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March 2, 1998

COPY

VIA FEDERAL EXPRESS

3335

Dorothy Jones, Esq.
State Water Resources Control Board
Department Counsel
2014 T Street, Suite 130
Sacramento, California 94244-2120

Ms. Lori Casias
State Water Resources Control Board
UST Programs
2014 T Street, Suite 130
Sacramento, California 94244-2120

Re: Ninth Avenue Terminal--Regarding Supplement to Notice of Appeal And Petition for Review (the "Appeal") Of The Removal Of Western Tube And Conduit From Notice Of Responsibility With Respect To Underground Storage Tank Located At Building H-107

RECEIVED
MAR 11 1998
STATE WATER RESOURCES CONTROL BOARD

Dear Ms. Jones and Ms. Casias:

As you are aware, we represent the City of Oakland, acting by and through its Board of Port Commissioners ("Port of Oakland") in connection with complex environmental litigation at the Ninth Avenue Terminal in the Oakland inner harbor, styled Port of Oakland, et al. v. Keep on Trucking, et al., USDC Northern District of California, Case No. C 95-03721 (CRB).

The purpose of this correspondence is to confirm the status of various petitions and appeals and supplement our appeal with respect to the removal of Western Tube & Conduit ("WTC") from its designation as a responsible party.

By letters dated February 2, 1998, our office notified the State Water Resources Control Board ("SWRCB") through Ms. Lori Casias that the Port of Oakland was appealing certain decisions by the SWRCB and that the Port of Oakland intended to provide

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Oakland's February 2, 1998 correspondence addresses the legal issues presented in the petition of that matter and the Port of Oakland reserves its right to provide the evidentiary basis for maintaining Gold Shields status as a responsible party.

4. In the Matter of Petition of Western Tube & Conduit Corporation:

On or about November 20, 1997, WTC served a petition for review requesting that Alameda County remove WTC as a responsible party for investigation and cleanup of the Site with respect to underground storage tank(s) it operated and/or had legal control over (State ID No. 3335).³

By letter dated December 11, 1997 the SWRCB removed WTC from its designation as a responsible party because no evidence was presented that "would indicate the unauthorized release occurred during the time Western Tube operate the tank(s)"⁴. By letter dated December 16, 1997 Alameda County verified that WTC had been removed from the designation of responsible party(ies) "for the petroleum hydrocarbon release attributed to the 1000 gallon underground storage tank adjacent to Building H-107."⁵

On February 2, 1998 our office notified the SWRCB, through Lori Casias, that the Port of Oakland was appealing various decisions by the SWRCB and that the Port of Oakland intended to provide additional information to support its appeal of the SWRCB's December 11, 1997, decision to remove WTC from their designation as a responsible party for the corrective action at the site. (See Exhibit "A".) Concurrently, by sending copies of our petitions/appeals to Alameda County, the Port of Oakland notified Alameda County that it was appealing WTC's removal as a responsible party.

This correspondence shall therefore serve as the Port of Oakland's supplement to its appeal with respect to the

³ A true and correct copy of WTC's petition for review is attached hereto as Exhibit "C".

⁴ A true and correct copy of the SWRCB's December 11, 1997 correspondence is attached hereto as Exhibit "D".

⁵ A true and correct copy of Alameda County's December 16, 1997 correspondence is attached hereto as Exhibit "E".

March 2, 1998

removal of WTC from the notice of responsibility requiring cleanup and investigation of the underground storage tank(s) located at Building H-107. Pursuant to Alameda County's December 16, 1997 correspondence this supplemental appeal addresses WTC's status as a responsible party with respect to the underground storage tank(s) at Building H-107 and not any other underground storage tank(s) which it operated and/or had legal control over at the Site⁶. The Port of Oakland reserves its right to further petition and provide evidentiary and factual basis with respect to any other removal regarding WTC.

II. Presentation of Evidence Regarding WTC's Responsibility For The Contamination At The Ninth Avenue Terminal Site -- Underground Storage Tank at Building H-107

WTC leased Building H-107 from 1968 through 1974, including the underground storage tank.⁷ On numerous occasions our consultant and representatives from the Port have provided Alameda County with credible and reasonable evidence which indicates that WTC had a responsibility for the contamination at the Ninth Avenue Terminal site. Attached hereto as Exhibit "F" are documents which evidence that WTC has responsibility for contamination at the site and that it controlled the underground storage tank at Bldg. H-107 during the period in which releases occurred. Specifically:

- (1) Exhibit "F-1" is a copy of WTC's November 1, 1968 lease agreement with the Port of Oakland and Port of Oakland Resolution No. 20402 which shows that WTC leased premises which included the dispensing pumps and underground storage tank at Building H-107 (see location of tanks and dispensing unit as drawn in by the Port's consultant);
- (2) Exhibit "F-2" is the Cross-Complaint filed by WTC, the same petitioner who has represented to the

⁶ In fact, on February 2, 1998 the Port of Oakland sought confirmation that the SWRCB decision to remove WTC from the responsible party designation related only to underground storage tank at Bldg. H-107 (see Exhibit "A"). The Port of Oakland has not yet received confirmation regarding this matter from the SWRCB or Alameda County.

⁷ Pursuant to initial disclosures of WTC; WTC may have had control over the UST until as late as 1980.

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SWRCB in its petition that "there is no evidence of a release during Western Tube's tenancy of the site." See Exhibit "C," WTC Petition, ¶ 4. This Cross-Complaint was filed in United States District Court, for the Northern District of California on or about May 8, 1997, and alleged that WTC subleased a portion of the property to C & T Trucking "who utilized the underground storage tank and caused or permitted to be caused the release of hazardous substances and/or petroleum hydrocarbons at the property as a result of its operation of the underground storage tank." See Exhibit "E-2," WTC's Cross-Complaint, page 9, ¶ 27. WTC's allegation alone provide the evidentiary basis for naming WTC as a responsible party. Under the Federal Rules of Civil Procedure, Rule 11, when WTC filed its cross-complaint it certified that: "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." We hope that we are not being too subtle in pointing out to the SWRCB that five months after representing to the United States District Court that there was evidence which would establish that releases occurred during WTC's control of the underground storage tank, WTC sent a petition to the SWRCB stating "there is no evidence of a release during WTC's tenancy of the site."

Further, WTC feigning lack of information regarding why they were named to the designation of responsible parties stated "it cannot argue why it is not a responsible party, except to rely on the constitutional requirement of due process of law." See Exhibit "C," WTC's Petition, at ¶ 7. In sum, WTC is attempting to dupe the SWRCB into believing that no information exists that would necessitate their being named a responsible party when in fact the tanks were utilized on a regular basis to fuel trucks delivering large diameter steel pipe throughout California, as part of a multi-national distribution network and export-import controlled by Sumitomo Metals of Japan. Again, WTC knows it utilized those tanks and even has witnesses

March 2, 1998

available who drove the trucks during these periods.

- (3) Exhibit "F-3" is WTC's November 25, 1996 Notice of Discharge, Notice of Intent to File Suit Pursuant to the Resource Recovery and Conservation Act 42 U.S.C. § 6972 ("RCRA") and the Clean Water Act 33 U.S.C. § 1365, and Notice Pursuant to the Oil Pollution Act, 33 U.S.C. § 2101. Once again, WTC alleged that "during C&T's operations . . . its stored, used and otherwise maintained solid wastes, hazardous substances and/or petroleum . . . and caused the discharge . . ." of said substances at the property. See Exhibit "F-3," WTC's Notice of Discharge at pp. 2-3. This is further evidence that requires the conclusion that WTC is a responsible party.
- (4) Exhibit "F-4" is a map prepared by our consultant that shows soil and groundwater concentrations in the former tank area have elevated levels of diesel; this data supports a finding that the tanks leaked during WTC's operation and that WTC contributed to the contamination at the site. Please note that the Port has no evidence of any party using or operating the tanks at H-107 after WTC vacated the premises in 1980;
- (5) Exhibit "F-5" are aerial photographs from April 3, 1970 and April 24, 1973 which show staining in the tank area establishing by circumstantial evidence that releases occurred during the WTC operational period.
- (6) Exhibit "F-6" is our consultant's expert opinion which is based upon the review of site specific analytical data from the tank area which strongly suggests that past releases of petroleum products did occur in the H-107 UST area. And based upon our consultant's experience, the observed straining, the site specific analytical data and the industry acknowledgement that releases are inherent with the operation of petroleum product distributions systems lead our consultant to conclude that impacted soil and groundwater likely

Dorothy Jones, Esq.
Ms. Lori Casias
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occurred during WTC's and their sublessee's operation of the UST.

The aforementioned exhibits provide the SWRCB a reasonable basis to conclude that WTC used and controlled the tanks during the time of interest and that unauthorized releases occurred during said period such that WTC should be designated a responsible party. If on the basis of the evidence presented in this supplemental petition an appeal meets your requirements, we ask that you reverse your decision to remove WTC from their designation as a responsible party. If you have further evidentiary concerns, we suggest that, given the clear and intentional misrepresentations by WTC, you require WTC employees to answer specific questions under penalty of perjury regarding WTC's usage of the tank at H-107. The following parties have been designated as knowledgeable in WTC's initial disclosure statement: Mark Alexander, Carl Crease, C.D. Erickson, and Pat Jackson.

If you decline either of these options, please notify the Port or call us to schedule an evidentiary hearing. Thank you for your anticipated cooperation in this matter.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

By
Jonathan W. Redding

JWR:lm
cc: Barney Chan (U.S. Mail)
Richard Denney, Esq. (U.S. Mail)
Mitchell Griffin, Esq. (U.S. Mail)
Carol Woo, Esq. (U.S. Mail)
Michele Heffes, Esq. (U.S. Mail)

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February 2, 1998

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Lori Casias
State Water Resources Control
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UST Programs
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Sacramento, CA 94244-2120

Re: Ninth Avenue Terminal -- Notice of
Responsibility to Encinal Terminals With
Respect to Underground Storage Tank H-317

Dear Mr. Chan:

It has come to our attention that Encinal Terminals ("Encinal") has successfully challenged Alameda County Health Care Services Agency's ("Alameda County") naming of Encinal to the December 16, 1997, order to investigate and cleanup the Ninth Avenue Terminal site. A true and correct copy of Alameda County's December 16, 1997, Order is attached hereto as Exhibit "A." Be advised that Alameda County's deletion of Encinal's name from the Notice of Responsibility Order, has necessitated that the Port exhaust all administrative remedies pursuant to Health & Safety Code § 25299 et seq., and Water Code Section 13320 and Title 23, California Code Regulations Section 2050, including petitioning to the State Water Resources Control Board to review the December 16, 1997, Order issued by Alameda County.

Chapter 6.75 -- Petroleum Underground Storage Tank Cleanup -- was added to the Health & Safety Code to give local government more flexibility in ordering dischargers to cleanup spilled gasoline and other petroleum products. Chapter 6.75 places local government on par with the Regional Water Quality Control Board. Among other things local agencies "may issue an order to the owner, operator or other responsible party requiring compliance" with the cleanup

EXHIBIT

A

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regarding its "Trucking Division" operations at the site. Exhibit "C5" shows that Encinal had keys to the UST pumping dispenser which delivered petroleum products from the UST to various equipment. Further, Exhibit "C6" shows that soil and groundwater concentrations in the former tank area have elevated levels of petroleum which support a finding that the tanks leaked during Encinal operation and that Encinal contributed to the contamination at the Site.

Generally speaking it is appropriate and responsible for a regulatory agency to name all parties for which there is reasonable evidence of responsibility, especially in cases of disputed responsibility. See Exhibit "D": In the Matter of the Petition of Exxon Co. U.S.A. (Order No. WQ85-7). Further, it is a matter of public policy that all entities for which there is substantial evidence of liability under Water Code Section 13304 be named. See Exhibit "E": In the Matter of the Petition of Sanmina Corporation, WQ 93-14 (and State Board Orders cited therein); In the Matter of the Petition of U.S. Cellulose and Louis J. and Shirley D. Smith, WQ 92-94. As a result it is unfair to place all of the responsibility on the Port as landowner. In fact for Alameda County (or any enforcement agency) to demand that an investigation and cleanup be undertaken only by the Port when there is credible and substantial evidence that Encinal has contributed to the contamination is arbitrary and capricious and is in effect selective enforcement against the Port.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

By
Jonathan W. Redding

JWR:mah
Enclosures
cc: Michele Heffes, Esq.
Kerry I. Zimmerman
Mitchell Griffin

February 2, 1998

sections of the statute. Health & Safety Code § 25299.37(c). Accordingly, Alameda County's naming of Encinal in the Order has merit. Water Code § 13304 assess responsibility for cleanup to:

"any person who has discharged or discharges waste into the waters of this state . . . or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create a condition of pollution or nuisance."

Orders issued pursuant to the Health & Safety Code section under which Alameda County is proceeding are equivalent to cleanup and abatement orders under Section 13304 of the Water Code. See: In the Matter of the Petition of Alvin Bacharach and Barbara Borsuk, 1991 Cal.ENV LEXIS 17 (June 20, 1991).¹

As you are aware, Encinal Terminals operated at the Ninth Avenue Terminal from 1956 until 1965. On numerous occasions our consultant and representatives from the Port have provided Alameda County with credible and reasonable evidence which indicates that Encinal has responsibility for the contamination of the Ninth Avenue Terminal site. For your files, the Port is again providing Alameda County documents which evidence that Encinal has responsibility for the contamination at the Site. (Attached hereto as Exhibit C1 to C6.) These documents show that Encinal had control of and the use of Underground Storage Tank H-317 which stored petroleum products and is now a source of contamination at the Site. Specifically, Exhibit "C1" is Encinal's 1956 Lease Agreement at the site, which shows that Encinal was responsible for the gasoline dispensing pumps and other equipment (Exhibit "C1", Lease, Page 16, § 33 and Page 7, § 12). Exhibit "C2" is a map prepared by Encinal that contemplated improvements to the UST area. Exhibit "C3" is a series of memoranda and correspondence prepared by Encinal and the Port which reference the use of the UST and that Encinal would have control of the UST and the petroleum products stored there in (Exhibit "C3": 1-5-56 Memorandum at ¶ 17 and 20; 1-11-56 Memorandum at ¶ 10). Exhibit "C4" is a letter from Encinal

¹ A true and correct copy of In the Matter of the Petition of Alvin Bacharach and Barbara Borsuk, 1991 Cal.ENV LEXIS 17 (June 20, 1991) is attached hereto as Exhibit "B."

