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DAVID D. COOKE

February 8, 1993

5500 Eastshore Highway

VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

The Honorable Carol Browner, Administrator
United States Environmental
Protection Agency
401 "M" Street, S.W.
Washington, DC 20460

The Honorable James Strock, Secretary
California Environmental
Protection Agency
555 Capitol Mall, Suite 235
Sacramento, CA 95814

Re: Aetna Real Estate Associates, L.P.'s
January 11, 1993 RCRA Citizen Suit Notice
regarding The Powell Street Plaza, Emeryville, California

Dear Ms. Browner and Mr. Strock:

We represent Eastshore Partners ("Eastshore") and related persons and entities[1/] in matters relating to the Powell Street Plaza property ("PIE Site" or "Site") located at 5500 Eastshore Highway in Emeryville, Alameda County, California. By this letter, Eastshore responds to Aetna Real Estate Associates, L.P.'s ("Aetna") January 11, 1993 notice letter ("Letter") alleging violations by Eastshore of the Resource Conservation and Recovery Act ("RCRA"), and threatening a citizen suit pursuant to sections 7002(a)(1)(A) and

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1/ From September 17, 1986, until on or about December 31, 1990, Eastshore was a California limited partnership. Upon its dissolution, Eastshore assigned all of its rights and assets to its constituent partners, East Bay Park Company ("East Bay Park") and two other companies. For purposes of this letter we refer collectively to Eastshore, East Bay Park, and its related entities as "Eastshore."

7002(a)(1)(B) of that act. In sum, Eastshore denies that it has committed any violation of RCRA, and contends that the U.S. Environmental Protection Agency ("EPA") and the California Environmental Agency ("Cal-EPA") should refrain from instituting any legal proceedings against Eastshore.

Before responding to Aetna's allegations, Eastshore briefly reviews the PIE Site's history and cleanup in order to provide a clear picture of what has happened at the Site, and to make it clear that Aetna's claim, in addition to its many other infirmities, rests upon the incorrect representation that Eastshore owned and operated the underground storage tanks ("USTs") formerly located at the PIE Site.

FACTS

Eastshore provides the following summary of information relevant to the issues raised in Aetna's Letter. This information is contained in public records or other documents, and/or has otherwise been made available to Aetna.

(1) Site History, Ownership and Operation:

From approximately 1944 to approximately March 1986, Pacific Intermountain Express, otherwise known as "P.I.E. Nationwide," or "P.I.E." (referred to herein as "PIE"), owned and/or operated the Site as a trucking and freight terminal. At unknown times during its ownership and operation, PIE installed several USTs at the Site for use in its trucking business.

On approximately December 27, 1985, it appears that PIE conveyed the Site to IU Terminals, Inc. ("IU Terminals"). IU Terminals was a newly formed corporation owned by PIE's parent corporation. On April 11, 1986, IU Terminals and East Bay Park (a local partnership which is Eastshore's predecessor in interest) entered into a written Agreement of Purchase and Sale (the "IU Terminals Agreement"), pursuant to which IU Terminals would sell the PIE Site to East Bay Park. East Bay Park did not actually acquire the PIE Site at that time, nor did it ever agree to purchase any trade fixtures installed or used by PIE at the Site, including the USTs. In approximately July 1986, after PIE had ceased its trucking operations at the Site, PIE removed all of its USTs from the Site.

After the execution of the IU Terminals Agreement, but before the actual transfer of the PIE Site to East Bay Park Co. in December 1986, IU Terminals entered into an agreement with PIE under which, inter alia, (a) PIE bought the Site back from IU Terminals, and (b) PIE agreed to assume all the rights and liabilities of IU Terminals related to the Site.

Eastshore understands that IU Terminals conveyed title to the Site back to PIE on or about September 26, 1986.

On or about September 30, 1986, Eastshore and PIE modified the IU Terminals Agreement, thereby requiring PIE to have its consultants prepare and submit a cleanup plan, and thence conduct a cleanup pursuant to the requirements of the appropriate regulatory agencies of hydrocarbon contamination at the Site. That contamination was the result of PIE's operations at the PIE Site, or was otherwise associated with PIE's USTs or the appurtenant piping systems.

