- III. City of Oakland Additions/Comments
- IV. Discussion

3901 Telegraph is within MacArthur Transit site.

Com Font letter

December 7, 2006 Meeting

NAME

AGEW. ~~Att~~

S-mail

Amin Levi, DELT

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BART MacArthur Station Meeting