

Exhibit 5

NATURAL HERITAGE INSTITUTE

100 PINE STREET, SUITE 1550
SAN FRANCISCO, CA 94104
(415) 693-3000 EXT. 122
(888) 589-1974 (FAX)
GANTENBEIN@N-H-I.ORG

OTHER OFFICES
SACRAMENTO, CA
NEVADA CITY, CA
ANCHORAGE, AK

March 4, 2005

VIA ELECTRONIC AND FIRST CLASS MAIL

Raul Godinez II, P.E., Director
Public Works Agency
City of Oakland
Dalziel Building
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, CA 94612
rgodinez@oaklandnet.com

Claudia Cappio, Development Director
Community and Economic Development Agency
City of Oakland
Dalziel Building
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, CA 94612
ccappio@oaklandnet.com

Re: Response to City of Oakland's letter dated January 13, 2005

Dear Directors Godinez and Cappio:

The Millsmont Homeowners Association (MHA) writes in response to your letter dated January 13, 2005 (January 13 letter), regarding the Leona Quarry Subdivision. This letter supplements MHA's preliminary response dated February 1, 2005.

As we stated in our preliminary response, the January 13 letter does not adequately address issues we have raised previously. We discuss the outstanding issues below, and also recent developments regarding the Alameda whipsnake. We would like to resolve these issues in a mutually agreeable manner. We believe such resolution requires in-person meetings. Thus, we reaffirm our outstanding request for a meeting with the City, DeSilva, agencies with permitting authority, and other interested stakeholders. We request a meeting within 30 days in order to resolve these issues in advance of spring construction. In the alternative, if the City will not meet with us, we request that the City state its refusal in writing.

Director Godinez
Director Cappio
March 4, 2005
Page 2

MHA is not interested in stopping the Leona Quarry Project. Our interests lie in preventing further degradation to and restoring the form and function of Chimes Creek. This degradation is the result of the City's permitting decisions to permanently route flows to Chimes Creek in excess of its natural capacity. The streambed in the vicinity of the 3000 block of Delmont Avenue has dropped ten feet or more in the past decade. Fences crossing the channel are now stranded ten feet or more above the streambed and serve as monuments to the former depth of the streambed. The rate of degradation greatly accelerated after the Ridgemont development was constructed in the 1980s. The Leona Quarry Project will contribute to this degradation. MHA members are losing an essential feature of their property as a result of upstream development. It is fundamentally inequitable to place the indirect costs of upstream development on downstream property owners.

MHA is also interested in protecting the water quality of Chimes Creek. Every year for the past 15 years, as a result of the City's failure to implement a proactive program of maintenance and repair, the sewer system in the vicinity of the 3000 block of Delmont Avenue routinely breaks during the rainy season and discharges stormwater and raw sewage into the creek. There are two reasons for the breaks: (1) the capacity of the lines is exceeded; and (2) the lines are exposed and poorly supported in several locations. Such discharges impair MHA's use and enjoyment of the creek and pose a public health risk. The Leona Quarry Project will contribute to this problem.

In sum, MHA wants a commitment by the City that it will address the direct, indirect, and cumulative impacts of this development on the form, function, and water quality of Chimes Creek.

I. Compliance with Water Quality Standards

The City has not addressed DeSilva's continuing failure to comply with applicable water quality standards. The Conditions of Approval and the Statewide General Permit for Discharges of Stormwater Associated with Construction Activity (State Water Resources Control Board Order 99-08-DWQ) (General Permit) require compliance with water quality standards.

The San Francisco Bay Regional Basin Plan (Basin Plan) prohibits the discharge of sediment-laden waters where turbidity is more than 10% above background turbidity when turbidity is above 50 NTU, and above 50 NTU when background turbidity is below 50 NTU. *See* Regional Board, Basin Plan, Ch. 3: Water Quality Objectives (1995). According to the Regional Water Quality Control Board (Regional Board), it appears that construction activities have resulted in violations of the turbidity standard: "the results appear to suggest that there were discharges from the lower detention pond ... and turbidity exceedances, on December 7, 8, 27, 30, 31, and January 3," and "there remain discharges of turbid water from the site." Email from Keith Lichten, RWQCB, to Julie Gantenbein, NHI (Jan. 24, 2005) (Attachment 1). Further, the

Director Godinez
Director Cappio
March 4, 2005
Page 3

Regional Board expressed concern that the January 24, 2005, monitoring report from the DeSilva did not include a discussion of measures taken to further reduce turbid discharges. *See id.* Indeed, according to reports submitted by Engeo Incorporated, DeSilva's stormwater management consultants, turbid discharges appear to have occurred throughout January and February. *See, e.g.*, Engeo Incorporated, Notice of Discharge for January 12, 2005 (Jan. 26, 2005) (“[T]he filtration system discharge turbidity (NTU) readings increased to approximately 217 NTU before the readings were noted during routine monitoring.”); Email from Mark Brest van Kempen to Faustino Jun Osalbo (Feb. 24, 2005) (Attachment 2) (“As you saw from the sample I had this morning, a discharge from the quarry gave Chimes Creek a turbidity reading of 568 NTU at 8:00 this morning.”).

On February 21, 2005, it appears that a significant violation of the General Permit and Conditions of Approval occurred. Mark Brest van Kempen, who lives on the 3000 block of Delmont Avenue, observed flows which were higher than anything he had witnessed in almost five years of living in the Millsmont neighborhood. *See* email from Mark Brest Van Kempen to Jun Osalbo, City, (Feb. 22, 2005) (Attachment 3). He took photographs which show the creek running at the same level as his backyard, whereas typically there is a more than a ten foot drop from his backyard to the creek. *See* Mark Brest Van Kempen, Photographs of Chimes Creek at 3835 Delmont Ave. (Feb. 21, 2005) (Attachment 4). Despite the high flows in the creek, Mr. Brest Van Kempen noted that the detention pond on the Project site did not fill up as would be expected. We understand that the City allowed DeSilva to direct runoff from the Ridgemont development, as well as the sub-drains for the western half of the site, directly into the City storm drains without passing it through the detention pond or baker tanks. Given that the detention pond is the primary means for ensuring clean discharge from the site, we are disappointed that the City allowed DeSilva to bypass the detention pond. We understand that this extreme measure was deemed necessary by the City because the detention pond and baker tanks were overwhelmed by the runoff from the site.