Subsequently, in early December 1986, pursuant to the IU Terminals Agreement as modified, East Bay Park Co. acquired the Site from PIE. As noted, by that time, PIE had removed all of its USTs from the Site, and had already begun (in November 1986) to remediate hydrocarbon contamination in the soil at the Site. While PIE continued its remediation activities at the Site, Eastshore developed and constructed a shopping center, known as the Powell Street Plaza, at the Site.

At no time did East Bay Park, Eastshore, or any other related entity ever operate any trucking facility at the Site, nor did they ever own or operate any UST at the Site. They have never been in the trucking business.

In approximately late March 1989, Aetna commenced negotiations with Eastshore to purchase the PIE Site. In conjunction with its extensive review of the property, Aetna engaged an environmental consultant to review copies of existing environmental reports and other documentation provided by Eastshore relating to the Site. Prior to the sale of the PIE Site to Aetna on or about February 14, 1990, Eastshore disclosed, and Aetna fully understood, that PIE had removed the USTs from the Site in mid 1986, and that PIE was in the process of remediating hydrocarbon contamination of the groundwater at the Site under the direction of regulatory authorities.

As discussed below, PIE did not complete the groundwater remediation at the Site. Instead, sometime in 1989 or 1990, PIE discontinued paying its consultant, CytoCulture, for its work at the PIE Site. As a result, CytoCulture eventually terminated its groundwater containment and cleanup operations at the PIE Site in or about June 1990, after Aetna had acquired the Site.

On or about October 16, 1990, PIE (through an entity known as Olympia Holding Corporation), filed a petition in the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division, for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. PIE's Chapter 11 reorganization petition was subsequently

converted to a Chapter 7 liquidation petition. We understand that the bankruptcy petition is still pending in Florida.

Aetna remains the owner of the PIE Site, and is currently engaged in discussions with Eastshore regarding the interpretation of the purchase-sale agreement between Eastshore and Aetna for the Site as that agreement relates to the cleanup of the Site. In particular, Aetna claims that Eastshore is obligated under that purchase-sale agreement to clean up certain contamination at the PIE site, while Eastshore disputes Aetna's claim. The parties have agreed, however, that Eastshore's environmental consultants, PES Environmental, Inc., may perform certain free phase petroleum hydrocarbon product removal at the Site after Aetna and Eastshore agree on the terms of a site access agreement. In anticipation thereof, Eastshore executed a service agreement with PES on December 15, 1992, and is currently awaiting Aetna's response to Eastshore's proposed modifications to a draft site access agreement.

(2) Remedial Efforts At the PIE Site:

A detailed understanding of the progress and status of remediation activities at the PIE Site may be important to your decision in this matter. Therefore, at the risk of some small repetition, Eastshore sets forth the history of these activities.

In the Spring of 1986, PIE retained Blymyer Engineering Company to conduct an investigation of the soil conditions at the Site. Blymyer discovered some hydrocarbon contamination apparently associated with PIE's USTs. We understand that at the time PIE or Blymyer notified the California Department of Health Services ("DHS")[2/], the San Francisco Bay Area Regional Water Quality Control Board ("RWQCB"), and the County of Alameda ("County") of the hydrocarbon contamination at the Site.

Under the County's supervision, PIE, through its contractors and environmental consultant, removed all of its USTs in late July of 1986. In addition, at the request of the appropriate agencies, and under the supervision of the County, PIE engaged CytoCulture Environmental Technology ("CytoCulture"), an environmental engineering firm, to investigate methods to remove and prevent migration of the petroleum contamination in the soil and the groundwater at the PIE Site. We understand that the County (and DHS, the RWQCB, and other agencies where applicable) reviewed and approved the actions and plans of PIE and its consultants.

2/ At the time DTSC was known as the Department of Health Services.

Overall, PIE conducted seven subsurface investigations and two soil remediation projects at the Site, between approximately March 1986 and March 1989. Geomatrix Consultants, Inc. drilled three test borings in April 1986 which detected hydrocarbon contamination. When the USTs were removed in July 1986, Groundwater Technology, Inc. found waste oil and diesel fuel in soil samples, and installed eight monitoring wells. In August 1986, Peter Kaldveer and Associates drilled seven exploratory borings to groundwater level which detected hydrocarbon contamination. Groundwater Technology, Inc. performed a site assessment in September 1986, and Geomatrix Consultants, Inc. performed another site assessment in December 1986, both of which found hydrocarbon contamination. Alton Geoscience drilled four test borings in October 1987, and eighteen more in March 1988, detecting hydrocarbon contamination both times.