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February 2, 1998

VIA FACSIMILE (916) 227-4344
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Lori Casias
State Water Resources Control Board
UST Programs
P. O. Box 944212
Sacramento, CA 94244-2120

Re: UST Petitions/Notice of Appeal of Proposed Removal
of Responsible Parties

Dear Ms. Casias:

We are the attorneys for the City of Oakland, acting by and through its Board of Port Commissioners (the "Port of Oakland") in connection with complex environmental litigation at the Ninth Avenue Terminal in the Oakland inner harbor, styled Port of Oakland, et al. v. Keep on Trucking et. al. U.S.D.C. Northern District of California, Case No. C 95-03721 (CRB).

As you are no doubt becoming aware, included within the multiple areas of contamination at this site, there is contamination associated with a number of underground storage tanks ("USTs"). With regard to the USTs the Port of Oakland has been fully cooperating with the Alameda County Health Care Services Agency ("Alameda County"), specifically Barney Chan, the Hazardous Materials Specialist who has been overseeing the investigation and the interim cleanup actions at this site for at least the past five years. Pursuant to Mr. Chan's requests and our own desire to investigate and cleanup the site, we have provided Mr. Chan with information concerning the prior owners and operators of the various USTs at the site. Alameda County has issued notices of responsibility to responsible parties who operated the various USTs that would be included in the Local Oversight Program ("LOP"). In

addition, please understand that it is the intent of the Port, where appropriate, to either become an applicant to the State of California Underground Storage Tank Cleanup Fund, or to have other responsible parties do so, in partial settlement of the Port's numerous claims against the PRP's. The Port and the citizenry of Oakland is especially interested in the Ninth Avenue Terminal Area because of the desire of the citizens to occupy and utilize the premises for greater public access (i.e., public marina, waterfront and open space, amongst a mixture of other commercial and retail usages). See: Excerpts of Waterfront Initiatives: Estuary Plan attached hereto as Exhibit "A".

Despite the foregoing, by letter dated January 29, 1997 you stated that:

"the County has decided to remove Encinal Terminals from the responsible party list because there is no evidence that the unauthorized release occurred during the time of their involvement with the site."

This is not the appropriate standard that State Water Resources Control Board ("SWRCB") decisions should be based, especially where a public agency is involved. Water Code § 13304 assess responsibility for cleanup to:

"any person who has discharged or discharges waste into the waters of this state . . . or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create a condition of pollution or nuisance."

In addition, it is appropriate and responsible for a regulatory agency to name all parties for which there is reasonable evidence of responsibility, especially in cases of disputed responsibility. In the Matter of the Petition of Exxon Co. U.S.A. (Order No. WQ85-7). **Nowhere does the time of the release enter the analysis.**^{1/}

^{1/} Indeed, there is no requirement under the LOP program which makes tank owners and operators responsible for investigation and cleanup. Documents exhibited in a letter under separate cover establish the liability of Encinal Terminals. Further, documents previously provided to Alameda County regarding Marine Terminals Corporation establish not only their operation of tanks but that a
(continued...)

Given the fact that the we are dealing with underground events imposing a time restriction is nonsensical and contrary to the express statutory language as drafted by the Legislature. Further, it is a matter of public policy that all entities for which there is substantial evidence of liability under Water Code Section 13304 be named. In the Matter of the Petition of Sanmina Corporation, WQ 93-14 (and State Board Orders cited therein); In the Matter of the Petition of U.S. Cellulose and Louis J. and Shirley D. Smith, WQ 92-94.

As a consequence of the Port's cooperation and its efforts to commence the cleanup of the property, as well as the simultaneous litigation to obtain reimbursement for past expenses and contribution to future expenses related to a variety of releases, (including above ground storage tanks, surface spills and releases from underground storage tanks) the defendants in this case now appear to be circulating petitions in boilerplate in order to end run the current litigation. As a result, the Port will have to appeal the removal of said defendants from various designations of the local oversight agency. We ask that the SWRCB promptly reconsider its position to remove the former operators, in light of the above, evidence previously supplied and Alameda County's conclusion that substantial releases have occurred at each and every UST site for which it has sent a Notice of Responsibility.

As we understand it, Mr. Chan does not have the desire to engage in individual battles with each of the defendants nor does the SWRCB. Please be advised, however, that under California law, the Port of Oakland is entitled to the support of the regulatory agencies and that they are required to name the other owners or operators of the tanks as responsible parties. In fact for Alameda County (or any enforcement agency) to demand that an investigation and cleanup be undertaken only by the Port of Oakland, when there is credible and substantial evidence that others have contributed to the contamination is arbitrary and capricious and is in effect selective enforcement against the Port of Oakland.

1/ (...continued)

release occurred during their operation. Further, the law in California is clear "owners seeking recovery from prior operators do not need to prove specific cause of the contamination", they need only show that the prior operators "contributed to" the soil and groundwater contamination. Zands v. Nelson (1992) 797 F.Supp. 805, at 810.

To this end, we will be preparing various appeals and/or petitions to the SWRCB and request that a stay, on all future decisions made to remove a party from the Notices of Responsibility, until the Port of Oakland, the affected property owner, files its own statements. Due process requires that the SWRCB afford the Port of Oakland an opportunity to be heard on these key issues. In addition, we wish to notify you that the Port of Oakland intends to provide information and appeal the removal of Western Tube and Conduit from the responsible party designation. Finally, we have understood that the petition by Western Tube and Conduit relates only to the underground storage tank at H-107, and not the other underground storage tank which it operated at H-213. We would like to have the record clarified in this regard and for you to consider all of the information provided in the enclosures.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

By
Jonathan W. Redding

JWR:lm
Enclosure
cc: Barney Chan (via fax 510-337-9335)
Michele Heffes, Esq.

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Sacramento, CA 94244-2120

Re: Ninth Avenue Terminal -- Notice of
Responsibility to Encinal Terminals With
Respect to Underground Storage Tank H-317

Dear Mr. Chan and Ms. Casias:

The purpose of this correspondence is to confirm that our letter of February 2, 1998, has been deemed by the State Water Resources Control Board as an official petition with respect to the removal of Encinal Terminals from the Notice of Responsibility requiring cleanup and investigation of underground storage tank H-317. Pursuant to Alameda County's January 29, 1997, correspondence "the County has determined to remove Encinal Terminals from the responsible party list because there is no evidence that the unauthorized release occurred during the time of their involvement with the site."

Although our office has already provided you with a reasonable basis to conclude that unauthorized releases occurred during or prior to the time that Encinal Terminals operated, or otherwise had control of the tank including hydraulic information and physical evidence, the Port now hereby wishes to supplement the record of evidence with our consultant's opinion of February 10, 1988, attached hereto as Exhibit "A". This opinion, is based on hydraulic and physical evidence already presented, as well as aerial photographs from May, 3, 1957 and July 3, 1959 attached to Exhibit "A". The aerial photographs show staining in the tank area

Mr. Barney Chan
Lori Casias
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February 11, 1998

proving that ongoing releases occurred during the Encinal operational period. Said evidence unequivocally provides a reasonable basis to include Encinal Terminals on the list of responsible parties.

Further, because Encinal Terminals had control, i.e., they had the legal ability to direct management of the tank and were in a legal possession to prevent the release, and assumed actual management duties of the tank, the critical requirements for naming Encinal Terminals have been met.

Of course, this submission of this evidence is done under a comprehensive reservation of rights including the right to challenge the standard adopted by the State Water Resources Control Board and the County of Alameda which requires evidence of the timing of a release during the named party's operational or ownership period.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

By
Jonathan W. Redding

JWR:mah

Attachment: Exhibit "A" - 2-10-98 Opinion by SCI and Aerial
Photographs

cc: Michele Heffes, Esq.
Mitchell Griffin
Kerry Zimmerman

1 DENNEY & OTHS LLP
Richard J. Denney, Jr., Esq. (State Bar No. 36337)
2 Eleanor Oths, Esq. (State Bar No. 144540)
Joseph L. Manalili (State Bar No. 181194)
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4 tel (818) 500-9030; fax: (818) 500-8079

5 Attorneys for Petitioner
Western Tube and Conduit Corporation

7 STATE OF CALIFORNIA
8 STATE WATER RESOURCES CONTROL BOARD

10 ***IN THE MATTER OF THE***

PETITION FOR REVIEW

11 **Petition of Western Tube and Conduit**
12 **Corporation for Review of Action of Alameda**
13 **County Health Care Services Agency Identifying**
14 **Petitioner as a Responsible Party for a Site**
Investigation and Cleanup at Site ID #3335

16 **1. Name and Address of the Petitioner:**

17 Western Tube and Conduit Corporation, c/o Richard J. Denney Jr., Esq., Denney & Oths LLP, 130
18 North Brand Blvd., Fourth Floor, Glendale, California 91203, telephone (818) 500-9030, facsimile (818)
19 500-8079.

21 **2. Specific Action of the Alameda County Health Care Services Agency (hereinafter the**
22 **“Agency”):**

23 Petitioner requests review of the Agency’s decision to name Western Tube and Conduit
24 Corporation as a responsible party for the investigation and cleanup of Site ID #3335. *Please see*
25 *attached “Notice of Responsibility” attached hereto as Exhibit “A.”*

27 **3. Date on Which the Agency Acted:**

28 October 23, 1997

EXHIBIT

C

1 **4. Reasons the Action Was Inappropriate:**

2 There is no evidence cited to support a finding that Western Tube is a responsible party. Western
3 Tube vacated the site in 1980 and there is no evidence of a release during Western Tube's tenancy of the
4 site.

5
6 **5. The Manner in Which the Petitioner is Aggrieved:**

7 Petitioner is aggrieved by the Agency's decision to name Western Tube as a responsible party for
8 site investigation and cleanup of Site ID #3335 because it would be obligated to incur investigation and
9 cleanup costs associated with alleged releases for which it is not responsible.

10
11 **6. Specific Action by the Agency Which Petitioner Requests:**

12 Petitioner requests that the State Board reverse the Agency's decision and find that Western Tube
13 is not a responsible party.

14
15 **7. Points and Authorities in Support of Legal Issues Raised in the Petition:**

16 Since there is no allegation as to why Western Tube is a responsible party, it cannot argue why it
17 is not a responsible party, except to rely on the constitutional requirement of due process of law. As
18 noted elsewhere in this petition, Western Tube has had no connection with the site since 1980 and there
19 is no evidence that a release occurred prior to that time. Prior to the Notice of Responsibility, the
20 Agency had not contacted Western Tube regarding this site nor presented Western Tube with any
21 evidence it may have regarding Western Tube's alleged liability. Absent any such evidence, no basis
22 exists to support the Agency's decision to name Western Tube as a responsible party.

23
24 **8. List of Persons Other Than the Petitioner Known by the Agency to Have an Interest in the**
25 **Subject Matter of the Petition:**

26 The Agency does not possess a list of persons who have an interest in the subject matter of this
27 petition. Therefore, Western Tube cannot provide such a list.

28

1 **9. Statement of Service of Petition:**

2 Western Tube has sent copies of this petition to the Agency, the Regional Board and to any
3 responsible parties known to Western Tube. Specifically, Western Tube has delivered copies of this
4 petition to the following:

5 Gordon Coleman (Chief Contract Project Director of the Agency), Barney Chan (Hazardous
6 Materials Specialist), Leroy Griffin (City of Oakland), Lori Casias (State Water Resources Control
7 Board), Kevin Braves (Regional Water Quality Control Board - San Francisco Bay Region) and
8 Jonathan Redding (counsel to the Port of Oakland). *Please see attached Proof of Service.*

9
10 **10. Copy of Request to the Agency for Preparation of the Record:**

11 A copy of Petitioner's request to the Agency for preparation of the record is attached hereto as
12 Exhibit "B."

13
14 **11. Additional Evidence**

15 The Agency did not present any evidence to Western Tube alleging a release during Western
16 Tube's tenancy of the site, which ended in 1980. If such evidence is alleged, Western Tube would like
17 an opportunity to respond to it.

18 ///

19 ///

20 ///

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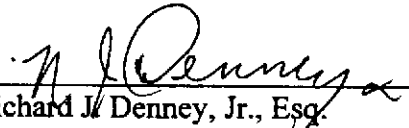
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CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Agency's decision to name Western Tube as a responsible party for site investigation and cleanup at Site ID #3335 was improper, inappropriate, and not supported by any evidence. Petitioner respectfully requests that the state board grant this petition and find that Western Tube is not a responsible party.

DATED: 11/20/97

DENNEY & OTHS LLP


Richard J. Denney, Jr., Esq.
Eleanor Oths, Esq.
Joseph L. Manalili, Esq.
Attorneys for Petitioner Western Tube and
Conduit Corporation

ALAMEDA COUNTY
HEALTH CARE SERVICES



AGENCY
DAVID J. KEARS, Agency Director

Certified Mail # P 143 588 394
10/23/97

ENVIRONMENTAL HEALTH SERVICES
ENVIRONMENTAL PROTECTION (LOP)
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
(510) 567-6700
FAX (510) 337-9335

Notice of Responsibility

StID# 3335
Keep on Trucking
370 8th Ave
Oakland, CA 94606

SITE Date First Reported 12/29/94
Substance: Diesel
Source : Federally Funded
MultiRPs?: Yes

Richard Denney, Esq.
Western Tube & Conduit
130 N. Brand Blvd. 4th Fl
Glendale, Ca 91203

Responsible Party (RP) # 2
(list of all RP's attached)

You are hereby notified that pursuant to Section 25297.1 of the Health and Safety Code, the above site has been placed in the Local Oversight Program. The above individual(s) or entity(ies) has (have) been identified as the party(ies) responsible for investigation and cleanup of the above site.