The flows in Chimes Creek on February 21, 2005, appeared to exceed pre-Project flows even though the storm itself did not appear to be larger than the 25-year, 24-hour design storm event. We understand that all measures of the stormwater system have not been installed yet. We note, however, that (1) the Conditions of Approval and General Permit require DeSilva to comply with water quality standards *during* construction; (2) the baker tanks which were in place on February 21, 2005, are additional measures which are not included in the post-Project stormwater management system; and (3) while slopes have not been revegetated (which would decrease runoff), impervious surfaces (which would increase runoff) have not yet been increased. Thus, the fact that the detention basin, which is the primary feature of the stormwater system, and baker tanks were inadequate to retain and treat runoff during this storm event appears to conflict with the Draft Subsequent EIR findings, which state:

Director Godinez
Director Cappio
March 4, 2005
Page 4

“[T]he proposed stormwater system would reduce Project impacts to pre-project levels, and would maintain pre-project levels even with the inclusion of redirected flows from the Ridgmont subdivision. Post-Project 24-hour, 25-year peak flows would be equal to or less than existing peak flows from a 25-year storm. The stormwater management system would operate during a 100-year, 24-hour storm without structural failure. *In fact the stormwater system studied in this SEIR would maintain peak flows from the 100-year storm at pre-project levels.*”

Subsequent Draft EIR, p. IV-20.

Plainly the City must be diligent in monitoring and enforcing compliance with water quality standards and permit terms at the Project site. We agree with the City that DeSilva should be recognized for its work in recent months to improve compliance with water quality standards by implementing additional measures under the revised Storm Water Pollution Prevention Plan (SWPPP). However, the City has an *ongoing* obligation to monitor and enforce compliance. Given this ongoing duty, we were concerned when the City cited a two-month old letter from the Regional Board, *sent at the beginning of the rainy season*, to support the claim that onsite conditions were satisfactory. *See City’s Response*, p. 3 (“The subdivider *recently* received a letter from the RWQCB expressing satisfaction with the progress of the erosion measures onsite.”) (emphasis added). A two-month old letter at the beginning of the rainy season is not a reliable indicator of the Regional Board’s current assessment of site conditions or of DeSilva’s compliance with permit terms, especially when Engeo Incorporated issued four Notices of Discharge during the period from December 8, 2004, to January 12, 2005. As the City and DeSilva have previously stated, conditions at the Project site rapidly change due to ongoing construction activities, and compliance measures require regular adjustments.

We request that the City require DeSilva to further revise the SWPPP to include immediate implementation of additional measures necessary to prevent turbid discharges from the Project site. We also request that the City provide information regarding the frequency of the storm event on February 21, 2005, and a description of measures that have been implemented since to prevent a similar event during future storms that do not exceed the design storm. If the City does not agree that the flows on February 21, 2005, exceeded pre-Project flows, we request independent evidence of pre-Project flows for comparable storm events. If the City did not authorize the routing of flows into the storm drain without flows first passing through the detention pond, we request an explanation for the exceedingly high flows in the creek on February 21, 2005.

II. Consultation with Agencies with Potential Permitting Authority

The City has not consulted with the U.S. Army Corps of Engineers (Corps), Regional Board, California Department of Fish and Game (DFG), or U.S. Fish and Wildlife Service

Director Godinez
Director Cappio
March 4, 2005
Page 5

(FWS), which have permitting authority under Clean Water Act (CWA) section 404, CWA section 401, Endangered Species Act section 10, and Fish and Game Code sections 1603, 2080, respectively, to ask whether permits are necessary. The City instead is assuming that permits are not necessary.

A. CWA section 404 and 401 Permits

The CWA has three potential permitting requirements for this Project, which cannot be satisfied by one permit. CWA section 402 (National pollutant discharge elimination system), 33 U.S.C. § 1342, requires a permit for an activity which will result in discharges of any pollutants into waters. CWA section 404 (Permits for dredged or fill material), 33 U.S.C. § 1343, requires a permit for the discharge of dredged or fill material into navigable waters. CWA section 401 (Certification), 33 U.S.C. § 1341, requires any applicant for a federal permit to conduct any activity which may result in the discharge into navigable waters of the United States (e.g., a section 404 dredge or fill permit) to provide the permitting authority with a certification from the state that the discharge will comply with state water quality standards. DeSilva is covered by an NPDES permit issued by the Regional Board under CWA section 402, but it has not satisfied the permitting requirements of CWA sections 401 and 404.

The Draft Environmental Impact Report (Draft EIR) states, “Chimes Creek is subject to Corps jurisdiction as “waters of the United States” under Section 404 of the Clean Water Act,” but then goes on to find that a section 404 permit is not necessary. Draft EIR, p. IV.B-12. The Regional Board was not satisfied by the Draft EIR’s findings, and the Board raised the issue again in its comments on the Draft Subsequent EIR:

“Should the project include work in jurisdictional waters of the United States, ... then it could likely require a permit ... pursuant to Section 404 of the [CWA]. Such permits also require a project proponent to apply and receive Water Quality Certification from the Water Board pursuant to Section 401 of the CWA. We would review the issues discussed in our September 5 letter as part of making the determination required as a part of issuing Water Quality Certification, that a project complies with State water quality standards.”

Letter from Keith Lichten, Regional Board, to Claudio Cappio (Dec. 4, 2003), City of Oakland, Final Subsequent EIR (Oct. 22, 2003), p. IV.E-1.

By letter dated October 25, 2004, we requested information regarding the City’s consultation with the Army Corps and Regional Board regarding the applicability of CWA sections 401 and 404 to the Leona Quarry Project. The City instead provided information regarding the Regional Board’s satisfaction with DeSilva’s compliance with water quality provisions related to the design of the detention basin. *See* Jan. 13 letter, p. 4. Again, the issue

Director Godinez
Director Cappio
March 4, 2005
Page 6

of designing the detention basin to comply with Alameda County's NPDES permit provisions is separate from the Project's compliance sections 401 and 404.