The first soil remediation project was conducted between November 1986 and February 1987, using Enhanced Natural Degradation to reduce hydrocarbon levels before the soil was disposed of at a county landfill. A second soil remediation project was conducted between May and September 1987, after the discovery of additional contamination. In conjunction with that project, PIE's consultants and contractors installed a groundwater extraction trench and bio-treatment system at the Site. DHS's Alternative Technologies Section approved the groundwater remediation program. The East Bay Municipal Utility District issued PIE a wastewater discharge permit (# 001-00002) in January 1989, for wastewater associated with that remediation. CytoCulture began groundwater treatment in March 1989, but discontinued the project in June 1990 because PIE failed to make payments.

Affiliates of Eastshore, along with other entities not involved in the current dispute with Aetna over contractual obligations with respect to the PIE Site, have interests in property adjacent to the PIE Site. Eastshore hired its own consultants, PES Environmental, Inc., to investigate the possibility of off-site migration of petroleum hydrocarbon contamination from the PIE Site. PES has determined that petroleum hydrocarbons from the PIE Site likely have moved onto a portion of the property adjacent to the PIE Site. In order to reduce the future potential for any significant hydrocarbon contamination to migrate from the PIE Site, Eastshore has proposed to Aetna to allow Eastshore's consultants, at Eastshore's expense, to remove existing free product from the PIE Site. At present, Eastshore is negotiating with Aetna for access to the PIE Site to conduct this work.

Against this background, we now turn to a review of Aetna's allegations.

AETNA'S ALLEGATIONS

In order to assert a citizen suit, Aetna is required to provide Eastshore with, among other things, the following:

> sufficient information to permit [Eastshore] to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated . . . [and] the date or dates of the violation. . . .

40 C.F.R. § 254.3(a). Based on the information provided in Aetna's Letter, it appears that Aetna's allegations of one or more RCRA violations by Eastshore, and which could serve as the basis for Aetna's threatened citizen suit, are limited to the following:

- Eastshore, or its alleged predecessor, East Bay Park, allegedly "owned and operated a number of underground storage tanks [USTs] which had leaked and which continued to leak various hydrocarbon wastes" at the PIE Site during Eastshore's ownership of the PIE Site. (Letter at p.2).

- Eastshore was allegedly aware of these problems at the time of its acquisition of the PIE Site. (Letter at p. 2).

- Eastshore, as the alleged owner/operator of the USTs during Eastshore's ownership of the PIE Site, supposedly "contributed to the past handling, storage, transportation, or disposal of hazardous waste, as defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), or solid waste, as defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), including ... petroleum fuel-related contaminants (i.e. total petroleum hydrocarbons (gas), total petroleum hydrocarbons (diesel), oil and grease, benzene, toluene, ethylbenzene and total xylenes) tetra-ethyl lead, and chloroform and other volatile organic compounds (collectively the "Contaminants"). (Letter at p. 3).

- The Contaminants allegedly present an "imminent and substantial endangerment to health and the environment" at the PIE Site, and are "currently migrating through the soil and into the groundwater beneath and adjacent to the [PIE Site] thereby further contaminating, or threatening further to contaminate, the waters of the State of California." (Letter at p. 3).

In addition to these allegations, Aetna refers to 40 C.F.R. Part 280 and the requirements listed therein, relating to certain requirements imposed on "owners" and "operators" of USTs, terms that have specific meanings under RCRA. (Letter at pp. 4-5; see 40 C.F.R. §§ 280.60, 280.62(a)(5),(6), 280.62(b), 280.63(a),(b), 280.64, and 280.65(a).[3/]

3/ Aetna claims that as the alleged owner/operator of the USTs, Eastshore failed (1) to

(continued...)

AETNA'S RCRA ALLEGATIONS ARE GROUNDLESS

(1) Eastshore Never Owned Or Operated The USTs At The Site

The foundation upon which Aetna bases its allegations against Eastshore is Aetna's false representation that Eastshore or East Bay Park "owned and operated a number of [USTs]" at the PIE Site. This is flatly untrue.