Any action or inaction by this local agency associated with corrective action, including responsible party identification, is subject to petition to the State Water Resources Control Board. Petitions must be filed within 30 days from the date of the action/inaction. To obtain petition procedures, please FAX your request to the State Water Board at (916) 227-4349 or telephone (916) 227-4408.

Pursuant to Section 25299.37(c)(7) of the Health and Safety Code, a responsible party may request the designation of an administering agency when required to conduct corrective action. Please contact this office for further information about the site designation process.

Please contact Barney Chan, Hazardous Materials Specialist at this office at (510) 567-6700 if you have any further questions.


Gordon Coleman, Chief
Contract Project Director

Please Circle One Add Delete Change

Reason: New RP

Attachment

C: Lori Casias, SWRCB
Barney Chan, Hazardous Materials Specialist

Report: Reimb97M 1/97

EXHIBIT A

ALAMEDA COUNTY - DEPARTMENT OF ENVIRONMENTAL HEALTH
HAZARDOUS MATERIALS DIVISION

10/23/97

LIST OF RESPONSIBLE PARTIES FOR

SITE

StID: 3335
Keep on Trucking
370 8th Ave
Oakland, CA 94606

Date First Reported 12/29/94
Substance: Diesel
Petroleum (X) Yes
Source: F

Mr. Dale Klettke
Port of Oakland
P. O. Box 2064
Oakland C A 94604-2064

Responsible Party #1
Property Owner

Richard Denney, Esq.
Western Tube & Conduit
130 N. Brand Blvd. 4th Fl
Glendale, Ca 91203

Responsible Party #2
Contact Person
Contact Company

DENNEY & OTHS LLP

130 NORTH BRAND BOULEVARD
FOURTH FLOOR
GLENDALE, CALIFORNIA 91203
TELEPHONE (818) 500-9030
FACSIMILE (818) 500-8079

November 20, 1997

Mr. Barney Chan
Hazardous Materials Specialist
Alameda County Health Care Services Agency
Environmental Protection (LOP)
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Re: StID# 3335, Notice of Responsibility

Dear Mr. Chan:

We represent Western Tube and Conduit Corporation ("Western Tube") in matters regarding the Port of Oakland's Ninth Avenue Terminal located in Oakland, California. We received a letter from the Alameda County Health Care Services Agency ("ACHCSA") dated October 23, 1997 naming Western Tube a responsible party for Site ID #3335.

We are filing a Petition with the State Water Resources Control Board ("SWRCB") contesting the ACHCSA's decision. Petition procedures require that a copy of the local agency record, i.e. ACHCSA's file on Western Tube, be submitted to the SWRCB. In addition, we would like a copy of the record. Please prepare the record and deliver copies to the following:

Richard J. Denney, Jr., Esq.
Eleanor Oths, Esq.
Denney & Oths LLP
130 N. Brand Blvd., 4th Floor
Glendale, CA 91203

Lori Casias
State Water Resources Control Board
UST Program
P.O. Box 944212
Sacramento, CA 94244-2120


EXHIBIT B

Mr. Barney Chan
November 20, 1997
Page 2
Re: Western Tube & Conduit

Thank you for your help in this matter. Please contact me with any questions you may have regarding this request.

Very truly yours,,

DENNEY & OTHS LLP


Richard J. Denney, Jr.

RJD:br

1 **PROOF OF SERVICE**

2 1013A (3) CCP Revised 5/1/88

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the county of Los Angeles, State of
5 California. I am over the age of 18 and not a party to the within
6 action; my business address is 130 North Brand Boulevard, 4th
7 Floor, Glendale, California 91203.

8 On November 20, 1997, I served the foregoing document
9 described as PETITION FOR REVIEW on the interested parties in this
10 action.

11 by placing the true copies thereof enclosed in sealed
12 envelopes addressed as stated on the attached mailing list.

13 || || by placing the original || || a true copy thereof enclosed
14 in sealed envelopes addressed as follows:

15 BY MAIL

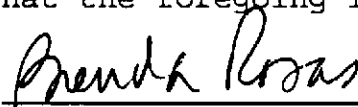
16 BY HAND-DELIVERY

17 * I deposited such envelope in the mail at Glendale,
18 California. The envelope was mailed with postage
19 thereon fully prepaid.

20 As follows: I am "readily familiar" with the firm's
21 practice of collection and processing correspondence for
22 mailing. Under that practice it would be deposited with the U.S.
23 postal service on that same day with postage thereon fully prepaid
24 at Glendale, California in the ordinary course of business. I am
25 aware that on motion of the party served, service is presumed
26 invalid if postal cancellation date or postage meter date is more
27 than one day after date of deposit for mailing in affidavit.

28 Executed on November 20, 1997, at Glendale, California.

I declare under penalty of perjury under the laws of the State
of California that the foregoing is true and correct.



Brenda Rosas

*(By mail signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)

SERVICE LIST

- 1) Gordon Coleman
Chief Contract Project Director
Alameda County Health Care Services Agency
Environmental Health Services
Environmental Protection (LOP)
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
- 2) Barney Chan
Hazardous Materials Specialist
Alameda County Health Care Services Agency
Environmental Health Services
Environmental Protection (LOP)
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
- 3) Leroy Griffin
Supervisor, Hazardous Materials Inspections
City of Oakland
Office of Emergency Services
Hazardous Materials Management Program
505 14th Street, Suite 702
Oakland, CA 94612
- 4) Lori Casias
State Water Resources Control Board
UST Program
2014 "T" Street, Suite 130
Sacramento, CA 95814
- 5) Kevin Braves
Regional Water Quality Control Board
San Francisco Bay Region
2101 Webster Street, Suite 500
Oakland, CA 94612
- 6) Port of Oakland
c/o Jonathan Redding
Fitzgerald, Abbott & Beardsley LLP
1221 Broadway, 21st Floor
Oakland, CA 94612-1837



Cal/EPA

**State Water
Resources
Control Board**

**Division of
Clean Water
Programs**

Mailing Address:
PO Box 944212
Sacramento, CA
94244-2120

2014 T Street,
Suite 130
Sacramento, CA
95814
(916) 227-4325
FAX (916) 227-4349

DEC 11 1997



Pete Wilson
Governor

Western Tube and Conduit Corporation
c/o Richard J. Denney, Jr., Esq.
Denney & Oths LLP
Attorneys at Law
130 North Brand Boulevard, 4th Floor
Glendale, CA 91203

Dear Mr. Denney:

**PETITION, UNDERGROUND STORAGE TANK (UST) LOCAL OVERSIGHT
PROGRAM, SITE NO. 3335, 370 8TH AVENUE, OAKLAND, ALAMEDA COUNTY**

This is in response to the petition submitted on behalf of Western Tube and Conduit Corporation. You are challenging their designation as a responsible party for corrective action at this site.

According to Barney Chan of the County, to date there has been no evidence presented to him which would indicate the unauthorized release occurred during the time Western Tube operated the tank(s); therefore, they are no longer considered responsible for this site. Mr. Chan will notify you of this fact in the near future. Consequently, the petition is now a moot point and I am closing the file on this matter.

If you have any questions, please telephone me at (916) 227-4325.

Sincerely,

Lori Casias
Local Oversight Program

cc: Barney Chan
Alameda County
Environmental Protection
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Michele Heffes
Environmental Department
Port of Oakland
PO Box 2064
Oakland, CA 94604-2064



Recycled Paper

Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.

EXHIBIT

D

ALAMEDA COUNTY
HEALTH CARE SERVICES

AGENCY
DAVID J. KEARS, Agency Director



ENVIRONMENTAL HEALTH SERVICES
ENVIRONMENTAL PROTECTION (LOP)
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
(510) 567-6700
FAX (510) 337-9335

December 16, 1997
StID # 3335

Mr. Dale Klettke
Port of Oakland
P.O. Box 2064
Oakland CA 94604-2064

Re: Notice of Responsibility for Keep on Trucking, 370 8th Ave.,
Oakland CA 94606

Dear Mr. Klettke:

As petitioned and concurred by the State Water Resources Control Board and our office, Western Tube and Conduit has been removed as a responsible party for the petroleum hydrocarbon release attributed to the 1000 gallon underground diesel tank adjacent to Building H-107 at the above referenced location. A Notice of Responsibility letter has been sent to your attention informing you of this action.

You may contact me at (510) 567-6765 if you have any questions.

Sincerely,

Barney M. Chan
Hazardous Materials Specialist

c: B. Chan, files

Ms. L. Casias, SWRCB

Mr. R. Denney, Esq., Denney & Oths, 130 North Brand Blvd., 4th
Floor, Glendale, CA 91203

Mr. J. Redding, Esq., Fitzgerald, Abbott & Beardsley LLP, 1221
Broadway, 21st Floor, Oakland CA 94612-1837

NOR-KOT

EXHIBIT

E

Index to EXHIBIT F

F-1	RESOLUTION GRANTING PERMISSION TO WESTERN TUBE & CONDUIT CORPORATION TO SUBLET PREMISES	06/02/71
	LICENSE AND CONCESSION AGREEMENT BETWEEN THE PORT OF OAKLAND AND WESTERN TUBE & CONDUIT CORPORATION	01/01/68
F-2	THIRD AMENDED CROSS-CLAIM BY WESTERN TUBE & CONDUIT CORPORATION AND SUMITOMO METAL U.S.A. CORPORATION	05/08/97
F-3	WESTERN TUBE & CONDUIT'S NOTICE OF DISCHARGE UNDER RCRA, CWA AND OPA	11/25/96
F-4	MAP SHOWING ELEVATED LEVELS OF DIESEL CONTAMINATION AT AND IN THE VICINITY OF THE UNDERGROUND STORAGE TANK AT BLDG. H-107	N/A
F-5	AERIAL PHOTOGRAPHS	04/03/70 AND 04/24/73
F-6	CORRESPONDENCE FROM SUBSURFACE CONSULTANTS INC. TO FITZGERALD, ABBOTT AND BEARDSLEY	02/26/98

BOARD OF PORT COMMISSIONERS
CITY OF OAKLAND

RESOLUTION NO. 20402

RESOLUTION GRANTING PERMISSION TO WESTERN
TUBE AND CONDUIT CORPORATION TO SUBLET
PREMISES.

RESOLVED that WESTERN TUBE AND CONDUIT CORPORATION, a corporation, hereby is permitted to sublease approximately 481 square feet of office area located in Port Building No. H-107 at Eighth Avenue and Embarcadero to C & T TRUCKING, INC., subject, however, to each and all of the terms and conditions of that certain Lease dated the 3rd day of February, 1969, between this Board, as Lessor, and WESTERN TUBE AND CONDUIT CORPORATION, as Lessee; and be it

FURTHER RESOLVED that the permission granted hereby shall be subject to cancellation and withdrawal by the Port upon ninety (90) days' prior written notice to said WESTERN TUBE AND CONDUIT CORPORATION.

At a regular meeting held June 2, 1971

Passed by the following vote:

Ayes: Commissioners Connolly, Gairnor, Walters and/Vice
President Soda - 4

Noes: None

Absent: Commissioners Berkley, Mortensen and President Tripp - 3

EXHIBIT

F I

1/11/68 (5) WFW:cw

PORT OF OAKLAND

BOARD OF PORT COMMISSIONERS

License and Concession Agreement

Handwritten initials and a checkmark.

THIS AGREEMENT made this 1st day of January, 1968, by and between the CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners, herein referred to as the "Port of Oakland" or the "Port", and WESTERN TUBE AND CONDUIT CORPORATION, a corporation,

herein referred to as the "Licensee",

W I T N E S S E T H:

For the better promotion of commerce and navigation and the development of the Port of Oakland, and on the condition of the faithful performance by Licensee of the terms, conditions and agreements hereinafter set forth, the Port hereby assigns to Licensee the license, concession and privilege to use, solely for the purposes hereinafter set forth, those premises situate in the "Port Area" of the City of Oakland, County of Alameda, State of California, more particularly described as follows:

1. Description of Premises:

An area of 481 square feet of office area and 3,684 square feet of warehouse area, and 16,845 square feet of open unpaved area, all located in the Ninth Avenue Terminal Area, as more particularly shown on the sketch attached hereto and made a part hereof,

together with appurtenances.

General Rev. 11/19/58

EXHIBIT

F 1

OAK 052950

2. Term: The term of this license shall commence on January 1, 1968 and continue to and including December 31, 1968.

3. Rental: ~~The Port acknowledges receipt of the sum of
Of said sum
is rent for the month commencing
Of said sum~~

~~will be retained by the Port as security for payment of rent and other charges hereunder and will be returned to Licensee if Licensee is not in default at the termination of its occupancy hereunder or under any renewal or extension hereof.~~

As monthly rental Licensee agrees to pay in lawful money of the United States of America, in advance and without previous demand, commencing on January 1, 1968

the sum of Three Hundred Fifty and 22/100 Dollars (\$350.22)

and a like amount on the first day of each and every calendar month thereafter to and including the 1st day of December, 1968.

In the event that Licensee is delinquent for a period of thirty (30) days or more in paying to the Port any rental or other sum payable to the Port pursuant to this agreement, Licensee shall pay to the Port interest thereon at the rate of one per cent (1%) per month from the date such sum was due and payable until paid.

4. Use of Premises: Except with the prior written consent of the Port, Licensee's use of the described premises shall be restricted to the following purposes, to wit:

For the storage of pipe.

Any use inconsistent with the above purposes or failure of the Licensee to use the described premises for the purposes expressed for a period of thirty (30) days shall render this agreement immediately revocable at the will of the Port. Licensee shall not occupy, use or appropriate any space, premises or land other than to it specifically assigned by this agreement except with the prior written consent of the Port, and if without such consent Licensee shall occupy, use or appropriate any such space, premises or land, it shall pay forthwith to the Port the reasonable rental value thereof and on failure to do so, the Port may at its option immediately declare a forfeiture of this agreement and of any rights that Licensee may have in or to the assigned premises or rights created hereby.

