

TRANSMIT REPORT

1993.08-06 14:11
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DIST. ATTORNEYS OFFICE

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**ALAMEDA COUNTY
DISTRICT ATTORNEY'S
OFFICE**

**CONSUMER & ENVIRONMENTAL
PROTECTION DIVISION**

FACSIMILE TRANSMITTAL

TO: 569-4757
Fax Phone Number

DATE: 8/6/93

NAME: ~~Tom Perreock~~ SCOTT SKENY & Tom Perreock

AGENCY: HAZMAT LOP

FROM: (510) 569-0505
Fax Phone Number

SENDER: GIL JENSEN

SPECIAL INSTRUCTIONS/COMMENTS: Tom: THE RACE



Alameda County
District Attorney's Office
John J. Meehan, District Attorney

August 6, 1993

Hans W. Herb
Attorney at Law
50 Santa Rosa Avenue, Fifth Floor
Santa Rosa, CA 95404

Re: *In Re the Property Know As 16035 East 14th Street, Oakland CA
Mary Petsas, Beatrice S. Gallegos and Gregory J Garcia Potentially
Responsible Parties*

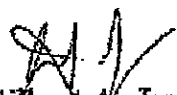
Dear Mr. Herb:

This office represents the San Francisco Bay Regional Water Quality Control Board, and the Alameda County Health Care Services Agency, Department of Environmental Health Hazardous Materials Program in the above matter. We are in receipt of the enclosed letter dated August 4, 1993 to representatives of the Agency apparently protesting a scheduled fact-finding pre enforcement meeting to be attended by the above agencies and our office.

While it is rare for persons potentially subject to prosecution for administrative, civil or criminal violations to not be interested in meeting with our office and the interested agencies before the necessity for legal action, we honor your clients apparent decision. Nevertheless, since the other potentially responsible party Ms Petsas wishes to attend, the scheduled Review Panel will meet as previously scheduled. Should your clients change their mind, they are of course welcome to attend.

Very truly yours,

JOHN J. MEEHAN
District Attorney

By: 
Gilbert A. Jensen
Senior Deputy District Attorney

JJM:GAJ:gj

cc: Attached List

Hans W. Herb
August 6, 1993
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David Kears, Agency Director

Rafat Shahid, Assistant Agency Director

Edgar Howell

William Attwater, Esq.

Mary Petsas
c/o Mark Johnson Esq.

California Environmental Insider

California Environmental Law Reporter

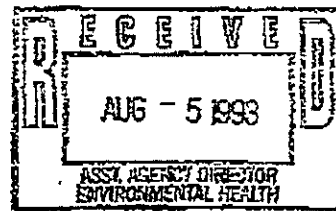
BNA Toxic Law Reporter

The Daily Journal

The Recorder

LAW OFFICES OF HANS W. HERB

50 Santa Rosa Avenue, Fifth Floor
Santa Rosa, California 95404



Arizona
California
Washington

August 4

Handwritten initials: CD, P, M, R

(707) 576-0757
Telecopier:

VIA OVERNIGHT MAIL

Mr. David J. Kears, Agency Director
Mr. Rafat A. Shahid, Assistant Agency Director
Mr. Edgar Howell
ALAMEDA COUNTY HEALTH SERVICES AND
HAZARDOUS MATERIALS PROGRAM
80 Swan Way Room 200
Oakland, CA 94621

RE: L.O.P. Site: 16055 East 14th Street,
San Leandro, CA
Our Clients: Beatrice S. Gallegos/
Gregory Garcia
Our File No: 01-126-01

Dear Messrs. Kears, Shahid & Howell:

In our mail today we received a curious document purporting to be from your offices (see attached). The hand-addressed certified mail letter contained a single piece of paper captioned "Notice of Pre-Enforcement Review Panel."

According to the document, a "star chamber" of regulatory officials will meet in Oakland on August 31, 1993, at 10:45 a.m. to discuss how to avoid the legal constraints which prohibit our clients' participation in the cleanup of the above-referenced site. The letter contains no reference to any legal authority for such a procedure. The reason for this is that the procedure is clearly illegal, unconstitutional, and violative of our clients' due process rights.