Aetna has received most, if not all, of the environmental reports relating to the Site prepared for PIE by PIE's consultants. Aetna also received from Eastshore all of the documents in Eastshore's possession concerning the history of the PIE Site when Aetna purchased the PIE Site from Eastshore in 1990. The reports and other documents and information previously provided to Aetna clearly indicate that neither Eastshore nor East Bay Park operated the Site as a trucking facility, or owned or operated the USTs at the PIE Site[4/] at any time. In light of the information contained in the reports and other documents and information Aetna received in conjunction with its purchase of the site, Aetna's allegations against Eastshore are simply untrue.

Subtitle I and Part 280 of the Federal Regulations apply to "owners" and "operators" of USTs. Eastshore is not properly classified as either. The statutory and regulatory definition of the term "owner" is:

3/(...continued)
investigate and pursue corrective action to address the contamination from the USTs; (2) to measure for the presence of a release where contamination is most likely to be present; (3) to begin and conduct free product removal; (4) to submit reports and other specified information to the implementing agency; and (5) to assemble adequate information relating to the soil contamination, surrounding populations, water quality, use and locations of wells, and land use. 40 C.F.R. §§280.60, 280.62(a)(5),(6), 280.62(b), 280.63(a),(b), 280.64, and 280.65(a).

4/ In its letter, Aetna states that the Site is "apparently listed in DEH [the Alameda County Department of Environmental Health] records as the 'P.I.E. Nationwide' Site...." (1/11/93 Aetna letter at p.2). Aetna's feigned ignorance of the Site history is surprising, considering, as Aetna knows, that the Site was previously owned and operated by PIE as a trucking facility, that PIE removed the USTs from the Site in mid-1986, and that PIE was conducting remedial efforts at the Site during Aetna's ownership under the supervision of the County of Alameda.

> in the case of a [UST] in use on November 8, 1984, or brought into use after that date, any person who owns [a UST] used for the storage, use, or dispensing of regulated [substances][5/]; and
>
> in the case of any [UST] in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owned such tank immediately before the discontinuation of its use.

42 U.S.C. § 6991(3)(A)(B); 40 C.F.R. § 280.12; see Cal. H & S Code §§ 25281(h),(i), 23 C.C.R. § 2804. At present, it is unclear whether PIE's USTs were in operation on or after November 8, 1984. However, even assuming that the tanks were in operation after that date, the facts clearly establish that Eastshore did not (a) purchase any of PIE's trade fixtures at the PIE Site, or (b) own or operate a vehicle maintenance facility or the USTs.

Eastshore's ownership of the Site, in turn, does not transform Eastshore into an "owner" or "operator" of the PIE's USTs. See 50 Fed. Reg. 46602, 46605 (11/8/85) (in the preamble to the final rule regarding notification of the existence of USTs, EPA rejected a proposal by several commentors that the person in direct control of real property be presumed to be the owner of the tank); 53 Fed. Reg. 43322, 43326 (10/26/88) (in the preamble to the final rule regarding UST financial responsibility requirements, EPA recognized that it is inappropriate to designate the property owner as having control over USTs, and deferred to property owners and operators to decide who should assume the costs for USTs on a case-by-case basis). Besides, assuming arguendo that a property owner where USTs are located could properly be deemed the "owner" or "operator" of a UST for purposes of RCRA, the facts are clear that PIE removed the tanks before Eastshore acquired the Site.[6/] Simply put, under any theory Eastshore is not properly viewed as an "owner" or "operator" of the USTs that existed at the PIE Site.

Since Eastshore never owned or operated the USTs at the PIE Site, each of Aetna's allegations that Eastshore violated specific sections of 40 C.F.R. Part 280 should be rejected.

5/ The term "regulated substances" is defined as any substance defined in section 9601(14) and petroleum. RCRA §9001(2), 42 U.S.C. §6991(2)

6/ If mere ownership of property were sufficient to trigger RCRA obligations with respect to USTs, Aetna would be the "owner" and "operator" of the USTs and guilty of the very same RCRA violations of which it accuses Eastshore.

2) Eastshore Has Not Contributed To and Is Not Contributing To A Violation of RCRA § 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B)

In its Letter, Aetna threatens a citizen suit under RCRA § 7002(a)(1)(B) if the EPA or the DTSC does not pursue an enforcement action. RCRA § 7002(a)(1)(B) addresses an alleged violation by

> any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). An enforcement action against Eastshore would require, among other things, proof that (1) the conditions at the Site present an "imminent and substantial endangerment;" (2) the "imminent and substantial endangerment" was caused by the "handling," "storage," "treatment," "transportation," or "disposal" of a "solid waste" or "hazardous waste;" and (3) Eastshore "contributed to" or is "contributing to" that "handling," "storage," "treatment," "transportation," or "disposal." Given these requirements and the facts of the case, there is simply no basis for a claim or action against Eastshore.