Licensee shall not use or permit said premises to be used in whole or in part during the term of this agreement, for any purpose or use in violation of any present or future laws, ordinances and general rules or regulations at any time applicable thereto of any public or governmental authority, including the City of Oakland, its Board of Port Commissioners and the Bay Area

Air Pollution Control District, relating to sanitation, air pollution control, the public health, safety or welfare; and Licensee hereby expressly agrees at all times during the term of this agreement, at its own cost, to maintain said premises in a clean, wholesome and sanitary condition and in compliance with any and all present and future laws, ordinances and general rules or regulations of any public or governmental authority now or at any time during the term of this agreement in force relating to sanitation or public health, safety or welfare; and Licensee shall at all times faithfully obey and comply with all laws, rules and regulations adopted by federal, state, local or other governmental bodies.

5. No Vending Machines: Licensee shall not sell, serve or vend, nor shall Licensee permit another person, firm or corporation to sell, serve or vend any food or food products, alcoholic or nonalcoholic beverages, cigarettes, cigars or tobacco on the described premises through coin operated vending machines, or otherwise, nor shall Licensee operate or maintain or permit to be operated or maintained on the described premises any coin operated nonmerchandising machines without the prior written consent of the Board of Port Commissioners and upon terms agreeable to the parties hereto; provided, however, that the provisions of this paragraph shall not prevent or prohibit Licensee from conducting or operating on the assigned premises the business or activity for which use, as hereinbefore in Paragraph 4 stated, said premises are assigned to Licensee.

6. Commercial Charges and Utilities: In addition to the rental above provided, Licensee agrees to pay all commercial and other Port charges incurred by it, including all dockage, tolls, demurrage and service charges, and at the rates prescribed therefor by the Board of Port Commissioners, and, unless otherwise provided, Licensee shall pay for all water, gas, heat, electricity, fuel, power, telephone service, and other utilities which may be furnished to or used in or about said premises during the term of this License. The Port will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of gas, electricity and water to Licensee in those portions of the Port Area where such utility services are provided by the Port and in cases where arrangements have been made between Licensee and the Port for the Port to furnish the same; provided, however, that the Port does not guarantee the continuity or sufficiency of such supply. The Port will not be liable for interruptions or shortages or insufficiency of supply or any loss or damage of any kind or character occasioned thereby if the same is caused by accident, act of God, fire, strikes, riots, war, inability to secure a sufficient supply from the utility company furnishing the Port, or any other cause except such as arises from the Port's failure to exercise reasonable diligence. It is understood that Licensee shall take such steps as Licensee may consider necessary to protect Licensee's equipment from any damage that may be caused to such equipment in the event of failure or interruption of any such utility services. Whenever the Port shall find it necessary for the purpose of making repairs or improvements to any utility supply system it shall maintain, it shall have the right to suspend temporarily the delivery of gas, electricity or water, or any thereof, but in all such cases reasonable notice of such suspension will be given to Licensee, and the making of such repairs or improvements will be prosecuted as rapidly as practicable and, if possible, so as to cause the least amount of inconvenience to Licensee.

General Rev. 11/19/58
Rev. 7/15/60
Rev. 8/31/61

7. Taxes and Assessments: Licensee shall and will pay all lawful taxes, assessments or charges which during the term hereof may become a lien or be levied by the state, county, city or any other tax or assessment levying body upon any interest in this agreement or any possessory right which Licensee may have in or to said land and/or the improvements thereon by reason of its use or occupation thereof, or otherwise, as well as all taxes, assessments and charges on goods, merchandise, fixtures, appliances, equipment and property owned by it in and about said premises.

8. Signs: Licensee shall not install, paint, inscribe or place any signs or placards either in or upon the said premises without the prior written consent of the Executive Director of the Port or his authorized representative. Licensee agrees, at its own expense, to remove or paint over, to the satisfaction of the Port, promptly upon termination of this agreement, any and all signs or placards installed, painted, inscribed or placed by it upon said premises; and should Licensee fail to so remove or paint over such signs or placards, the Port may do so at the expense of Licensee, and Licensee shall reimburse the Port for the cost thereof upon demand.

9. Promotion of Port: Licensee shall in good faith and with all reasonable diligence employ its best endeavors and all practical means to promote and aid the development of the commerce of the Port and the use of its facilities. Other things being equal, it shall ship through and receive through the municipal docks and terminals owned by the Port all the goods, materials and other commodities which it may be able to control or direct.

10. Condition of the Premises: The taking of possession of said premises by Licensee shall, in itself, constitute acknowledgment by Licensee that said premises are in good condition and satisfactory for its use.

11. Repairs, Alterations and Additions: The Port shall not be obligated to make any repairs, alterations, additions or betterments to said premises during the term hereof. Licensee shall be liable at its own expense to make all repairs to windows and repairs to said premises where the damage is caused by Licensee or its employees, agents, invitees, or persons coming upon said premises by Licensee's authority or permission. Should Licensee fail to make any repairs for which it is liable, the Port shall have the option to make the same; and Licensee shall immediately reimburse the Port for the cost thereof. The making of such repairs by the Port shall in no event be construed as a waiver of the duty of Licensee to make repairs as herein provided. Licensee may make alterations, additions and betterments to said premises only with the prior written approval of the Port and upon securing the necessary building, electrical or plumbing permits from the City of Oakland. Licensee waives the right to make repairs at the expense of the Port and waives the benefit of the provisions of Sections 1941 and 1942 of the Civil Code of the State of California relating thereto; and further agrees that if and when any repairs, alterations, additions, or betterments shall be made by it as in this paragraph provided, it promptly shall pay for all labor done of materials furnished in that behalf and shall keep said premises and building and Licensee's possessory interest therein free and clear of any lien or encumbrance of any kind whatsoever.

General Rev. 9/12/61

12. Title to Improvements: Licensee agrees that all structures, locks, bolts, repairs, alterations, equipment and/or improvements affixed to or made upon said premises by either of the parties hereto, shall be and become the property of the Port, and shall remain upon and be surrendered with the premises as part thereof upon termination of this agreement, save that Licensee may at the termination of this agreement, if Licensee is not in default under any of the provisions of this agreement, and if the premises are restored to their original or to a better condition, remove its machinery, boilers, tanks (excepting sprinkler systems and tanks used therewith and fixed fire protection apparatus), apparatus, conveyors, movable partitions and other trade fixtures heretofore and/or hereafter placed thereon by it; provided, the provisions of this paragraph may be waived by resolution of the Board upon application prior to the making of any such improvements.

13. Liability for Damages: This agreement is made upon the express condition that the Port, and members of the Board of Port Commissioners and its officers, agents and employees, shall be free from all liabilities and claims for damages and/or suits for or by reason of any injury or injuries to any person or persons or death or deaths of any person or persons or damages to property of any kind whatsoever, whether the person or property of Licensee, its agents or employees or third persons, from any cause or causes whatsoever while in or upon said premises or any part thereof during the term of this agreement or occasioned by any occupancy or use of said premises or any activity carried on by Licensee in connection therewith, and Licensee hereby covenants and agrees to indemnify and to save harmless the Port, and members of the Board of Port Commissioners and its officers, agents and employees, from all liabilities, charges, expenses (including counsel fees) and costs on account of or by reason of any such injury or injuries, death or deaths, liabilities, claims, suits or losses, however occurring or damages growing out of same.

14. Hazardous Substances: No goods, merchandise or material shall be kept, stored or sold in said premises which are in any way explosive or hazardous; and no offensive or dangerous trade, business or occupation shall be carried on therein or thereon, and nothing shall be done on said premises other than as is provided for in Paragraph 4 of this agreement which will increase the rate of or suspend the insurance upon the structures hereby assigned to Licensee or upon adjacent buildings or other structures of the Port, and no machinery or apparatus shall be used or operated on said assigned premises which will in any way injure said premises or adjacent buildings, provided, however, that nothing in this paragraph contained shall preclude Licensee from bringing, keeping or using on or about said premises and buildings such materials, supplies, equipment and machinery as are necessary or customary in carrying out the uses mentioned in Paragraph 4 hereof. In the event such uses include the keeping or storage of inflammable or explosive substances, such substances shall be stored in closed containers, and shall be stored, used or dispensed in the manner prescribed by the regulations of the Board of Port Commissioners, the Fire Prevention Bureau of the City of Oakland, or other public body having authority in the matter, and in any event, in the safest possible manner.

15. Forfeitures: It is mutually covenanted, and this agreement is made upon the condition, that if the rents or other sums which Licensee herein agrees to pay, or any part thereof, shall be unpaid on the date on which the same shall become due, or if default be made in all or any of the other terms, agreements, conditions or covenants herein contained on the part of Licensee, or should Licensee abandon and cease to use the premises for a period of thirty (30) days at any one time, except when prevented by fire, earthquake, war, strikes, or other calamity beyond its control, then and in any such event, at its option the Port may declare this agreement forfeited, whereupon all improvements of every kind and description shall, at the option of the Port, be forfeited to and become the property of the Port, and the Port may exercise all rights of entry or reentry upon said premises. No forfeiture shall be declared by the Port unless and until not less than fifteen (15) days' written notice of failure of Licensee to perform any such term, agreement, condition or covenant shall have been given by the Port to Licensee, and no forfeiture of said agreement for any such default by Licensee shall be declared by the Port if such default shall have been cured or obviated prior to the expiration of such notice, even though performance of such term, agreement, condition or covenant shall not have been effected or completed strictly within the period during which same should have been effected or completed; provided, that only three days' notice need be given of forfeitures declared for breaches of Paragraphs 3 and 4.

16. Right of Entry as Agent: In any and all cases in which provision is made herein for termination of this agreement, except by forfeiture, or for exercise by the Port of right of entry or reentry upon said premises, or in case of abandonment or vacating of the premises by Licensee, and the Port may not elect to invoke a forfeiture of said agreement, Licensee hereby irrevocably appoints the Port the agent of Licensee to enter upon said premises and remove any and all persons and/or property whatsoever situated upon said premises, and place all or any portion of said property, except such property as may be forfeited to the Port, in storage for account of and at expense of Licensee; and in such case the Port may relet the premises upon such terms as to it may seem fit, and if a sufficient sum shall not thus be realized after paying expenses of such reletting and collecting to satisfy the rent and other sums herein reserved to be paid, Licensee agrees to satisfy and pay any deficiency, and to pay expenses of such reletting and collecting. Licensee hereby exempts and agrees to save harmless the Port from any cost, loss or damage arising out of or caused by any such entry or reentry upon said premises and/or the removal of persons and/or property and storage of such property by the Port or its agents.

17. Surrender and Holding Over: Licensee covenants that at the expiration of the term of this agreement or any extension or holding over, or upon its earlier termination, it will quit and surrender said premises in good state and condition, reasonable wear and tear and damage by the elements excepted, and Licensee agrees forthwith to remove therefrom all machinery, apparatus, boilers, tanks (excepting sprinkler tanks), equipment, conveyors, trade fixtures and personal property belonging to Licensee. Licensee further covenants and agrees

that said premises and all structures, foundations and improvements thereon which by and under the terms of this agreement are provided to then remain on the assigned premises and which have become the property of the Port, shall be well and sufficiently repaired and in good and tenantable order and condition, with allowance for reasonable wear and tear, and the Port shall have the right on such termination, to enter upon and take possession of all said premises.

Should Licensee hold over the use of said premises after this agreement has terminated in any manner, such holding over shall be deemed merely a holding from month to month and at the rental herein provided for, payable monthly in advance, but otherwise on the same terms and conditions as herein provided.

18. Destruction of Premises: Whenever the premises, or any essential part thereof shall be destroyed by fire or other casualty, this agreement shall in case of total destruction terminate, and in case of partial destruction or injury, shall terminate at the option of the Port, upon giving at least thirty (30) days' notice to Licensee after such fire or injury, and no rent shall accrue to the Port after such termination. Should the Port elect, in such event, not to terminate such agreement, it will, with reasonable diligence, restore the premises as nearly as practicable to their former condition, and Licensee's obligation to pay rent shall be abated during the time and in proportion to the extent that said premises are not tenantable.

19. Duty to Guard Goods: Licensee shall assume the responsibility for the guarding and safekeeping of, and the risk of loss to, all property and equipment stored or located upon or used in connection with the said premises.

20. Waivers: No waiver by either party at any time of any of the terms, conditions, covenants or agreements of this agreement or of any forfeiture shall be deemed or taken as a waiver at any time thereafter of the same or any other term, condition, covenant or agreement herein contained, nor of the strict and prompt performance thereof. No delay, failure or omission of the Port to reenter said premises or to exercise any right, power, privilege or option arising from any default, nor subsequent acceptance of rent then or thereafter accrued shall impair any such right, power, privilege or option, or be construed to be a waiver of any such default or relinquishment thereof, or acquiescence therein, and no notice by the Port shall be required to restore or revive time as of the essence hereof after waiver by the Port of default in one or more instances. No option, right, power, remedy or privilege of the Port shall be construed as being exhausted or discharged by the exercise thereof in one or more instances. It is agreed that each and all of the rights, powers, options or remedies given to the Port by this agreement are cumulative, and no one of them shall be exclusive of the other or exclusive of any remedies provided by law, and that exercise of one right, power, option or remedy by the Port shall not impair its rights to any other right, power, option or remedy.

General Rev. 11/19/58
Rev. 7/15/60

21. Assignment Prohibited: Licensee shall not at any time, in any manner, either directly or indirectly, assign, hypothecate, encumber or transfer this agreement or any interest therein, or sublet the whole or any part of said premises, or license the use of same in whole or in part without written consent of the Port.

Licensee further covenants and agrees that neither this agreement, nor any interest therein shall be assignable or transferable in proceedings in attachment, garnishment or execution against Licensee, or in voluntary or involuntary proceedings taken under the authority of any bankruptcy act or provision thereof, or in any proceedings in insolvency or receivership taken by or against Licensee or by any process of law, and that possession of the whole or any part of said premises shall not be divested from Licensee in such proceedings or by any process of law, without written consent of the Port; and any such divesting of possession by Licensee or any assignment, sale or transfer of this agreement, or any interest therein, either voluntarily or by judgment, execution, bankruptcy, receivership, insolvency proceedings, or by process or operation of law, shall at the option of the Port be null and void and of no force or effect and shall cause this agreement to terminate immediately at the option of the Port.