By letter dated January 14, 2005, we requested that the Corps and Regional Board confirm whether they had been contacted by City or DeSilva regarding the applicability of CWA sections 401 and 404 permitting requirements to the Leona Quarry Project. By letter dated January 26, 2005, the Army Corps confirmed that neither the City nor DeSilva had contacted them regarding the Project. *See* letter from Jane M. Hicks, Acting Chief, Regulatory Branch, Corps, to Julie Gantenbein, NHI (Jan. 26, 2005) (Attachment 5). By email dated February 22, 2005, the Regional Board confirmed that they did not complete a jurisdictional delineation or receive an application for water quality certification for work on the Project site. *See* email from Keith Lichten, Regional Board, to Julie Gantenbein, NHI (Feb. 22, 2005) (Attachment 6).

The City does not have the authority to determine the Corps' and Regional Board's jurisdiction for purposes of CWA sections 401 and 404. The City's determination that CWA sections 401 and 404 do not apply to this Project, in the absence of consultation with the Corps and the Regional Board, *exceeds the City's legal authority*. The fact that DeSilva has been grading in jurisdictional waters without a section 404 permit or section 401 certification creates a potential liability for the City, as lead agency under the California Environmental Quality Act (CEQA), and DeSilva, as the discharger. According to the Regional Board,

"If a discharger fills jurisdictional waters in the absence of an appropriate permit from the Corps and/or our Agency, then we may seek appropriate redress under the relevant sections of the California Water Code, including, but not limited to, adopting a Cleanup and Abatement Order requiring abatement of the discharge and its effects and the Board considering Administrative Civil Liability. We may also pursue informal enforcement, such as issuing a Notice of Violation and requesting the discharger to informally abate the problem, if that discharger is cooperative and particularly if a problem was caused inadvertently, is easy to correct, or otherwise does not have a significant water quality impact."

Id.

We request that the City provide actual notice to the Corps and Regional Board of its determination that a CWA section 404 permit and section 401 certification are not necessary and the factual basis for that determination, and request the agencies' concurrence with that determination within 30 days.

B. Fish and Game Code Section 1603 Streambed Alteration Agreement

Director Godinez
Director Cappio
March 4, 2005
Page 7

The City has allowed DeSilva to proceed with grading activity without consulting the Department of Fish and Game regarding the need for a Fish and Game Code section 1603 streambed alteration agreement. The City did not evaluate the applicability of section 1603 during environmental review on the assumption that no construction activity would occur in the project headwaters. The City does not have authority to determine the DFG's jurisdiction under section 1603.

The failure to consult with DFG regarding the applicability of section 1603 is egregious given the existence of a streambed on the Project site. Lowney Associates' Daily Field Reports describe work in a "former streambed": "Four of the scrapers cut from the slope to the east of the former stream bed. The soils were placed as fill in the former stream bed." Lowney Associates, Daily Field Report No. 40 (July 14, 2004); *see also* Daily Field Report Nos. 36-39, 41-46. For purposes of DFG's jurisdiction, a stream is defined broadly as, "a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life." *See* 14 CCR § 1.72. As stated in Mark Brest van Kempen's declaration, prior to grading activity there was a creek on the Project site, which supported cattails, reeds, willows, frogs, and damselflies, and thus appeared to meet the criteria for DFG jurisdiction.¹ The City, let alone Lowney Associates, is not authorized to determine that a streambed is no longer viable. The absence of flow in the streambed during the dry summer months of July and August does not mean the streambed is no longer functional. The City's determination that Fish and Game Code section 1603 does not apply to this Project, in the absence of consultation with DFG, *exceeds the City's legal authority*.

We request that the City provide actual notice to DFG of its determination that a section 1603 streambed alteration agreement is not necessary and the factual basis for that determination, and request the agency's concurrence with that determination within 30 days. We note that failure to comply with section 1603 may result in a civil penalty of up to \$25,000 for each violation.

C. Federal and California Endangered Species Act Incidental Take Permit

Neither the City nor DeSilva consulted DFG or FWS regarding potential impacts to Alameda whipsnakes, state- and federally-listed threatened species,² which may be present on the Project site. *See* letter from Robert Floerke, DFG, to Claudia Cappio (July 16, 2002), p. 2; pers. comment John Krause, DFG (Mar. 1, 2005). DeSilva's failure to comply with measures

¹ Fish is defined broadly to include, wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof. *See* Fish and Game Code § 45.

² The Alameda whipsnake was listed as threatened under the federal ESA on December 5, 1997, and under CESA on June 27, 1971. *See* 62 Fed. Reg. 64,306; DFG, State and Federally listed Endangered and Threatened Animals of California (Jan. 2005), available at <http://www.dfg.ca/whdab/pdfs/TEAnimals.pdf>.

Director Godinez
Director Cappio
March 4, 2005
Page 8

required under the Special Status Species Mitigation Monitoring Plan (SSSMMP), and the City's failure to adequately monitor compliance with and enforce the SSSMMP, increases the likelihood that the Project will adversely impact the Alameda whipsnake and its habitat.

Section 2080 of California Endangered Species Act (CESA), Fish and Game Code § 2080, prohibits the take of state-listed threatened and endangered species. Under CESA section 2081, DFG may authorize individuals to take listed species if the take is incidental to an otherwise lawful activity, the impacts of the authorized take are minimized and fully mitigated, and the take will not jeopardize the continued existence of the listed species.

Under section 9 of the federal Endangered Species Act (ESA), 16 U.S.C. § 1538, take of listed species is prohibited. Violations are subject to a \$25,000 penalty. *See* 16 U.S.C. § 1540. Liability runs to both the individuals conducting the activity and the agency that permitted the activity; thus both the City and DeSilva could be held liable for any take. However, under ESA section 10, 16 U.S.C. § 1539, FWS may authorize individuals to take listed species if the take is incidental to an otherwise lawful activity, the impacts of the authorized take are minimized and fully mitigated, and the take will not jeopardize the continued existence of the listed species.