There is no "imminent and substantial endangerment" present at the PIE Site. Whether a situation presents an "imminent and substantial endangerment" depends on the facts of the particular site in question. A situation may be viewed as "imminent," in part, depending on the nature and degree of the substance involved and of the effect of that substance on the environment subject to exposure. Similarly, one court has held that a situation may be regarded as "substantial" in circumstances where there is

> (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken;
>
> (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or
>
> (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).

United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 846 (W.D. Mo. 1984)(citing legislative discussion of "imminent and substantial endangerment" as it may apply to RCRA and CERCLA).

Based on the reports prepared by PIE's consultants (and previously delivered to Aetna), we understand that the groundwater below the PIE Site and adjacent properties is "brackish," and has not been, nor is intended to be, suitable for use as drinking water or otherwise. Eastshore is not aware of any evidence suggesting that the alleged migration of petroleum products in the groundwater at the PIE Site has posed, currently poses, or will pose any threat to the groundwater at and near the PIE Site. Aetna's Letter does not contain any information to suggest otherwise. The only information in Aetna's Letter which arguably suggests that there is "an imminent and substantial endangerment" present at the PIE Site is Aetna's allegation that petroleum products in the soils at the PIE Site are migrating through the soil and into the groundwater beneath and adjacent to the Site. (Letter at p. 3). Aetna's Letter does not provide any information to link that alleged migration to the groundwater with a threat to health or the environment, much less establish why that migration (which Aetna has identified as being associated with the alleged "disposal" from PIE's USTs which removed from the Site in 1986) suddenly presents the danger Aetna claims.[7/]

When viewed in light of the dispute between Aetna and Eastshore over their respective contractual obligations, the "danger" Aetna has identified appears not to involve the environment or human health. Rather, the real issue from Aetna's prospective seems to be its desire to gain leverage in its dispute with Eastshore over the meaning of the purchase-sale agreement negotiated between the parties at the time PIE was conducting its cleanup at the Site.

Considering the groundwater's past and current condition and its expected uses, there is no support for Aetna's claim that the petroleum products at the PIE Site present "an imminent and substantial endangerment" under RCRA.

Eastshore has not "contributed to" and is not "contributing to" RCRA "disposal." The meaning of "contributed to" and "contributing to" under RCRA has not been clearly delineated by the courts. At a minimum, however, it appears that in order for person to be viewed as having "contributed to" or as currently "contributing to" a RCRA "disposal," there must be some causal relation or connection between the person and the alleged "disposal." Assuming, arguendo, that a leak from a UST constitutes a "disposal" within the meaning of

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7/ If one were to ignore the Site's characteristics, as Aetna's Letter suggests, an action under section 7002 or 7003 would appear to be available in every case where a potential claimant alleged the mere presence of solid or hazardous wastes. Effectively, this would render meaningless the "imminent and substantial endangerment" language in the statute.

the statute (a contention which Eastshore disputes), Aetna's allegations fail because the requisite connection is absent.

Eastshore did not own or operate the Site (or the USTs for that matter) at the time the petroleum products allegedly leaked from the USTs. In fact, PIE removed the USTs before Eastshore acquired the Site. Thus, the alleged "disposal" did not take place during Eastshore's ownership. That is, the alleged "disposal" was not caused by Eastshore. By contrast, PIE, as the entity that installed, owned, and operated the tanks during the operation of its trucking facility, and that removed the tanks prior to its sale to East Bay Park, is the party theoretically liable under RCRA.

In an attempt to fashion a RCRA claim out of the contract dispute with Eastshore, Aetna further alleges that the petroleum products have and continue to migrate at the PIE Site and into the groundwater. The mere fact that Eastshore was an owner of the PIE Site while the petroleum contamination allegedly migrated in the soils and groundwater does not transform Eastshore into a party responsible under section 7002(a)(1)(B) of RCRA because migration alone does not constitute a RCRA "disposal." Moreover, assuming that the migration were viewed as a "disposal," there is no evidence that Eastshore took any acts which "contributed to" that migration.