The restrictions hereinabove contained against assignment or hypothecation of the agreement or any interest therein or subletting of the said premises or any part thereof by the Licensee, shall not be construed or deemed removed or waived at any other subsequent time, or at all, by any consent which the Port may hereafter give in respect to any such matters.

22. Right to Inspect Premises: The Port reserves the right to enter upon the premises at any reasonable time to inspect the same and to make any repairs that it may consider necessary to the preservation of the premises. Should any repairs be such as the Licensee should have made hereunder, the Licensee shall immediately reimburse the Port for the cost of such repairs, but the making of such repairs by the Port shall in no event be construed as a waiver of the Port's right to require the Licensee to keep said premises in repair as herein provided.

23. Premises to be Kept Clean: Licensee at all times shall keep said premises, including private Port roadways in front of said premises and areas adjacent to said premises fronting on such roadways, in a neat, clean and orderly condition, and shall prevent the accumulation of and shall maintain said premises and said adjacent areas and roadways free of any weeds, refuse or waste materials which present any unattractive appearance or which might be or constitute a fire hazard, or the accumulation of which might increase the rates of or suspend existing fire insurance on said premises. Should Licensee fail to maintain said premises and said adjacent areas and roadways free of any weeds, refuse or waste materials, the Port shall have the option to remove the same; and Licensee shall immediately reimburse the Port for the cost thereof. The performance of such removal by the Port shall in no event be construed as a waiver of the duty of Licensee to keep the premises clean as set forth in this Paragraph 23 shall include the removal of weeds, refuse and waste materials which emanate from the licensed premises and scatter onto adjoining property.

24. Fire Extinguishers: Licensee agrees at its own expense to keep on the premises fire extinguishers of such number,

type and material as may be prescribed from time to time by the regulations of the Board of Port Commissioners, the Fire Prevention Bureau of the City of Oakland, or other competent authority.

25. Additional Provisions: (if any)

Either party shall have the right to terminate this agreement on the last day of any monthly rental period by giving to the other party at least ninety (90) days' prior written notice of such proposed termination.

26. Lien for Charges: Licensee hereby gives and grants to the Port a lien upon, and hereby hypothecates to the Port, all fixtures, chattels and personal property of every kind and description now or hereafter to be placed or installed in or upon the assigned premises and agrees that in the event of any failure on the part of Licensee to make payment when due of any rents or other charges herein specified to be made by Licensee, the Port may take possession of, remove from the assigned premises, store at the expense of Licensee and sell the same at a private sale and may credit the net proceeds upon any indebtedness due, or damage sustained by the Port without prejudice to further claims thereafter to arise under the terms of this agreement.

27. Successors: Each and every of the provisions, agreements, terms, covenants and conditions herein contained to be performed, fulfilled, observed and kept shall be binding upon the successors and assigns of the respective parties hereto, and the rights hereunder, and all rights, privileges and benefits arising under this agreement and in favor of either party, shall be available in favor of the successors and assigns thereof, respectively; provided no assignment by or through Licensee in violation of the provisions of this agreement shall vest any rights in any such assignee or successor.

28. No Interest in Land Created: Licensee agrees that this agreement is a license and concession and not a lease and that no interest or estate in real property, or improvements thereon, is created hereby.

29. Time of Essence: Time is expressly declared to be of the essence of this agreement.

30. Notice: Any notice required or permitted to be given Licensee may be given to it ~~at~~ by United States mail, postage prepaid, at 370 - 8th Avenue, Oakland, California 94606;

provided, however, that if Licensee shall give notice in writing to the Port of any change in said address, then and in that event such notice shall be given to Licensee at the changed address specified in such notice.

31. Agreement in Triplicate: This agreement is executed in triplicate; each triplicate part thereof shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto thereunto duly authorized, have executed this agreement the day and year first above written.

CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners.

Approved as to form and legality this 19th day of March 1968

By [Signature]
Secretary of said Board

WESTERN TUBE AND CONDUIT CORPORATION,
a corporation.

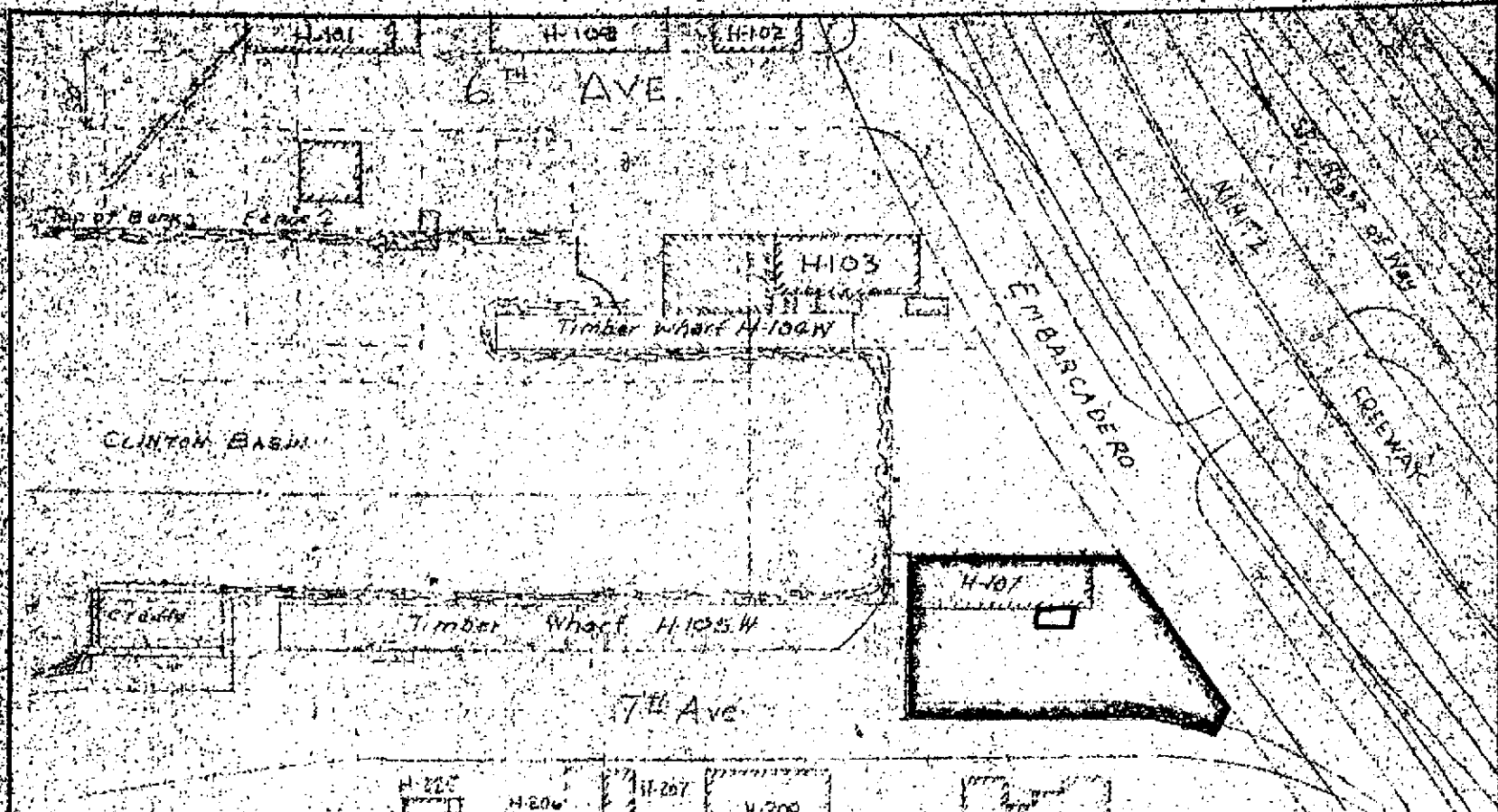
[Signature]
Port Attorney

By [Signature]
Executive Vice President

Port Resolution No. 18300

Attest [Signature]

General Rev. 11/19/58
Rev. 8/28/59
Rev. 7/15/60



ASSIGNED AREA SHOWN OUTLINED BY SHADING

PORT OF OAKLAND	
OAKLAND, CALIFORNIA	
NINTH AVE. TERMINAL AREA	
SKETCH TO ACCOMPANY LEASE TO	
<i>WESTERN TUBE & CONDUIT CORPORATION</i>	
DATE 2-15 1947	SCALE 1"=100'
DRAWN BY	CHECKED BY
SUBMITTED BY	Asst. Chief Engineer
APPROVED BY	
Chief Engineer	
SHEET 1 OF 1 SHEETS	FILE SK H-3

□ UST Pump and Dispenser

1 DENNEY & OTHS LLP
RICHARD J. DENNEY, JR. (State Bar No. 36337)
2 ELEANOR OTHS (State Bar No. 144540)
JOSEPH L. MANALILI (State Bar No. 181194)
3 130 North Brand Boulevard
4th Floor
4 Glendale, California 91203
(818) 500-9030

5 Attorneys for Defendants and Counter-Claimants
6 and Cross-Claimants Western Tube & Conduit
7 Corporation and Sumitomo Metal U.S.A. Corporation

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10

11 CITY OF OAKLAND, a municipal)
corporation, acting by and)
12 through its BOARD OF PORT)
COMMISSIONERS,)
13)
Plaintiff,)

14 vs.)

15)
KEEP ON TRUCKING COMPANY, INC.,)
16 PAUL BOJANOWER, C. DUANE)
ERICSON COMPANY, INC. formerly)
17 known as C.D. ERICSON COMPANY,)
INC., C. DUANE ERICSON, WESTERN)
18 TUBE & CONDUIT, SUMITOMO METALS)
U.S.A. CORPORATION, and DOES 1)
19 through 200, inclusive,)
20 Defendants.)

21)
WESTERN TUBE & CONDUIT)
22 CORPORATION, a California)
corporation, and SUMITOMO METAL)
23 U.S.A. CORPORATION, a Delaware)
Corporation,)
24 Counter-Claimants,)

25 vs.)

26)
CITY OF OAKLAND, a municipal)
27 corporation, acting by and)
through its BOARD OF PORT)
28 COMMISSIONERS,)
Counter-Defendants.)

CASE NO. C 95-03721 CW

THIRD AMENDED CROSS-CLAIM BY
WESTERN TUBE & CONDUIT
CORPORATION AND SUMITOMO METAL
U.S.A. CORPORATION

EXHIBIT

F 2

1 WESTERN TUBE & CONDUIT)
 CORPORATION, a California)
 2 corporation, and SUMITOMO METAL)
 U.S.A. CORPORATION, a Delaware)
 3 Corporation,)
)
 4 Cross-Claimants,)
)
 5 vs.)
)
 6 C. DUANE ERICSON COMPANY, INC.,)
 a California corporation,)
 7 formerly known as C.D. ERICSON)
 COMPANY, INC.; C. DUANE)
 8 ERICSON, an individual; KEEP ON)
 TRUCKING COMPANY, INC., a)
 9 California corporation; PAUL)
 BOJANOWER, an individual;)
 10 VICTOR ADELSON dba VIC ADELSON)
 DRAYAGE; AMCO CHEMICAL)
 11 CORPORATION, a California)
 corporation; JOSEPH J. HARE, an)
 12 individual; GOLD SHIELD)
 DISTRIBUTORS, a California)
 13 corporation; BRITZ, INC., as)
 successor by merger to BRITZ)
 14 CHEMICAL COMPANY, a California)
 corporation; C&T TRUCKING,)
 15 INC., a corporation; CHEVRON)
 U.S.A., INC., a California)
 16 corporation, EDEN-NATIONAL)
 STEEL CORPORATION, a California)
 17 corporation; GROENIGER &)
 COMPANY, a California)
 18 corporation; A. J. WHITE)
 ENTERPRISES, INC. dba HARBOR)
 19 FORKLIFT; THE KALMAN COMPANIES;)
 KALMAN TRUST; LAKESIDE NON-)
 20 FERROUS METALS, INC., a)
 California corporation; MARINE)
 21 TERMINALS CORPORATION, a Nevada)
 corporation; SAFEWAY INC., a)
 22 Maryland corporation; and)
 THOMAS & BETTS CORPORATION, a)
 23 Tennessee corporation; HORATIUS)
 CARNEY, an individual; DAVID)
 24 THOMPSON, an individual,)
)
 25 Cross-Defendants,)
)
 26

27 Defendants, Counter-Claimants and Cross-Claimants, Western Tube
 28 & Conduit Corporation and Sumitomo Metal U.S.A. Corporation submit the

1 following cross-claims which are not included in the Stipulation and
2 Order Regarding Counterclaims and Cross-Claims Deemed Asserted and
3 Avoided ("Stipulation"), a copy of which is attached hereto as Exhibit
4 "A." More specifically, Cross-Claimants Western Tube & Conduit
5 Corporation and Sumitomo Metal U.S.A. Corporation cross-claim against
6 Marine Terminals Corporation, which did not join the Stipulation,
7 cross-claim against newly added cross-defendants as set forth below,
8 and cross-claim for breach of contract against Keep on Trucking
9 Company, Inc. and Paul Bojanower because such cross-claim was not
10 included in the Stipulation.