In its comments on the Draft and Final EIRs and in subsequent emails and calls to the City, DFG requested that the City and/or DeSilva consult with DFG and FWS regarding the potential impacts of the Leona Quarry Project on Alameda whipsnake. Pers. Comm. John Krause, DFG (Mar. 1, 2005). Despite these requests, the City has not consulted, or required DeSilva to consult, with DFG and/or FWS regarding an incidental take permit or measures necessary to mitigate potential impacts. The City also avoided mandatory consultation with FWS under section 7 of the ESA,³ 16 U.S.C. § 1536, by failing to obtain a CWA section 404 dredge or fill permit from the Corps.

It appears that the extent of the City's consultation regarding listed species was to respond to DFG's Draft EIR comments in the Final EIR. In its response to comments on the Draft EIR, the City justified the decision not to follow DFG's recommendations or obtain an incidental take permit on the fact that the mitigation plans required by the City would contain adequate mitigations and avoidance measures to prevent potential impacts to the Alameda whipsnake. Unfortunately, the City has not ensured timely implementation of mitigation measures.

³ "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" 16 U.S.C. § 1536(a)(2).

Director Godinez
Director Cappio
March 4, 2005
Page 9

Essex Environmental Inc.⁴ first reported outstanding items required to comply with the SSSMMP in June 2004. However, measures to achieve compliance were not implemented until late January 2005, almost eight months later. *See* Essex Environmental, Inc., Environmental Inspection Report (Feb. 1, 2005). Eight months is an unacceptable delay between report of non-compliance and corrective action. It is not clear from Essex's reports why outstanding items and reports of non-compliance were not addressed in a timely manner. *See, e.g.*, Environmental inspection Report (Aug. 11, 2004) ("The Non-Compliance issued four weeks ago ... is still an outstanding issue that needs to be resolved."), ("The contractor needs to either build a new whipsnake exclusion fence isolating the north slope work area or submit plans for approval to the City of Oakland for an alternative measure for Alameda whipsnake in the area of the slope repair in the lower quarry. ... (refer to Environmental Inspection Report of June 9, 2004).").

We are particularly concerned that City staff recommended approval of the final maps in spite of several months of reports from Essex that DeSilva was not complying with Conditions of Approval related to protection of biological resources, including the Alameda whipsnake. Condition of Approval No. 37 provides:

"For the duration of the project, the City Development Director shall have the authority to determine whether the Project Applicant and the Project substantially comply with terms and conditions of this approval Upon a determination of non-compliance, the Director shall have the authority to suspend further Project approvals, including without limitation final subdivision maps, grading permits, building permits or certificates of occupancy for the duration of such noncompliance."

It seems that regular reports of non-compliance beginning in June 2004 would warrant suspension of Project approvals. We request that City staff provide the legal and factual basis for its decision to recommend approval of the final maps despite repeated notices of non-compliance.

Further, it appears that the SSSMMP may not be entirely consistent with the language in the CEQA Mitigation and Monitoring Program (MMRP). *See* letter from Mark Cassady, Essex Environmental, Inc., to Marcel Uzegbu (April 27, 2004). According to Essex Environmental, the SSSMMP uses "'qualified wildlife biologist,' 'wildlife biologist,' and 'biological monitor' interchangeably for preconstruction activities that are required in B.1a of the MMRP to be performed by the 'qualified wildlife biologist.'" *See id.* In addition, the original plan, consistent with the Alameda whipsnake mitigation measures, stated that all vegetation clearing in

⁴ We understand that the City contracted with Lowney Associates to for a variety of tasks, which include reviewing changes made during construction for conformance and technical requirements of the Project, City ordinances and mitigation and monitoring plans and reports. Lowney Associates sub-contracted with Essex Environmental for biological services, including oversight of measures necessary to protect Alameda whipsnake.

Director Godinez
Director Cappio
March 4, 2005
Page 10

whipsnake habitat would be done by hand, but the new plan allows for some clearing to be performed by heavy equipment, including a front loader. *See id.* It seems that clearing by front loader as opposed to by hand would have increased impacts and would require increased mitigation. It does not appear that the City ever addressed these inconsistencies; instead it appears that the SSSMMP may be materially different from the plans which were analyzed under CEQA.

We request that the City provide actual notice to DFG and FWS of its determination that an incidental take permit is not necessary and the factual basis for this determination, and request the agencies' concurrence with that determination within 30 days.

In the course of contacting FWS regarding the Alameda whipsnake, we also request that the City require DeSilva to consult with FWS regarding birds protected under the Migratory Bird Treaty Act of 1918 (MBTA), 16 U.S.C. §§ 703-712. FWS is the federal agency responsible for administering the MBTA, which prohibits the taking of any migratory bird, or any part, nest, or egg of any such bird. *See* 16 U.S.C. § 703. The Project may be adversely affecting white-throated swifts, which have been observed nesting and foraging on the site. *See, e.g.,* Essex Environmental, Environmental Inspection Report (Sept. 3, 2004). While the Draft EIR defines special status species to include species protected by the MBTA, it does not evaluate measures necessary to comply with the MBTA with respect to the white-throated swift. *See* Draft EIR, p. IV.B-13. It is not clear whether this omission is intentional, or if the City did not believe white-throated swifts were present. However, given the documented presence of white-throated swifts onsite, the City and DeSilva should evaluate measures necessary to protect them.

III. Further Degradation of the Form and Function of Chimes Creek

The City has not adequately responded to the concern that peak flows resulting from discharges from the Leona Quarry Project will further degrade Chimes Creek. Previous permits issued by the City for upstream development appear to have had a substantial impact on the form and function of Chimes Creek as it flows through the Millsmont neighborhood. Based on personal observations and documents maintained by Alameda County Public Works Agency (ACPWA), it appears the channel bed has dropped ten feet or more in the past decade. *See* ACPWA Photographs at Delmont Ave. (Attachment 7). The rate of degradation greatly accelerated following the construction of the Ridgemont development. Chimes Creek is not just a channel for flow; it is an essential feature of MHA members' property. The City has allowed upstream development without adequate measures to protect downstream property. As a result, MHA members are faced with impaired use and enjoyment of the creek and decreased property values. Although the Project likely will contribute to this problem, City staff have stated DeSilva is not required to perform creek restoration.