The petroleum products at the PIE Site are not RCRA "solid wastes" or "hazardous wastes." Aetna claims that the petroleum products at the PIE Site are "hazardous wastes" or "solid wastes" regulated by RCRA. The central inquiry into whether a substance is a "solid waste" is whether the material from industrial and commercial activities has been discarded. See RCRA § 1004(27), 42 U.S.C. § 6901(27). The petroleum products at the PIE Site are not "solid wastes" within the meaning of the statute because those products were not discarded, but instead apparently leaked from PIE's USTs.[8/]

8/ "Hazardous wastes" are a subset of "solid wastes." See RCRA §1001(5), 42 U.S.C. §6901(5); see 40 C.F.R. §261.3. Since the petroleum products at this Site could not be viewed as "solid wastes," Eastshore does not discuss whether those substances could be "hazardous wastes."

There has not been a RCRA "disposal" by Eastshore at the PIE Site. [9/] RCRA defines "disposal" as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

RCRA § 1003(3), 42 U.S.C. § 6903(3).

The information in Aetna's Letter arguably suggests a "disposal" has taken place at the Site because the USTs apparently leaked into the soils at the PIE Site and because the hydrocarbon contamination is "migrating" through the soil and into the groundwater. (Letter at p. 3). Some court opinions suggest that leaks from underground tanks could constitute a "disposal" within the meaning of RCRA. Eastshore does not believe that such opinions properly define a RCRA "disposal." Moreover, passive migration of petroleum products in the soils and groundwater does not constitute "disposal" within the meaning of the statute. Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989).

CONCLUSION

Aetna's notice is a thinly veiled attempt to elevate a simple contract dispute between itself and Eastshore into a federal case. The fact remains, however, that there is no basis to invoke federal jurisdiction under RCRA. Aetna's representation that Eastshore owned or operated the USTs at the PIE Site is false. Eastshore could not violate any of the requirements under part 280 of the Code of Federal Regulations listed by Aetna, nor could Eastshore's past actions have contributed to (or presently contribute to) a violation of RCRA. Accordingly, we respectfully submit that an enforcement action against Eastshore would be inappropriate.

Notwithstanding, as noted above Eastshore is and has for some time been prepared to commence a program to remove free phase petroleum hydrocarbons from the groundwater at

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9/ Aetna provides no information, much less a suggestion, in its Letter that Eastshore contributed to or is contributing to the "handling," "storage," "treatment," or "transportation" of solid or hazardous wastes at the PIE Site. Thus, we do not discuss a RCRA claim based on such allegations.

the Site, subject to obtaining site access approval from Aetna, which as of this date Eastshore has been unable to obtain.

If you have any questions regarding Eastshore's involvement with the PIE Site or concerning Aetna's allegations, please contact me at (415) 397-0100. We are available to discuss Aetna's allegations or to assist you in gathering available information on the PIE Site.

Very truly yours,

David D. Cooke

DDC:phb

cc: Thomas J. Gram, Esq.

n:\cli\10\37\2418\ltr\2418prlc.015

cc: Barry S. Sandals, Esq.
Morrison & Foerster (attorneys for Aetna)
345 California Street
San Francisco, CA 94104-2675

Daniel McGovern, Region IX, Regional Administrator
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94104

Brian Oliva, Hazardous Materials Division
Alameda County Department of Envt'l. Health

William F. Soo Hoo, Director
California Department of Toxic Substances Control

Walter Pettit, Executive Director
California Water Resources Control Board

Steven R. Ritchie, Executive Director
California Regional Water Quality Control Board

STID 1184

MORRISON & FOERSTER

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January 11, 1993

BY HAND DELIVERY

David D. Cooke, Esq.
Beveridge & Diamond
Suite 3400
One Sansome Street
San Francisco, CA 94104-4438

Re: Powell Street Plaza, Emeryville

Dear David:

On behalf of Ætna Real Estate Associates, L.P. ("Ætna"), this acknowledges receipt of your December 18, 1992 letter, in which, on behalf of Eastshore Partners ("Eastshore"), you disclaim any responsibility for cleaning up soil and groundwater contamination at the Powell Street Plaza. Obviously, Ætna and Eastshore disagree fundamentally about the meaning of Section 14.01(s) of the Purchase and Sale Agreement dated February 14, 1990, and it appears unlikely at present that Eastshore can be persuaded to change its view.