11 **CROSS-CLAIMS**

12 1. Defendants, Counter-Claimants and Cross-Claimants Western
13 Tube & Conduit Corporation ("Western Tube") and Sumitomo Metal U.S.A.
14 Corporation ("Sumitomo") allege against Keep on Trucking Company, Inc.,
15 Paul Bojanower, C&T Trucking, Inc., Horatius Carney, David Thompson,
16 and Marine Terminals Corporation (hereinafter collectively referred to
17 as "Cross-Defendants) as follows:

18 **INTRODUCTION**

19 2. On or about November 26, 1996, Plaintiff and Cross-Defendant,
20 Port of Oakland ("Plaintiff" or the "Port") filed a First Amended
21 Complaint in this action, Case No. C 95-037221 CW, seeking damages,
22 declaratory relief and injunctive relief under federal and state laws
23 for alleged releases of hazardous substances and petroleum on the
24 Port's property which is defined in Section 725 of the Charter of the
25 City of Oakland and includes all of the land on the Oakland Estuary
26 which is bounded by Clinton Basin, Oakland Estuary Inner Harbor, the
27 Ninth Avenue Terminal and the Embarcadero and referred to hereinafter
28 as the "Property."

1 3. The First Amended Complaint contains thirty-three (33)
2 separate Claims for Relief seeking damages under the Resource
3 Conservation Recovery Act ("RCRA"), 42 U.S.C. §§ 6972 and 6973; damages
4 under the Clean Water Act ("CWA"), 33 U.S.C. §1365; cost recovery and
5 damages under the Oil Pollution Act ("OPA"), 33 U.S.C. §2708;
6 contribution under OPA, 33 U.S.C. §2709; cost recovery under the
7 Comprehensive Environmental Response, Compensation and Liability Act
8 ("CERCLA"), 42 U.S.C. §9607, as amended by the Superfund Amendments and
9 Reauthorization Act of 1986; contribution under CERCLA §113, 42 U.S.C.
10 §9613; declaratory relief under CERCLA §113(g)(2), 42 U.S.C.
11 §9613(g)(2); breach of contract; negligence; intentional and negligent
12 continuing nuisance; permanent nuisance; intentional continuing
13 trespass; negligent continuing trespass; intentional permanent
14 trespass; negligent permanent trespass; waste; indemnity pursuant to
15 California Water Code §13350(j); unjust enrichment; equitable
16 indemnity; injunctive relief; and declaratory relief. Cross-Claimants
17 Western Tube and Sumitomo deny liability for all Claims alleged in the
18 First Amended Complaint.

19 4. Cross-Claimants Western Tube and Sumitomo sue Cross-
20 Defendants because Cross-Claimants Western Tube and Sumitomo are
21 informed and believe, and on that basis allege that Cross-Defendants
22 are liable for the alleged contamination at the Property.

23 JURISDICTION AND VENUE

24 5. This Court has jurisdiction over Cross-Claimants Western
25 Tube's and Sumitomo's Cross-Claims (the "Cross-Claims") under 28 U.S.C.
26 §1367(a). The Cross-Claims arise out of the same transactions and
27 occurrences which are the subject of the First Amended Complaint and
28 questions of law and fact common to all parties will arise in this

1 action. This Court also has independent jurisdiction pursuant to 28
2 U.S.C. §§ 1331 and 2201 and 42 U.S.C. §§ 6972, 9607 and 9613, and 33
3 U.S.C. §§ 1365 and 2709.

4 6. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b),
5 in that the Property is located in this District.

6 CROSS-CLAIMANTS

7 7. Cross-Claimant Western Tube is a corporation organized and
8 existing under the laws of California and is qualified to do business
9 in California.

10 8. Cross-claimant Sumitomo is a corporation organized and
11 existing under the laws of Delaware and is qualified to do business in
12 California.

13 CROSS-DEFENDANTS

14 9. Cross-Claimants Western Tube and Sumitomo are informed and
15 believe, and on that basis allege that Keep on Trucking Company, Inc.
16 ("KOT") was, and is, a California corporation qualified to do business
17 in California.

18 10. Cross-Claimants Western Tube and Sumitomo are informed and
19 believe, and on that basis allege that Paul Bojanower ("Bojanower") is
20 an individual who resides in California and owns a controlling interest
21 in KOT.

22 11. Cross-Claimants Western Tube and Sumitomo are informed and
23 believe, and on that basis allege that Marine Terminals Corporation
24 ("Marine Terminals") was, and is, a Nevada corporation qualified to do
25 business in California.

26 12. Cross-Claimants Western Tube and Sumitomo are informed and
27 believe, and on that basis allege that C&T Trucking, Inc. ("C&T
28 Trucking") is a corporation not in good standing having been suspended

1 by the Franchise Tax Board.

2 13. Cross-Claimants Western Tube and Sumitomo are informed and
3 believe, and on that basis allege that Horatius Carney is an individual
4 who resides in California, and was, and is, a shareholder and/or
5 officer of C&T Trucking.

6 14. Cross-Claimants Western Tube and Sumitomo are informed and
7 believe, and on that basis allege that David Thompson is an individual
8 who resides in California, and was, and is, a shareholder and/or
9 officer of C&T Trucking.

10 15. Cross-Claimants Western Tube and Sumitomo are unaware of the
11 true names and capacities, whether individual, associate, corporate or
12 otherwise, of Cross-Defendants ROES 151 through 250, inclusive, or any
13 of them, and therefore sue Cross-Defendants, and each of them, by such
14 fictitious names. Cross-Claimants Western Tube and Sumitomo will seek
15 leave of this Court to amend the Cross-Claim when the identities of
16 these persons are ascertained.

17 16. Cross-Claimants Western Tube and Sumitomo are informed and
18 believe, and on that basis allege that at all relevant times, Cross-
19 Defendants and ROES 251 through 300, inclusive, and each of them, were
20 the agents, employees, and/or alter egos of the other, and in doing the
21 things herein alleged, each Cross-Defendant was acting within the scope
22 and course of their agency and authority and was subject to and under
23 the supervision and control of the other Cross-Defendants.

24 GENERAL ALLEGATIONS

25 KOT

26 17. Cross-Claimants Western Tube and Sumitomo are informed and
27 believe, and on that basis allege that KOT was, and is, a tenant of the
28 Property. Cross-Claimants Western Tube and Sumitomo are further

1 informed and believe, and on that basis allege that KOT installed,
2 owned and/or operated certain underground and above-ground storage
3 tanks and other facilities for treatment, storage and disposal of
4 hazardous substances and/or petroleum products at the Property.

5 18. Cross-Claimants Western Tube and Sumitomo are informed and
6 believe, and on that basis allege that during KOT's tenancy on the
7 Property, it has caused or permitted to be caused the release of
8 hazardous substances and/or petroleum products at the Property.

9 PAUL BOJANOWER

10 19. Cross-Claimants Western Tube and Sumitomo are informed and
11 believe, and on that basis allege that Bojanower was, and is, the
12 President, sole shareholder and alter ego of KOT. Cross-Claimants
13 Western Tube and Sumitomo are further informed and believe, and on that
14 basis allege that Bojanower is personally liable for the acts of KOT,
15 including its direct and indirect ownership and/or operation of certain
16 tanks and facilities at the Property, by which KOT discharged and
17 released hazardous substances and petroleum at the Property.

18 20. Cross-Claimants Western Tube and Sumitomo are informed and
19 believe, and on that basis allege that there exists a unity of
20 interest, and at all times herein mentioned, existed a unity of
21 interest and ownership between KOT and Bojanower and unknown ROES, such
22 that any individuality and separateness between KOT, Bojanower and
23 unknown ROES have ceased and KOT and unknown ROES are the alter ego of
24 Bojanower. KOT and unknown ROES are, and at all times mentioned
25 herein, were a mere shell, instrumentality and conduit through which
26 Bojanower carried on this business.

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28 ///

1 MARINE TERMINALS

2 21. Cross-Claimants Western Tube and Sumitomo are informed and
3 believe, and on that basis allege that Marine Terminals was, and is,
4 a current tenant of the Property and adjacent areas.

5 22. Cross-Claimants Western Tube and Sumitomo are informed and
6 believe, and on that basis allege that Marine Terminals controlled and
7 occupied large portions of the Property, including the Ninth Avenue
8 Terminal, pursuant to leases and a management agreement with the Port
9 dating from 1965. Cross-Claimants Western Tube and Sumitomo are
10 further informed and believe, and on that basis further allege that
11 pursuant to the management agreement, Marine Terminals was responsible
12 for the management, storage, unloading, and transportation of various
13 hazardous substances at the Property.

14 23. Cross-Claimants Western Tube and Sumitomo are informed and
15 believe, and on that basis allege that portions of the Property
16 occupied and operated by Marine Terminals contained above-ground
17 storage tanks containing fuel oil and kerosine. Cross-Claimants
18 Western Tube and Sumitomo have been informed that a plume of
19 hydrocarbons has been detected directly downstream from portions of the
20 Property controlled by Marine Terminals.

21 24. Cross-Claimants Western Tube and Sumitomo are informed and
22 believe, and on that basis allege that Marine Terminals' operations
23 caused or present a significant threat of contamination at the
24 Property. More specifically, Cross-Claimants Western Tube and Sumitomo
25 are informed and believe, and on that basis allege that Marine
26 Terminals was responsible for releases of petroleum hydrocarbons at the
27 Property in or about May 1975 and November 1992.

28 ///

1 25. Cross-Claimants Western Tube and Sumitomo are informed and
2 believe, and on that basis allege that Marine Terminals leased and
3 sublet portions of the Property. Cross-Claimants Western Tube and
4 Sumitomo are further informed and believe, and on that basis further
5 allege that pursuant to these leases, Marine Terminals was responsible
6 for the maintenance and repair of railroad tracks, including the
7 greasing and cleaning of them. Cross-Claimants Western Tube and
8 Sumitomo are further informed and believe, and on that basis further
9 allege that A.J. White Enterprises, Inc., dba Harbor Forklift ("Harbor
10 Forklift") subleased property from Marine Terminals and that Harbor
11 Forklift utilized chemicals which contaminated the ground or caused a
12 significant threat of contamination.

13 26. Cross-Claimants Western Tube and Sumitomo are informed and
14 believe, and on that basis allege that as a result of the utilization
15 of the Property by Marine Terminals and its sublessees, Marine
16 Terminals is responsible for discharging and releasing contaminants
17 onto the Property.

18 C&T TRUCKING

19 27. Cross-Claimants Western Tube and Sumitomo are informed and
20 believe, and on that basis allege that Cross-Claimants Western Tube
21 subleased a portion of the Property to C&T Trucking. Cross-Claimants
22 Western Tube and Sumitomo are further informed and believe, and on that
23 basis further allege that C&T Trucking utilized an underground storage
24 tank at the Property and that C&T Trucking caused or permitted to be
25 caused the release of hazardous substances and/or petroleum
26 hydrocarbons at the Property.

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HORATIUS CARNEY

28. Cross-Claimants Western Tube and Sumitomo are informed and believe, and on that basis allege that Horatius Carney was, and is, a shareholder and/or officer of C&T Trucking and alter ego of C&T Trucking. Cross-Claimants Western Tube and Sumitomo are further informed and believe, and on that basis further allege that Horatius Carney is personally liable for the acts of C&T Trucking, including, without limitation, contamination caused or permitted to be caused by C&T Trucking during its utilization of said underground storage tank at the Property.

29. Cross-Claimants Western Tube and Sumitomo are informed and believe, and on that basis allege that there now exists a unity of interest, and at all times herein mentioned there existed a unity of interest and ownership, between C&T Trucking, Horatius Carney and unknown ROES such that any individuality and separateness between C&T Trucking, Horatius Carney and unknown ROES had ceased and C&T Trucking and unknown ROES were and are the alter ego of Horatius Carney.

DAVID THOMPSON

30. Cross-Claimants Western Tube and Sumitomo are informed and believe, and on that basis allege that David Thompson was, and is, a shareholder and/or officer of C&T Trucking and alter ego of C&T Trucking. Cross-Claimants Western Tube and Sumitomo are further informed and believe, and on that basis further allege that David Thompson is personally liable for the acts of C&T Trucking, including, without limitation, contamination caused or permitted to be caused by C&T Trucking during its utilization of said underground storage tank at the Property.

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1 31. Cross-Claimants Western Tube and Sumitomo are informed and
2 believe, and on that basis allege that there now exists a unity of
3 interest, and at all times herein mentioned there existed a unity of
4 interest and ownership, between C&T Trucking, David Thompson and
5 unknown ROES such that any individuality and separateness between C&T
6 Trucking, David Thompson and unknown ROES had ceased and C&T Trucking
7 and unknown ROES were and are the alter ego of David Thompson.

8 FIRST CLAIM FOR RELIEF

9 (CERCLA §107)

10 **Against Cross-Defendants Marine Terminals, C&T**
11 **Trucking, Horatius Carney and David Thompson)**

12 32. Cross-Claimants Western Tube and Sumitomo repeat and reallege
13 the allegations of Paragraphs 1 through 31, above, as though fully set
14 forth herein.

15 33. Cross-Defendants, and each of them, are "persons" as defined
16 by §101(21) of CERCLA, 42 U.S.C. §9601(21).

17 34. Cross-Claimants Western Tube and Sumitomo are informed and
18 believe, and on that basis allege that the Property referred to herein
19 is, and at all relevant times was, a "facility" within the meaning of
20 §101(9) of CERCLA, 41 U.S.C. §9601(9), which hazardous substances have
21 been and/or are being discharged and released.

22 35. Cross-Claimants Western Tube and Sumitomo are informed and
23 believe, and on that basis allege that each Cross-Defendant was an
24 "owner" or "operator" of a facility as defined by §101(20) of CERCLA,
25 42 U.S.C. §9601(20).

26 36. Cross-Claimants Western Tube and Sumitomo are informed and
27 believe, and on that basis allege that the substances disposed of at
28 the facility by each Cross-Defendant were and are "hazardous

1 substances" within the meaning of §101(14) of CERCLA, 42 U.S.C.
2 §9601(14).

3 37. Cross-Claimants Western Tube and Sumitomo are informed and
4 believe, and on that basis allege that there have been and currently
5 are "releases" or threatened releases within the meaning of §101(22)
6 of CERCLA, 41 U.S.C. §9601(22), of hazardous substances at the
7 Property.

8 38. Cross-Claimants Western Tube and Sumitomo are informed and
9 believe, and on that basis allege that Cross-Defendants are liable
10 under §107(a) of CERCLA, 42 U.S.C. §9607(a), in that they owned or
11 operated and were responsible for the facility when hazardous
12 substances were stored, used, disposed or discharged thereon.