Director Godinez
Director Cappio
March 4, 2005
Page 11

The City cites the hydrologic analyses undertaken for the environmental documents to support the argument that DeSilva is not required to perform creek restoration because the Project will not increase pre-Project runoff. However, the Regional Board stated that the City's hydrologic analyses fell short of showing "that the project would be expected to reduce downstream impacts due to a modified runoff hydrograph, because it does not make the connection between flows from the project site and those that may be causing erosion downstream." Letter from Keith Lichten, Regional Board, to Claudia Cappio (Sept. 5, 2003); *see also* letter from Keith Lichten to Claudio Cappio (Dec. 4, 2003) ("our comment letter is not listed in Appendix B of the DSEIR, and based on our review of the DSEIR, ... our comments have not yet been addressed."). The Regional Board requested that the Supplemental EIR:

"[R]equire a fuller analysis of downstream creek conditions, including a shear/stress/erosion analysis that looks at the creeks in the field in order to determine what sorts of flows are causing the erosion. This is crucial analysis, because it is possible that a well-intentioned attempt to reduce flows can actually exacerbate erosion problems in a creek. ... An analysis that looks only at changes in flows from the project site, without an understanding of how those flows may be interacting with the downstream creek, is necessarily inconclusive."

Id. The City elected not to undertake the further study recommended by the Regional Board. In the absence of the Regional Board's concurrence with the City's determination that CWA section 401 does not apply to the Project, the need to address downstream degradation is a live issue. If the Regional Board determines that section 401 does apply, it is possible that the Regional Board will issue a water quality certification which includes conditions necessary to address the direct, indirect, and cumulative impacts of the Project on downstream water quality.

We appreciate the recent invitation to meet with City staff to discuss and review the hydrologic model for this Project. In advance of that meeting we request that the City provide (1) the estimated pre-Project (or baseline) peak flows during the 25-year, 24-hour design storm event, and (2) the estimated post-Project, mitigated peak flows during the design storm event. We also request that the City provide flow exceedance curves for Chimes Creek pre-Ridgemont development, post-Ridgemont development, and post-Leona Quarry development. This data should help explain how the City's permitting decisions have affected flows in Chimes Creek.

IV. Further Degradation of the Sewer Line Along Chimes Creek

The City has not addressed the systemic problem of the failing sewer line along Chimes Creek. City staff's January 25, 2005 Supplemental Report describes an incident on December 4, 2004, but does not mention the fact the sewer line along Chimes Creek is exposed in several places as a result of degradation and erosion of the streambanks. The sewer lines are suspended in mid-air where the banks have eroded away, and are only partially supported by ropes and

Director Godinez
Director Cappio
March 4, 2005
Page 12

wood under-girding. See MHA, "Sewer Lines at Chimes Creek" (Dec. 4, 2004), "Sewer Line Breaks Again" (Jan. 2005), *available at* <http://community.webshots.com/user/chimescreek>. Every year for the past 15 years the sewer line has broken routinely and discharged untreated sewage into the creek during storm events. The most recent break occurred on February 21, 2005.

We acknowledge that City staff generally have been responsive to MHA's reports of breaks in the sewer lines and have attempted to secure the exposed sewer lines with rope and wooden planks. However, we are dissatisfied with this reactive program of repair that has persisted for 15 years. The City has an affirmative duty to maintain City infrastructure and comply with water quality standards, which it is not meeting with respect to the sewer lines on Chimes Creek. As mentioned previously, we believe the primary causes for the poor condition of the sewer lines are (1) exceedance of current capacity, and (2) exposure of the lines caused by erosion of the streambanks. The exposure and routine breaks in the sewer lines impair MHA's use and enjoyment of the creek and poses a threat to public health. The Leona Quarry Project will contribute to this problem.

MHA previously expressed concern over what we understood to be City plans to condemn private property along Chimes Creek in order to install larger sewer lines to accommodate wastewater from Leona Quarry. Installation of larger sewer lines is inconsistent with the EIR, which finds the current sewer lines adequate to accommodate increased volume from Leona Quarry. The City assured MHA, "there are no City plans for condemnation of property along Chimes Creek;" "[t]he City proposed to replace the existing sewer line with the same pipe size within the existing public easement." See Jan. 13 letter, p. 4. However, this assurance appears to conflict with the staff's "Supplemental Report on the Status of Leona Quarry Subdivision Project Related to Compliance with Conditions of Approval and Response to Letters from Natural Heritage Institute Regarding Concerns from Millsmont Homeowner's Association on Leona Quarry Subdivision Project" (Jan. 25, 2004) (Supplemental Report), which provides:

"City staff analyzed the capacity of Line S and determined that some sections outside the creek area will need to be *upsized to accommodate the additional flow from Leona Development*. . . . Staff plans to hold a meeting with the owners to explain that *this work might affect their property*, seek their input and address their concerns."

Supplemental Report, p. 3.

We request written clarification of the apparent conflict between City staff's descriptions of proposed sewer line work along Chimes Creek. We request copies of the City's records of discharges of the sewer lines along Chimes Creek in the Millsmont area for the past five years

Director Godinez
Director Cappio
March 4, 2005
Page 13

within 30 days. We also request a commitment from the City that it will develop and implement a proactive plan to stabilize the sewer lines that are exposed along Chimes creek. We hope the City's recent schedule of public meetings to discuss this issue is representative of the City's intention to implement such a proactive program in the near future.

IV. Creek Restoration

The City still has not provided MHA a copy of the technical report regarding the creation of a creek on the Project site required under Condition of Approval 23(g). Condition 23(g) requires "[a] review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin" The City did provide a copy of the two-page summary of the technical review. *See* letter to Jim Summers, DeSilva Group, from Frank Groffie and Frank Berlogar, Berlogar Geotechnical Consultants (Oct. 13, 2004) (Attachment 8). According to the summary, DeSilva's geotechnical consultants advised DeSilva that, "a perennial creek, particularly if unlined, would not be appropriate from a geotechnical standpoint." *Id.* Unfortunately, the summary does not discuss the consultants' specific findings of fact on which this conclusion is based.

Berlogar's conclusion appears to be inconsistent with Phil Williams & Associates, Inc.'s (PWA) initial findings regarding creation of a creek on the Project site. PWA has stated:

"Topographically, the site represents the headwaters area of Chimes Creek. It is likely that it included the first and second order channels of the creek, which were fed by local springs in addition to winter rainfall-runoff. The quarry excavation eliminated these channels. The conceptual plans for the site indicate some consideration of incorporating a "restored" creek channel in the proposed development. We recommend inclusion of a restored stream system on the site, which will provide habitat, aesthetic, and water quality benefits.