As a consequence, Ætna has no choice but to consider litigation to enforce its cleanup rights. Accordingly, I am enclosing a copy of a notice letter we are sending today to your client and to federal and state regulatory agencies pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. (We would of course expect to bring other claims, including a breach of contract claim.) As you know, RCRA requires that a potential plaintiff wait ninety days before initiating suit under Section 7002(a)(1)(B). Ætna is open to further discussions with Eastshore in that period.

As stated in my December 1, 1992 letter to you, Ætna believes that Eastshore should implement the proposal by PES Environmental, Inc. to perform certain free product

removal activities, although those activities would only be a first step toward an adequate cleanup. I am therefore enclosing a proposed access agreement to govern PES activities on Ætna's property, if Eastshore is still willing to go forward with this work.

Very truly yours,

Barry S. Sandals

BSS:beh
Enclosures

bcc: Jeff Berry
Maria Burgi
George Sellman

ACCESS AGREEMENT

This Access Agreement ("Agreement") is made as of this _____ day of December, 1992, by and between Ætna Real Estate Associates, L.P. ("Ætna") and Eastshore Partners ("Eastshore").

RECITALS

A. Ætna owns certain real property commonly known as the Powell Street Plaza in Emeryville, California (the "Plaza Property").

B. Eastshore previously owned the Plaza Property, and sold it to Ætna pursuant to a Purchase and Sale Agreement dated February 14, 1990 (the "Purchase Agreement"). Under Section 14.01(s) of the Purchase Agreement, Eastshore has certain obligations respecting the cleanup of petroleum hydrocarbon contamination at the Plaza Property and desires access to it to undertake certain cleanup activities as hereinafter described.

NOW, THEREFORE, in consideration of the foregoing Recitals and the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Ætna hereby agrees to grant Eastshore and its appropriate contractors a temporary license to enter into such areas of the Plaza Property as may be reasonably necessary or appropriate (without interference with Ætna's tenants) to perform the Covered Work, as that term is defined herein, in accordance with the following terms and conditions:

1. Covered Work.

(a) The Covered Work at the Plaza Property shall consist of work performed pursuant to a written Work Plan, submitted by Eastshore and approved by Ætna, which shall proceed as generally described in the November 9, 1992 letter from PES Environmental, Inc. to Thomas Gram, Exhibit 1 hereto.

(b) Eastshore shall submit a written Work Plan to Ætna and obtain Ætna's written approval of it before initiating the Covered Work at the Plaza Property. It shall be within Ætna's sole discretion whether to approve any Work Plan submitted. Eastshore shall begin implementation of the approved Work Plan within fourteen (14) days of its receipt of Ætna's written approval.

(c) Eastshore agrees that it will own and take full responsibility for any solid and hazardous waste generated by it and its representatives and contractors as part of the Covered Work, including the responsibility for disposing of any such waste and complying with all government requirements related thereto, at Eastshore's sole cost and expense.

(d) Eastshore shall comply and shall cause its agents, officers, employees, and contractors to comply with all laws, statutes, ordinances and government rules, regulations and requirements now or hereafter in effect with respect to their activities in, on or about the Plaza Property.

(e) Eastshore shall pay all costs associated with the Covered Work.

(f) If Ætna requests, Eastshore shall provide Ætna with splits of any samples taken at the Plaza Property and shall permit oversight of the Covered Work by Ætna's representatives.

2. Indemnity. Eastshore, its partners, agents, employees and contractors agree to defend, indemnify and hold harmless Ætna, its agents, officers and employees from any claims, demands, liabilities, damages, losses, costs, expenses, reasonable attorneys' fees and experts' fees arising directly or indirectly from the activities, acts or omissions of Eastshore, its contractors, subcontractors, agents and representatives conducted pursuant to this Agreement, including any contamination caused or exacerbated by them in the course of performing the Covered Work at the Plaza Property.

3. Insurance. Eastshore's contractors and subcontractors shall each maintain, and upon request to Eastshore by Ætna, Eastshore shall furnish evidence that its contractors and subcontractors each maintain, broad form comprehensive general liability insurance coverage, with no exclusion for environmental claims and with the explosion, collapse and underground (xcu) exclusions eliminated, in the amount of $5,000,000.00 for any and all personal injury and property damage that may arise from any act or omission of such contractor or subcontractor in connection with its entry on the Plaza Property or performance of the Covered Work by such contractor or subcontractor on the Plaza Property. Such insurance shall cover personal injury and property damage to the Plaza Property and the buildings and equipment located thereon and any injury to Ætna or to any tenant on the Plaza Property, as well as personal injury and property damage to any other third party or its property,

which personal injury or property damage is proximately caused by acts or omissions of such contractor or subcontractor on or in the vicinity of the Plaza Property. Ætna shall be named as an additional insured under the foregoing insurance coverage of Eastshore's contractors and subcontractors.