13 39. Plaintiff seeks to hold Cross-Claimants Western Tube and
14 Sumitomo liable under CERCLA §107(a), 42 U.S.C. §9607(a), for all costs
15 resulting from alleged releases or threatened releases of hazardous
16 substances at the Property.

17 40. Cross-Claimants Western Tube and Sumitomo deny they are
18 liable under any facts or theories alleged in the First Amended
19 Complaint. However, to the extent that it is determined that, under
20 CERCLA §107(a), 42 U.S.C. §107(a), Cross-Claimants Western Tube and
21 Sumitomo are liable for costs or damages, all of which are denied by
22 Cross-Claimants Western Tube and Sumitomo, Cross-Defendants are jointly
23 and severally liable for all such costs or damages.

24 WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
25 relief as hereinafter set forth.

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SECOND CLAIM FOR RELIEF

(Contribution Under CERCLA §113

Against Cross-Defendants Marine Terminals, C&T

Trucking, Horatius Carney and David Thompson)

41. Cross-Claimants Western Tube and Sumitomo repeat and reallege the allegations of Paragraphs 1 through 40, above, as though fully set forth herein.

42. CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1), provides for an action by a private party for contribution from any other party who is liable or potentially liable under CERCLA §107(a), 42 U.S.C. §9607(a).

43. Plaintiff seeks to hold Cross-Claimants Western Tube and Sumitomo liable under CERCLA §107(a), 42 U.S.C. §9607(a), for all costs resulting from alleged releases or threatened releases of hazardous substances at the Property.

44. Cross-Claimants Western Tube and Sumitomo deny they are liable under any facts or theories alleged in the First Amended Complaint. However, to the extent that it is determined that, under CERCLA §113(f), 42 U.S.C. §9613(f), Cross-Claimants Western Tube and Sumitomo are liable for costs or damages, all of which are denied by Cross-Claimants Western Tube and Sumitomo, Cross-Claimants Western Tube and Sumitomo are entitled to contribution from Cross-Defendants for some or all such costs or damages.

WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for relief as hereinafter set forth.

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THIRD CLAIM FOR RELIEF

(Declaration that Cross-Defendants Marine Terminals,
C&T Trucking, Horatius Carney and David Thompson
Are Liable Parties Under CERCLA)

45. Cross-Claimants Western Tube and Sumitomo reallege and incorporated by reference Paragraphs 1 through 44 above, as though fully set forth herein.

46. An actual controversy has arisen and now exists between Cross-Claimants Western Tube and Sumitomo, on the one hand, and Cross-Defendants, on the other hand, in that Cross-Claimants Western Tube and Sumitomo contend, and Cross-Claimants Western Tube and Sumitomo are informed and believe that Cross-Defendants deny that Cross-Defendants are liable for the necessary costs of response in connection with the Property, as well as other damages.

47. This Court has jurisdiction pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. §9613(g)(2) and 28 U.S.C. §2201(a), to enter a declaratory judgment establishing liability for future costs incurred in response to releases and threatened releases of hazardous substances.

48. Absent a judicial declaration setting forth the parties' rights, obligations and liabilities with respect to these costs, a multiplicity of actions may result.

49. Cross-Claimants Western Tube and Sumitomo therefore request a judicial determination of the following rights, obligations and liabilities of the parties with regard to the allegedly hazardous substances on the Property and a judicial declaration setting forth Cross-Defendants' liabilities to Cross-Claimants Western Tube and Sumitomo, including, without limitation:

1 (a) that Cross-Defendants are "persons" under CERCLA who
2 owned or operated a "facility" at the time of a release of
3 hazardous substances;

4 (b) that Cross-Defendants are jointly and severally liable
5 to Cross-Claimants Western Tube and Sumitomo for all past,
6 present and future response costs under CERCLA §107(a), 42 U.S.C.
7 §9607(); and

8 (c) that Cross-Defendants are liable to Cross-Claimants
9 Western Tube and Sumitomo for contribution under CERCLA §113(f),
10 42 U.S.C. §9613(f).

11 50. Said judicial determination is necessary and appropriate in
12 order that the Cross-Claimants Western Tube and Sumitomo may ascertain
13 their rights under applicable statutes as against Cross-Defendants.

14 WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
15 relief as hereinafter set forth.

16 FOURTH CAUSE OF ACTION

17 (Common Law Contribution

18 **Against Cross-Defendants Marine Terminals, C&T**
19 **Trucking, Horatius Carney and David Thompson)**

20 51. Cross-Claimants Western Tube and Sumitomo reallege and
21 incorporate by reference Paragraphs 1 through 50 above, as though fully
22 set forth herein.

23 52. Cross-Claimants Western Tube and Sumitomo have an equitable
24 right of contribution against Cross-Defendants.

25 53. While expressly denying that Cross-Claimants Western Tube and
26 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
27 Western Tube and Sumitomo allege that if they are held liable for any
28 or all of the alleged injuries and damages purportedly sustained by

1 Plaintiff, any such liability of Cross-Claimants Western Tube and
2 Sumitomo will be a direct and proximate result of the acts, conduct or
3 failure to act on the part of Cross-Defendants, and each of them, and
4 not as a result of any acts, conduct or failure to act by Cross-
5 Claimants Western Tube and Sumitomo.

6 54. While expressly denying that Cross-Claimants Western Tube and
7 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
8 Western Tube and Sumitomo allege that if they are held liable for any
9 or all of the alleged injuries and damages purportedly suffered by
10 Plaintiff, the conduct of Cross-Claimants Western Tube and Sumitomo was
11 passive, secondary and derivative and not active or primary. Cross-
12 Claimants Western Tube and Sumitomo are informed and believe, and on
13 that basis allege that the conduct of Cross-Defendants, and each of
14 them, was active, primary and affirmative.

15 55. While expressly denying that Cross-Claimants Western Tube and
16 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
17 Western Tube and Sumitomo allege that if they are held liable for any
18 or all of the alleged injuries and damages purportedly suffered by
19 Plaintiff, principles of equity entitle Cross-Claimants Western Tube
20 and Sumitomo to equitable contribution from Cross-Defendants, and each
21 of them, in proportion to each party's liability and fault.

22 WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
23 relief as hereinafter set forth.

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1 FIFTH CLAIM FOR RELIEF

2 (Implied Equitable Indemnity

3 Against Cross-Defendants Marine Terminals, C&T

4 Trucking, Horatius Carney and David Thompson)

5 56. Cross-Claimants Western Tube and Sumitomo reallege and
6 incorporate by reference Paragraphs 1 through 55 above, as though fully
7 set forth herein.

8 57. While expressly denying that Cross-Claimants Western Tube and
9 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
10 Western Tube and Sumitomo allege that if they are held liable for any
11 or all of the alleged injuries and damages purportedly suffered by
12 Plaintiff, the conduct of Cross-Claimants Western Tube and Sumitomo was
13 passive, secondary and derivative and not active or primary. Cross-
14 Claimants Western Tube and Sumitomo are informed and believe, and on
15 that basis allege that the conduct of Cross-Defendants, and each of
16 them, was active, primary and affirmative.

17 58. The equitable position of Cross-Claimants Western Tube and
18 Sumitomo with respect to the Plaintiffs Claims is superior to that of
19 the Cross-Defendants. Accordingly, each of the Cross-Defendants has
20 an equitable duty, implied in law, to indemnify, defend and hold Cross-
21 Claimants Western Tube and Sumitomo harmless from and for the Claims,
22 and from or for any other damages, losses, and expenses, including
23 attorneys' fees, which may be incurred by Cross-Claimants Western Tube
24 and Sumitomo in connection with the Plaintiff's Claims or any other
25 claims relating to the Property.

26 59. While expressly denying that Cross-Claimants Western Tube and
27 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
28 Western Tube and Sumitomo allege that if they are held liable for any

1 or all of the alleged injuries and damages purportedly suffered by
2 Plaintiff, principles of equity entitle Cross-Claimants Western Tube
3 and Sumitomo to equitable indemnification, in whole or in part, from
4 Cross-Defendants, and each of them, for any judgment or settlement paid
5 by Cross-Claimants Western Tube and/or Sumitomo for Plaintiff's Claims
6 and any other damages, losses, and expenses, including attorneys' fees,
7 which may be incurred by Cross-Claimants Western Tube and Sumitomo in
8 connection with Plaintiff's Claims or any other claims relating to the
9 Property.

10 WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
11 relief as hereinafter set forth.

12 SIXTH CLAIM FOR RELIEF

13 (Negligence Against Cross-Defendants Marine Terminals,
14 C&T Trucking, Horatius Carney and David Thompson)

15 60. Cross-Claimants Western Tube and Sumitomo reallege and
16 incorporate by reference Paragraphs 1 through 59 above, as though fully
17 set forth herein.

18 61. Cross-Defendants, and each of them, owed a duty of care with
19 respect to maintenance of the Property, including, without limitation,
20 a duty to (1) operate and maintain the Property in accordance with all
21 applicable laws and regulations; (2) prevent the release or threatened
22 release of contaminants or waste at, from, or below the Property; and
23 (3) make appropriate financial plans and reserve the funds necessary
24 for the investigation and clean-up of the Property.

25 62. Cross-Defendants, and each of them, breached the foregoing
26 duty of care by, among other things (1) not operating and maintaining
27 the Property in accordance with all applicable laws and regulations;
28 (2) not preventing the release or threatened release of contaminants

1 or waste at, from, or below the Property; and (3) not making
2 appropriate financial plans and reserving the funds necessary for the
3 investigation and clean-up of the Property.

4 63. As a direct and proximate consequence of the foregoing
5 breach, Cross-Claimants Western Tube and Sumitomo have incurred, and
6 in the future will incur, costs, expenses and attorneys' fees in
7 investigation and defense of Plaintiff's Claims.

8 64. While expressly denying that Cross-Claimants Western Tube and
9 Sumitomo are liable to Plaintiff in any respect, Cross-Claimants
10 Western Tube and Sumitomo allege that if they, or either of them, are
11 held liable for any or all of the alleged injuries and damages
12 purportedly suffered by Plaintiff, such liability would be a direct and
13 proximate result of Cross-Defendants' breach of duty.

14 65. Cross-Claimants Western Tube and Sumitomo are entitled to
15 damages from Cross-Defendants, and each of them, for any judgment or
16 settlement paid by Cross-Claimants Sumitomo and/or Western Tube for
17 Plaintiff's Claims and any other damages, losses, and expense,
18 including attorneys' fees, which may be incurred by Cross-Claimants
19 Western Tube and/or Sumitomo in connection with Plaintiff's Claims or
20 any other claims relating to the Property.

21 WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
22 relief as hereinafter set forth.

23 **SEVENTH CLAIM FOR RELIEF**

24 **(Breach of Sublease By Western Tube Against**

25 **All Cross-Defendants Except Marine Terminals)**

26 66. Cross-Claimants Western Tube and Sumitomo reallege and
27 incorporate by reference Paragraphs 1 through 65 above, as though fully
28 set forth herein.

1 67. Cross-Claimants Western Tube and Sumitomo are informed and
2 believe, and on that basis allege that Cross-Claimant Western Tube
3 entered into a written sublease with KOT and one or more oral subleases
4 with C&T Trucking with respect to a portion of the Property
5 (collectively, the "Subleases").

6 68. Cross-Claimants Western Tube and Sumitomo deny liability for
7 the Claims and deny that they are liable in any way to the Port.
8 However, to the extent, if any, Cross-Claimants Western Tube and
9 Sumitomo have liability (whether held liable or not) for the Claims
10 asserted by the Port, KOT, Paul Bojanower, C&T Trucking, Carney and
11 Thompson are liable to Cross-Claimants Western Tube under the Subleases
12 for the entire extent of Cross-Claimants Western Tube's and Sumitomo's
13 liability to the Port.

14 69. WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
15 judgment as hereinafter set forth.

16 EIGHTH CLAIM FOR RELIEF

17 (Contribution Pursuant to Section 1009 of the Oil
18 Pollution Act Against Cross-Defendants Marine
19 Terminals and C&T Trucking)

20 70. Cross-Claimants Western Tube and Sumitomo reallege and
21 incorporate by reference paragraphs 1 through 69 above, as though fully
22 set forth herein.

23 71. Cross-Claimants Western Tube and Sumitomo are accorded the
24 right under OPA §1009, 33 U.S.C. §2709, to seek contribution from "any
25 other person who is liable or potentially liable under [the OPA], or
26 another law."

27 72. Marine Terminals and C&T Trucking were given formal notice
28 of Cross-Claimants Western Tube's and Sumitomo's intent to sue under

1 the OPA in a letter dated November 25, 1996 ("Notice"). True and
2 correct copies of the said Notice are attached hereto as Exhibit "B"
3 and are incorporated herein by this reference.

4 73. Cross-Claimants Western Tube and Sumitomo deny liability for
5 all claims in the First Amended Complaint, Cross-Claims and any other
6 claims relating to the Property.

7 74. However, if Cross-Claimants Western Tube and/or Sumitomo are
8 determined to be liable to any person or entity under the OPA, the
9 Cross-Defendants Marine Terminals and C&T Trucking are liable to Cross-
10 Claimants Western Tube and Sumitomo, pursuant to § 1009 of the OPA.

11 75. WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
12 judgment as hereinafter set forth.

13 NINTH CLAIM FOR RELIEF

14 (Contribution Pursuant to RCRA and/or Federal
15 Common Law Against Cross-Defendants Marine
16 Terminals and C&T Trucking)

17 76. Cross-Claimants Western Tube and Sumitomo reallege and
18 incorporate by reference paragraphs 1 through 75 above, as though fully
19 set forth herein.

20 77. Cross-Claimants Western Tube and Sumitomo, as herein alleged,
21 are each a "person" within the meaning of RCRA §7002, 42 U.S.C. §6972,
22 as defined by 42 U.S.C. §6903(15).