Additional water quality and habitat benefits can be provided during the design of the detention facility, as well as design attributes of the developed areas. These are typically developed in coordination with the [Regional Board] as part of their 401 certification program, and are designed to minimize/remove typical urban runoff pollutants."

City of Oakland, Draft Subsequent EIR (Oct. 22, 2003), App. C, Philip Williams & Associates Ltd., Initial Report (Nov. 2002), p. 11. Given the significant potential benefits of creation of a creek on the site, we expect the City considered more than a two-page summary prepared by DeSilva's consultants before dismissing this measure from consideration.

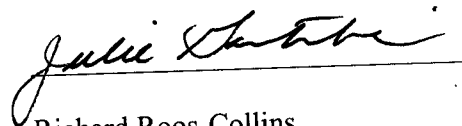
Director Godinez
Director Cappio
March 4, 2005
Page 14

We request a copy of the full report prepared by Berlogar Consultants regarding the creation of a creek on the Project site, and a copy of the City's findings regarding the full report within 30 days.

CONCLUSION

In conclusion, we respectfully request that City staff respond to this letter and the issues raised. We prefer to resolve these issues in a mutually agreeable manner. We believe a face-to-face meeting is necessary to achieve resolution, and so we request that the City convene a meeting within 30 days. Participants should include the City, DeSilva, Regional Board, DFG, FWS, and other interested stakeholders. The City should not allow the Project to proceed without resolving these outstanding issues.

Sincerely,



Richard Roos-Collins
Julie Gantenbein
Attorneys for MILLSMONT
HOMEOWNERS ASSOCIATION

Cc:

City Councilmember Jane Brunner
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6910 (fax)

City Councilmember Danny Wan
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6910 (fax)

City Councilmember Nancy Nadel
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612

Director Godinez
Director Cappio
March 4, 2005
Page 15

(510) 238-6129 (fax)

City Councilmember Jean Quan
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6129 (fax)

City Councilmember Ignacio De La Fuente
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6910 (fax)

City Councilmember Desley Brooks
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6910 (fax)

City Councilmember Larry Reid
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
lreid@oaklandnet.com
(510) 238-6910

City Councilmember Henry Chang
One Frank Ogawa Plaza, 2nd floor
One City Hall Plaza
Oakland, CA 94612
(510) 238-6938 (fax)

John Russo, Oakland City Attorney
One Frank Ogawa Plaza, 6th floor
One City Hall Plaza
Oakland, California 94612
(510) 238-6500 (fax)

Deborah Edgerly
City Administrator

Director Godinez
Director Cappio
March 4, 2005
Page 16

One City Hall Plaza, 3rd Floor
Oakland, CA 94612
(510) 238-2223 (fax)

Marcel I. Uzegbu, P.E., Project Manager
Engineering and Design
Public Works Agency
City Of Oakland
250 Frank H. Ogawa Plaza, Suite 4314
Oakland, CA 94612
(510) 238-7227 (fax)

Dale Bowyer, Supervising Water Control Resources Engineer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Robert W. Floerke, Regional Manager, Central Coast Region
California Department of Fish and Game
P.O. Box 47
Yountsville, CA 94599

Kent Peyton, Project Manager
DeSilva Gates Construction
11555 Dublin Boulevard
P.O. Box 2909
Dublin, CA 94568
(925) 560-1163 (fax)

Marie A. Cooper, Attorney
Bingham McCutchen LLP
1333 North California Blvd., Suite 210
P.O. Box V
Walnut Creek, CA 94596-1270

Attachment 1

Julie Gantenbein

From: Keith Lichten [klichten@waterboards.ca.gov]
Sent: Monday, January 24, 2005 5:25 PM
To: Julie Gantenbein
Cc: Dale Bowyer; Lawrence Kolb; Laurie Taul; Shin-Roei Lee
Subject: Re: DeSilva's Monitoring Reports for Leona Quarry Project

Dear Ms. Gantenbein,

Thank you for your email this morning and telephone calls of last week.

Overall, we believe that the sediment and erosion protection at the Quarry site have been significantly improved over the conditions we observed in October and early November.

We did receive a monitoring report from DeSilva last Tuesday afternoon. The cover narrative included with the report states that the primary (lower) detention basin on the site did discharge during the storms beginning December 8 (perhaps 6?) and 31, 2004, and again during the storm that began on January 2, 2005. The submitted results appear to suggest that there were discharges from the lower detention pond and/or from the lower portion of the site to the south of the existing construction entrance, and turbidity exceedances, on December 7, 8, 27, 30, 31, and January 3. The monitoring report does not include a discussion of measures taken to further reduce turbid discharges; however, we understand that the storage/detention volume of the large lower detention basin was recently increased.

The current design of DeSilva's sediment filtering system treats flows at a rate of approximately 0.78 cubic feet per second. That is, if the large lower detention basin was full and had no additional flows entering it, it would be emptied by this treatment system (assuming the system was operating 24 hrs/day) in about 2 days and 2 hours. We understand the lower basin to have a storage capacity of about 3.3 acre feet. This is somewhat large in an absolute sense, but smaller when compared to the area that discharges into it. The challenge, then, is that when multi-day storm events come in, as we recently have seen, then the relatively low storage capacity of the lower basin is exhausted, causing a discharge of turbid water.

We also note that, based on the submitted information, it is not clear that flocculant tests were completed on each day that the system was operating. If the system was operated correctly, then the likelihood of flocculant discharge was low. However, we will be contacting DeSilva on this question.

While we appreciate and support the efforts that DeSilva has made to improve erosion and sediment control on its site, and believe that they have likely improved the quality of discharge over the conditions present in October and early November, we note that there remain discharges of turbid water from the site. As such, we are hopeful that further refinement of the system and the continued establishment of some of the site's vegetated erosion control measures, will act to reduce additional turbid discharges.

If you have any questions or comments, please contact me as below.

Regards,

-Keith H. Lichten, P.E.