4. Notice. Eastshore agrees to provide not less than forty-eight (48) hours written notice to Ætna prior to the performance of any approved Covered Work. All notices required by this Agreement shall be either (i) personally delivered, (ii) placed in the United States Mail, first-class postage prepaid, certified mail, return receipt requested, (iii) sent via Federal Express or (iv) sent via telecopier. Any notice, consent or approval shall be deemed received on the earlier of (i) the date actually received, or (ii) three days after being deposited in the United States Mail, certified mail, return receipt requested. All notices, consents and approvals shall be sent to the parties at the following addresses or telecopy numbers unless otherwise notified in writing:

To Ætna: George Sellman
Ætna Investment Group
151 Farmington Avenue, IG4E
Hartford, CT 06156-9624
Telecopier No.: (203) 275-4817

with copies to: Jeffery R. Berry, Esq.
Law Department, YFF1
Ætna Insurance Company
Cityplace
Hartford, CT 06156
Telecopier No.: (203) 275-4020

and Barry S. Sandals, Esq.
Morrison & Foerster
345 California Street
San Francisco, CA 94104
Telecopier No.: (415) 677-7522

To Eastshore: Thomas Gram
5800 Shellmound, Suite 210
Emeryville, CA 94608
Telecopier No.: _____

with a copy to: David D. Cooke, Esq.
Beveridge & Diamond
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438
Telecopier No.: (415) 397-4238

5. Restoration. Eastshore agrees to restore any portion of the Plaza Property affected by the Covered Work to the same condition as that which existed prior to the initiation of the Covered Work.

6. Reports. Eastshore agrees that it will direct its contractor(s) to send to Ætna copies of all reports and other written communications made to Eastshore by such contractor(s) at the same time that they are sent to Eastshore. Neither Eastshore nor its contractor(s) shall communicate with any government agency regarding the Covered Work without Ætna's prior approval and participation.

7. Encumbrances. Eastshore agrees to keep the Plaza Property free and clear of all liens and encumbrances, including but not limited to mechanics' liens, arising out of performance of the Covered Work, and shall indemnify and hold Ætna harmless from and against the cost of removing any such encumbrance.

8. Term. Eastshore, its agents and contractors, shall have access to the Plaza Property for _____ months from the date of execution of this Agreement in order to perform the Covered Work, so long as Eastshore is not in

material breach of the foregoing covenants and so long as the Covered Work is continuing in accordance with the approved Work Plan.

9. Attorneys' Fees. In the event any party to this Agreement brings an action or proceeding for a declaration of the rights of the parties under this Agreement, for injunctive relief, or for damages, or any other action arising out of the Agreement or the performance of the Covered Work, the prevailing party shall be entitled to, in addition to such other relief as may be granted in the litigation, an award of reasonable attorneys' fees and costs.

10. Reservations. By entering into this Agreement, neither Eastshore nor Ætna waives any legal rights with regard to potential claims or causes of action against the other or against any other person or entity not a party to this Agreement. Without limitation, Ætna expressly reserves all rights and causes of action it may have for rescission or for specific performance of the Purchase Agreement, for damages related to any wastes on the Plaza Property and damages, costs, fees and expenses related to the Covered Work or any interference with Ætna's beneficial use and enjoyment of the Plaza Property caused by Eastshore's use of the Plaza Property pursuant to the Agreement.

11. Choice of Law. This Agreement is to be covered by and construed in accordance with the laws of the State of California, except that this Agreement shall be given fair and reasonable construction in accordance with the intention of the parties and without regard to or aid of Section 1654 of the California Civil Code.

12. Counterparts. This Agreement may be executed in multiple counterparts, all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, this Access Agreement has been executed as of the day and year first above written.

ÆTNA REAL ESTATE ASSOCIATES, L.P.

By: _____

Its: _____

EASTSHORE PARTNERS

By: _____

Its: _____