I implore the County to seek the advice of competent legal counsel regarding the County's concerns. I know the County is upset and frustrated and is looking to "lash out" wherever it can. Unfortunately, however, there are legal constraints which must be respected by the County. To learn more about the legal constraints prohibiting such activity, you should ask your attorney to review the California Health and Safety Code, beginning at §25280, and §12300 et seq. of the California Water Code. The procedure to address your concerns can be found at Title 23, Chapter 6, §2050 et seq. More importantly, the attorney you select would do well to review your local oversight contract with the State Water Resources Control Board which requires that all disputes be resolved following the procedures established by the State Water Resources Control Board. The State Water Board has a procedure whereby petitions may be reviewed by the five member State Water Resources Control Board. The State Water

Mr. David Keats, Agency Director
Mr. Rafat A. Shahid, Assistant Agency Director
Mr. Edgar Howell
ALAMEDA COUNTY HEALTH SERVICES AGENCY
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Resources Control Board has a legal department which can assist you with understanding the procedures. Their decisions form the basis for establishing future cases.

In this case, we have already explained to the State Water Resources Control Board that fundamental notions of due process and constitutional law are implicated. With all due respect to you and your staff, the issues involved in our petition to the State Board are legal issues which require the attention of experienced lawyers familiar with California law. Once the State Board has issued its decision on our petition, you will be advised by them of the result. In the meantime, although I appreciate your frustration, there is simply no legal way to proceed as suggested by the mystery document (if it in fact really did come from your office).

The purpose of this letter is to advise you that under California Code of Civil Procedure §1021.5, we have the right and duty to bring a legal action to enjoin and prohibit the Alameda County Health Care Services Agency, Department of Environmental Health, Hazardous Material Division from proceeding with this action. If it is necessary for us to proceed with legal action we will be entitled to recover all of the legal fees. The Alameda County Health Care Services Agency will be responsible for payment of those fees.

You should also note that it is not our desire "to heat up" misguided agencies. Instead, we seek to encourage governmental agencies to voluntarily comply with their legal obligations. It is only if an agency will not voluntarily cease and desist in illegal and unconstitutional conduct that we will pursue legal action. Should we find it necessary to proceed with legal action in this case we will argue that your agency was well aware of the illegality of the practice and was given ample opportunity to voluntarily cease and desist the practice.

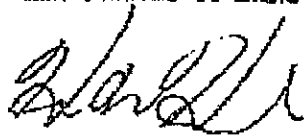
In our experience courts award substantially higher attorney's fees in cases where the offending governmental agency was informed that a practice was illegal, was encouraged to obtain legal counsel, and continued despite the clear lack of authority. For that reason, we again encourage and implore you to consider consultation with an attorney at least marginally familiar with the issues raised by this matter.

Finally, should you decide to proceed with this matter, please advise me of all the applicable procedures, rules, authority, and regulation for such a procedure. Please also provide me with written confirmation of the independent neutral third-party's qualifications, experience and expertise in this field. We also demand a full, complete, and accurate written transcript of any proceedings along with copies of all evidence, charges, and other relevant documents.

Mr. David Kears, Agency Director
Mr. Rafat A. Shahid, Assistant Agency Director
Mr. Edgar Howell
ALAMEDA COUNTY HEALTH SERVICES AGENCY
HAZARDOUS MATERIALS PROGRAM
August 4, 1993
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If you have any comments or questions, please feel free to contact me at 800-767-9562.

Very truly yours,
LAW OFFICES OF HANS W. HERB



Hans W. Herb

HWH/bm

cc: Attached List

Mr. David Kears, Agency Director
Mr. Rafat A. Shahid, Assistant Agency Director
Mr. Edgar Howell
ALAMEDA COUNTY HEALTH SERVICES AGENCY
HAZARDOUS MATERIALS PROGRAM
August 4, 1993
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STATE WATER RESOURCE CONTROL BOARD
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CALIFORNIA ENVIRONMENTAL INSIDER
P.O. Box 884973
San Francisco, CA 94188-4973

CALIFORNIA ENVIRONMENTAL LAW REPORTER
136 Carlin Road
Conklin, NY 13748-1531

EPA TOXIC LAW REPORTER
1231 25th Street, N.W.
Washington, D.C. 20637

THE DAILY JOURNAL
1390 Market St., Suite 1210
San Francisco, CA 94102

THE RECORDER
625 Polk St., Suite 500
San Francisco, CA 94123