Julie Gantenbein

From: Mark Brest van Kempen [mbvk@sbcglobal.net]
Sent: Thursday, February 24, 2005 6:07 PM
To: Osalbo, Faustino Jun
Cc: Brooks, Desley; Nadel, Nancy; Uzegbu, Marcel; Estes, Lesley; Schwarz, Alison; khl@rb2.swrcb.ca.gov; friendsof2creeks@yahoogroups.com; nannystu@pacbell.net; Neary, Mike; Office of the Mayor; Julie Gantenbein; chiye@cazuma.com; Ward, Ron (PWA); Lau, David W; Sweiss, Fuad; jean@jeanquan4council.org; cityochang@aol.com; Ralph Kanz; william madison
Subject: Re: Silty Chimes Creek complaint

Jun
As you saw from the sample I had this morning a discharge from the quarry gave Chimes Creek a turbidity reading of 568 NTU at 8:00 this morning. Since then the creek has been turbid on and off all day.

I was also so preoccupied with the problems from the storm that I forgot to ask you about the water quality problems yesterday that you and William Madison were investigating.

I also wanted to mention that very silty surface run off from the site was entering three separate City storm drains after the storm on Monday. I have pictures showing this that you are welcome to have.

The Creek is now cloudy for long periods of time between storm events. Before grading began the Creek would completely clear out 3-4 hours after the rain stopped. I obviously dont call you about all turbidity in the Creek caused by construction activities in the quarry. I only call about the very worst incidents.

Is the City planning on levying fines for any of these violations?

Do you know what is going on at the Quarry that is causing this intermittent turbidity?

I am now extremely concerned that the same experts who designed and reviewed the original plans to handle water on this site (which could never have worked in their original forms and failed miserably), are the same experts who are assuring us of the viability of the rest of the project- including hillside stability. I am extremely concerned that the City's oversight experts on this project are the same people who apparently did not turn over notices of non-compliance to the City for months and months.

As we have seen in Southern California lives might be at stake with a site like this. I hope all the people involved in this project are keeping this in mind.

The GHAD does not cover consciences.

--

Mark Brest van Kempen
3835 Delmont Ave
Oakland CA 94605
510 568 6889

Attachment 3

Julie Gantenbein

From: Mark Brest van Kempen [mbvk@sbcglobal.net]
Sent: Tuesday, February 22, 2005 4:04 PM
To: Osalbo, Faustino Jun
Cc: Brooks, Desley; Nadel, Nancy; Uzegbu, Marcel; Estes, Lesley; Schwarz, Alison; khl@rb2.swrcb.ca.gov; friendsof2creeks@yahoogroups.com; nannystu@pacbell.net; Neary, Mike; Office of the Mayor; Julie Gantenbein; chiye@cazuma.com; Ward, Ron (PWA); Lau, David W; Sweiss, Fuad; jean@jeanquan4council.org; cityochang@aol.com; gamirzehni@oaklandnet.com
Subject: Run off bypassing detention pond

Jun
Thank you very much for coming by to review the changes in the sub drain for the Leona Quarry project that I had questions about.

Yesterday after the large rainstorm we had a torrential flood the like of which neighbors had never seen before, even after a multi-day storm.

This flash flood broke the hanging sewer line once again spilling raw sewage into creek, caused the manhole at the bottom of Chimes Creek to overflow again spilling raw sewage into creek, and caused a significant amount of erosion on my property as well as the property of other neighbors.

I understand that this large increase in runoff was due to the City recently allowing DeSilva to redirect much of the drainage from the Ridgmont development as well as the sub drains for the entire western half of Leona Quarry FROM THE DETENTION POND DIRECTLY INTO CITY STORM DRAINS and subsequently into Chimes Creek.

This decision of the City to allow DeSilva to bypass the detention pond with a significant amount of the site's run off has had disasterous results to the Chimes Creek community as documented in Photographs that I gave to you.

I understand that the reason for this temporary measure was because the detention pond/ baker tank system was repeatedly being overwhelmed during rainstorms and could not adequately handle the amount of water coming off the site.

As Im sure you are aware there are significant fines associated with the City allowing sewer lines to spill into Creeks and waterways and the number of sewer spills is adding up.

I am really quite shocked and disappointed to learn that the City has knowingly greatly increased the rate of run off coming into Chimes Creek after all we have been through so far.

Thank you for taking the time to explain the situation to me. The increased run off now, unfortunately, makes perfect sense to me.





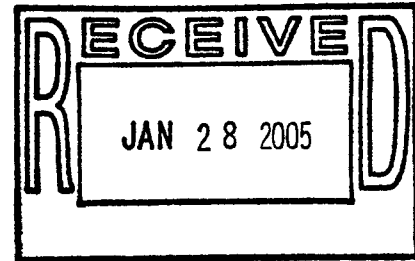
DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

JAN 28 2005

Regulatory Branch

SUBJECT: File Number 29366S

Ms. Julie Gantenbein
Natural Heritage Institute
2140 Shattuck Avenue, 5th Floor
Berkeley, California 94704-1222



Dear Ms. Gantenbein:

This letter is in regard to your request dated January 14, 2005, concerning the history of the Department of the Army in reviewing plans by the DeSilva Corporation to construct 477 residential units in the Leona Quarry east of I-580 near Mills College (Seminary Avenue) and Merritt College (Campus Drive) in the City of Oakland, Alameda County, California. Your particular concern is the potential impacts of this project on Chimes Creek.

Based on a search of our database for the following subjects: "Chimes Creek", "Leona", and "DeSilva"; the Corps of Engineers, San Francisco District, Regulatory Branch does not appear to have received any requests from the City of Oakland or Desilva Corporation to confirm our jurisdiction relative to the Leona Quarry Project and Chimes Creek.

A Department of the Army authorization would be required for any activity that would involve the discharge of fill material into a water of the United States, including adjacent wetlands, pursuant to Section 404 of the Clean Water Act (33 U.S.C. Section 1344). The Corps has not yet determined that the portion of Chimes Creek potentially impacted by this project is a water of the United States so it would be highly speculative and inappropriate to comment on any implications that the Leona Quarry Project may have on its compliance with Section 404 of the Clean Water Act.

If you have any questions regarding this matter, please call Edward A. Wylie of our Regulatory Branch at 415-977-8464. Please address all correspondence to the Regulatory Branch and refer to the File Number at the head of this letter.

Sincerely,

Jane M. Hicks

Jane M. Hicks
Acting Chief, Regulatory Branch

Copy Furnished:

CA RWQCB, Oakland, CA (Attn: Keith Lichten)
City of Oakland, Oakland, CA (Attn: Marcel I. Uzegbu)
DeSilva Gates Construction, Dublin, CA (Attn: Kent Peyton)

Julie Gantenbein

From: Keith Lichten [klichten@waterboards.ca.gov]
Sent: Tuesday, February 22, 2005 5:05 PM
To: Julie Gantenbein
Cc: Dale Bowyer; Laurie Taul; Shin-Roei Lee
Subject: RE: DeSilva's Monitoring Reports for Leona Quarry Project

Julie,

Reviewing the Leona Quarry file this afternoon, I realized that we had not yet responded to your letter of January 14, 2005, inquiring about any jurisdictional determinations for Chimes Creek where it flows across the Leona Quarry site.

As we discussed in our telephone conversation of January 4, 2005, the U.S. Army Corps of Engineers would typically be the entity completing and/or verifying jurisdictional delineations of waters of the United States for the subject site. Of course, while the Corps has the ability to both complete and then verify, typically a developer will have its consultant complete a draft jurisdictional delineation, which is then verified by the Corps. It would be unusual for the Board to complete a separate delineation of jurisdictional waters for its Clean Water Act Section 401 Water Quality Certification. We did not complete such a delineation in this case, and also did neither receive an application for Certification, nor issue Certification for work on the project site, as far as I am aware.

If a discharger fills jurisdictional waters in the absence of an appropriate permit from the Corps and/or our Agency, then we may seek appropriate redress under the relevant sections of the California Water Code, including, but not limited to, adopting a Cleanup and Abatement Order requiring abatement of the discharge and its effects and the Board considering Administrative Civil Liability. We may also pursue informal enforcement, such as issuing a Notice of Violation and requesting the discharger to informally abate the problem, if that discharger is cooperative and particularly if a problem was caused inadvertently, is easy to correct, or otherwise does not have a significant water quality impact.

Please let me know if you do not find this email responsive to your request, or if you require a more formal response beyond this email.

Regards,

-Keith H. Lichten, P.E.
Acting Section Leader
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

(510) 622-2380 direct
(510) 622-2460 fax
klichten@waterboards.ca.gov

>>> "Julie Gantenbein" <gantenbein@n-h-i.org> 02/21/05 12:47PM >>>
Keith:

I have to attend a meeting at 1515 Clay on Wednesday, 2/23. May I come in to review the additional monitoring reports shortly after 1 p.m.?
Thanks. Julie

SCENE 12 LINE 51 REACH 05 TYPE OF CHANNEL Natural DATE 4/1/77

DAMMIS WEEDS EROSION FENCES ROBERTS SILE TIDEGATES SPECIAL STRUCTURES DIS-POSITION



Pipe rocks impeding flow at 3835/3839 Delmont



No Helix 3845
Delmont explains
that pipe rocks
placed in line has
by downstream neighbors
impede flow in high
flow periods

Boys yard at 3845 Delmont

SUBMITTED BY Delmont REVIEWED BY GC DATE 4/1/77

Zone 12 Line J-1
11-22-82
Inv. # 292 & 294



Looking U/S of culvert
outfall
11-22-82



Looking D/S From culvert
11-22-82

Julie Kuntelbach
N4H
888-589-1974

BGC
BERLOGAR
GEOTECHNICAL
CONSULTANTS



Via Facsimile and Mail

October 13, 2004
Job No. 2420.300

Mr. Jim Summers
The DeSilva Group
11555 Dublin Boulevard
P.O. Box 2922
Dublin, California 94568

Subject: Discussion of Proposed Perennial Creek
Leona Quarry Residential Project
Mountain Boulevard
Oakland, California

COA 23g

Dear Mr. Summers:

As requested by Mr. David Chapman, of The DeSilva Group, this letter summarizes our opinions regarding a proposed perennial creek through the Leona Quarry residential project, Mountain Boulevard, Oakland, California.

Conditions of Approval (COA) for the Leona Quarry project were adopted by a resolution of the City Council of Oakland on February 17, 2004. COA No. 23g reads as follows: "A review and recommendations pertaining to the creation of a perennial creek through the site that drains into the lower detention basin, consistent with condition of Approval No. 19."

An early version of a land plan for the project showed such an artificial perennial creek that was to meander southward through the development. At that time, we advised The DeSilva Group and their design team that such a perennial creek, particularly if unlined, would not be appropriate from a geotechnical standpoint. Our concerns were soil saturation, erosion and pavement failure.

The current project grading plan by Carlson, Barbee & Gibson, dated April 13, 2004, includes no such major artificial creek channel. We have noted that the current grading plan shows a set of small, aligned drainage swales with concrete-lined ditches meandering southward through the site alongside A Street. Due to their small sizes, disconnectedness, and concrete-lined ditches, these swales have no significant geotechnical impact. We have had no objection to these swales.

SOIL ENGINEERS • ENGINEERING GEOLOGISTS • 5587 SUNOL BOULEVARD • PLEASANTON, CA 94566 • (925) 484-0220 • FAX: (925) 846-9645

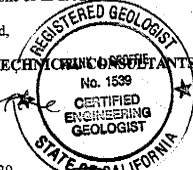
October 13, 2004
Job No. 2420.300
Page 2

We trust this letter provides you with the information you require at this time. If you have any questions, please call one of us at 925-484-0220.

Respectfully submitted,

BERLOGAR GEOTECHNICAL CONSULTANTS

Frank Groffie
Frank Groffie
Principal Geologist
R.G. 4930, C.E.G. 1539



Frank Berlogar
Frank Berlogar
RCE 20383, Exp. 9/30/05
FIG/FB:fg/vpv



Copies: Addressee (1)
The DeSilva Group (2)
Attention: Mr. David Chapman
DeSilva-Gates Construction (1)
Attention: Mr. Kent Peyton
Discovery Builders (1)
Attention: Mr. Albert Seeno III