23 78. RCRA §7002(a)(1)(B), 42 U.S.C. §6972(a)(1)(B), provides that
24 any person may commence a civil action on his own behalf for
25 appropriate relief against any person who has contributed or who is
26 contributing to the past or present handling, storage, treatment,
27 transportation, or disposal of any solid or hazardous waste which may
28 present an imminent and substantial endangerment to health or to the

1 environment.

2 79. Cross-Claimants Western Tube and Sumitomo are informed and
3 believe, and on that basis allege that Marine Terminals and C&T
4 Trucking (hereinafter collectively referred to as "Noticed Defendants")
5 have contributed and are contributing to the past and present handling,
6 storage, treatment, transportation and/or disposal of solid and/or
7 hazardous waste at, and adjacent to, the Property, as defined by 40
8 C.F.R. §§ 261.2 and 261.3, hereinbefore alleged, and that as a result
9 thereof have presented, currently present and may and will present an
10 imminent and substantial endangerment to health and to the environment
11 as contemplated by RCRA § 7002(a)(1)(B).

12 80. Marine Terminals and C&T Trucking were given formal notice
13 of Cross-Claimants Western Tube's and Sumitomo's intent to sue under
14 RCRA on November 25, 1996. True and correct copies of the November 25,
15 1996 Notice to Marine Terminals and C&T Trucking are attached hereto
16 as Exhibit "B" and are incorporated herein by this reference. The
17 Notice, described herein, delineated the specific violations of law.
18 The Notice was sent by certified mail, addressed to the persons
19 required to be notified pursuant to RCRA §7002(b)(2)(A), 42 U.S.C.
20 §6972(b)(2)(A), and regulations promulgated thereunder. Such Notice
21 was given more than 90 days prior to the filing and serving of this
22 Cross-Claim.

23 81. Cross-Claimants Western Tube and Sumitomo deny liability for
24 all claims in the First Amended Complaint, Cross-Claims and any other
25 claims relating to the Property.

26 82. However, if Cross-Claimants Western Tube and/or Sumitomo are
27 determined to be liable to any person or entity under RCRA, the Cross-
28 Defendants are, pursuant to RCRA and/or federal common law, liable to

1 Cross-Claimants Western Tube and Sumitomo for contribution.

2 83. WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
3 judgment as hereinafter set forth.

4 TENTH CLAIM FOR RELIEF

5 (Contribution Pursuant to the Clean Water Act
6 and/or Federal Common Law Against Cross-
7 Defendants Marine Terminals and C&T Trucking)

8 84. Cross-Claimants Western Tube and Sumitomo reallege and
9 incorporate by reference paragraphs 1 through 83 above, as though fully
10 set forth herein.

11 85. CWA §505(a)(1), 33 U.S.C. §1365(a)(1) provides that a citizen
12 may bring a suit on his own behalf for appropriate relief against any
13 person who is alleged to be in violation of an effluent standard or
14 limitation under the CWA. The term "effluent standard or limitation"
15 for purposes of CWA §505(a)(1) includes any unlawful act under CWA
16 §301, 33 U.S.C. §1311. CWA §301(a) prohibits the discharge of any
17 pollutant from a point source into navigable waters of the United
18 States, unless in compliance with specified sections of the CWA.
19 Further, CWA §311(b)(1), 42 U.S.C. §1321(b)(1) declares that it is the
20 policy of the United States to no discharges of oil to the navigable
21 waters or shorelines shall be permitted.

22 86. Cross-Claimants Western Tube and Sumitomo are informed and
23 believe, and on that basis allege that the Noticed Defendants, as a
24 consequence of their use, possession, ownership and/or operation of the
25 Property have discharged, released and disposed, and continue to
26 discharge, release and dispose, of solid wastes, including oil,
27 petroleum wastes and hazardous wastes at the Property onto, into, and
28 adjacent to the Property, and that such solid wastes have

1 intermittently discharged and continue to intermittently discharge, as
2 a result of continued leaching and migration of such wastes from the
3 Property to the Clinton Basin and the Oakland Estuary Inner Harbor.
4 Said unlawful discharges are discharges of pollutants from a point
5 source into navigable waters of the United States within the meaning
6 of and in violation of CWA §301, 33 U.S.C. §1311.

7 87. Cross-Claimants Western Tube and Sumitomo notified Marine
8 Terminals and C&T Trucking in a letter dated November 25, 1996. Said
9 Notices delineated the specific violations of the law, were sent by
10 certified mail, and were addressed to the persons required to be
11 notified pursuant to CWA §505(a)(1), 33 U.S.C. §1365(a)(1), and
12 regulations promulgated thereunder.

13 88. Cross-Claimants Western Tube and Sumitomo deny liability for
14 all claims in the First Amended Complaint, Cross-Claims and any other
15 claims relating to the Property.

16 89. However, if Cross-Claimants Western Tube and/or Sumitomo are
17 determined to be liable to any person or entity under the Clean Water
18 Act, Cross-Defendants are, pursuant to RCRA and/or federal common law,
19 liable to Cross-Claimants Western Tube and Sumitomo for contribution.

20 90. WHEREFORE, Cross-Claimants Western Tube and Sumitomo pray for
21 judgment as hereinafter set forth.

22 **ELEVENTH CAUSE OF ACTION**

23 **(Declaratory Relief**

24 **Against Cross-Defendants Marine Terminals, C&T**
25 **Trucking, Horatius Carney and David Thompson)**

26 91. Cross-Claimants Western Tube and Sumitomo reallege and
27 incorporate by reference paragraphs 1 through 90 above, as though fully
28 set forth herein.

- 1 1. For general damages according to proof;
- 2 2. For special damages according to proof;
- 3 3. For judgment under CERCLA §113 in an amount according to
- 4 proof;
- 5 4. For judgment under CERCLA §107 in an amount according to
- 6 proof;
- 7 5. For judgment under OPA §1009 in an amount according to proof;
- 8 6. For judgment under CWA §505 in an amount according to proof;
- 9 7. For judgment under RCRA §7002(a)(1)(B) in an amount according
- 10 to proof;
- 11 8. For contribution of any and all amounts which Cross-Claimants
- 12 Western Tube and Sumitomo are held liable with respect to the matters
- 13 alleged herein.
- 14 9. For equitable indemnification of any and all amounts which
- 15 Cross-Claimants Western Tube and Sumitomo are held liable with respect
- 16 to the matters alleged herein.
- 17 10. For a declaration of the respective rights and liabilities
- 18 of Cross-Claimants Western Tube and Sumitomo and the Cross-Defendants
- 19 for such damages, if any, and a declaration that Cross-Claimants
- 20 Western Tube and Sumitomo are entitled to contribution and
- 21 indemnification from Cross-Defendants for any loss, liability, verdict,
- 22 judgment, costs or other expenses that Cross-Claimants Western Tube and
- 23 Sumitomo may incur in connection with this action.
- 24 11. For any costs with respect to the matters alleged herein;
- 25 12. For costs of suit herein incurred; and
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1 13. For such other, further legal or equitable relief as the
2 Court may deem just and proper.

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DATED: May 8, 1997

DENNEY & OTHS LLP
Richard J. Denney, Jr.
Eleanor Oths
Joseph L. Manalili

BY: Eleanor Oths
ELEANOR OTHS
Attorneys for Defendants, Counter-
Claimants and Cross-Claimants,
Western Tube & Conduit Corporation
and Sumitomo Metal U.S.A. Corporation

WESTERTUBE\OAKLAND\JRDAMEND.XCO

DENNEY & ASSOCIATES

130 NORTH BRAND BOULEVARD
FOURTH FLOOR
GLENDALE, CALIFORNIA 91203
TELEPHONE (818) 500-9030
FACSIMILE (818) 500-8079

November 25, 1996

BY REGISTERED MAIL
RETURN RECEIPT REQUESTED

C&T Trucking, Inc.
1 Maydon Court
Oakland, California 94605

Attention: Kenneth C. Evans

Re: Notice of Discharge, Notice of Intent to File Suit Pursuant to Solid Waste Disposal Act §7002(a)(1) and Federal Water Pollution Control Act §505(a)(1) and Notice Pursuant to the Oil Pollution Act, 33 U.S.C. §2701

Location of Alleged Violation: Port of Oakland, Oakland California, including, specifically, the area proximate to the Ninth Avenue Terminal of the Clinton Basin ("Port Property")

Dear Mr. Evans:

This letter constitutes notice by Western Tube and Conduit Corporation and Sumitomo Metal U.S.A. Corporation (collectively referred to as "Western Tube"), of the discharge of solid wastes, hazardous substances and/or petroleum by C&T Trucking, inc., a California corporation ("C&T"). A Complaint has been filed by the Port of Oakland ("Port") against Western Tube and other parties in the United States District Court for the Northern District of California, Case No. C 95-03721 CW. Western Tube denies all liability with respect to the matters alleged in the Complaint. Western Tube hereby serves notice to C&T of its intent to file a cross-claim against C&T in the aforementioned action.

Specifically, this letter constitutes notice by Western Tube of: (1) an alleged violation by C&T of an effluent standard or limitation pursuant to the Federal Water Pollution Control Act (33 U.S.C. §1365 ("CWA §505(a)")); (2) intent by Western Tube to initiate suit against C&T for alleged violations of §7002(a)(1)(A) of the Solid Waste Disposal Act (42

EXHIBIT

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U.S.C. §6972 ("RCRA §7002") and under §7002(a)(1)(B) of this Act for disposing of solid or hazardous waste which creates an imminent and substantial endangerment to health or the environment; and (3) the obligation of C&T to compensate Western Tube for removal costs and damages resulting from an alleged oil pollution incident.

This Notice to file suit under RCRA §7002(a)(1) is being given pursuant to 40 C.F.R. §§ 254.2 and 254.3, which set forth the requirements for notice prior to filing a RCRA §7002(a)(1) suit.

This Notice to file suit under CWA §505(a)(1) is being given pursuant to 40 C.F.R. §§ 135.2 and 135.3, which set forth the requirements for notice prior to filing a CWA §505(a)(1) suit.

This Notice of the obligation of C&T to compensate Western Tube for removal costs and damages resulting from an alleged oil pollution incident is being tendered pursuant to the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 et seq., 40 C.F.R. Part 136.

A. Facts

Western Tube and Sumitomo Metal incorporates by reference this Notice Letter dated November 25, 1996 to C&T from the Port.

On October 20, 1995, the Port filed a complaint against Western Tube and other entities in the United States District Court for the Northern District of California.

The Port alleges that solid wastes, hazardous substances and petroleum products have leaked and/or were discharged, thereby contaminating the soil, surface water, and groundwater at, and adjacent to, the Port Property. The complaint further alleges that the aforementioned substances have not been removed, contained or otherwise immobilized. The complaint further alleges that the alleged contamination constitutes a continuing discharge and release into and through the soil, surface water and groundwater as a result of leaching and migration.

C&T leased or otherwise controlled and operated on the Port Property or continues to release or otherwise control or operate the Port Property. Western Tube is informed and believes and thereby alleges that during C&T's operations at the Port Property, it stored, used and otherwise maintained solid wastes.

hazardous substances and/or petroleum. Western Tube is informed and believes and thereby alleges that C&T's operations caused or permitted to be caused the discharge of solid wastes, hazardous substances and/or petroleum at the Port Property. Western Tube is informed and believes and thereby alleges that such contamination persists at the Port Property and continues to migrate through the soil and groundwater in violation of RCRA §7002(a), CWA §505(a)(1) and the OPA, 33 U.S.C. §§ 2701 et seq.

B. The Activity Alleged To Constitutes A Violation

Reference is made to paragraph I.A. herein which is hereby incorporated by reference in its entirety.

C. The Person Or Persons Responsible For The Alleged Violation

C&T.

D. The Date Or Dates Of The Violation

On or before November 2, 1992, and through the present.

E. The Persons Giving This Notice Are

Western Tube and Conduit Corporation
Attn: Mr. Genura Murakami
Vice President
2001 East Dominguez Street
P.O. Box 2720
Long Beach, California 90801-2720

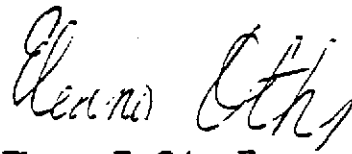
Sumitomo Metal U.S.A. Corporation
Attn: Mr. Masahiro Takeya, President
8750 West Bryn Mawr, Room 1000
Chicago, California 60631

F. Legal Counsel Giving Notice Representing The Persons Giving Notice

Denney & Associates
Richard J. Denney, Jr., Esq.
Eleanor F. Oths, Esq.
130 North Brand Boulevard, Fourth Floor
Glendale, California 91203

Very truly yours,

DENNEY & ASSOCIATES



Eleanor F. Oths, Esq.
Attorneys for Western Tube and
Conduit Corporation and Sumitomo
Metal U.S.A. Corporation

EFO:lmc

cc: Ms. Carol Browner
Administrator
United States Environmental
Protection Agency
Washington, D.C. 20460

cc: Mr. James Strock
Chief Administrative
Officer of Solid Waste
California Environmental
Protection Agency
555 Capitol Mall, Suite 235
Sacramento, California 95814

cc: Ms. Felicia Marcus
Regional Administrator
United States Environmental
Protection Agency
75 Hawthorne Street
San Francisco, California 94105

cc: Barney Chan
Alameda County Health Care
Services Agency
80 Swan Way, Room 200
Oakland, California 94621

C&T Trucking, Inc.
November 25, 1996
Page 5

cc: Walt Pettit State Water Resources Control Board 901 "P" Street Sacramento, California 95814	cc: Steve Ritchie Regional Water Quality Control Board San Francisco Region 210 Webster, Suite 500 Oakland, California 94612
cc: Perry Officer Joseph D. Ramos U.S. Coast Guard Building 14 Coast Guard Island	cc: Michele Heffes, Esq. Deputy Port Attorney Port of Oakland 530 Water Street, 4th Floor Oakland, California 94607
cc: Jonathan W. Redding, Esq. Richard T. White, Esq. Fitzgerald, Abbott & Beardsley LLP 1221 Broadway, 21st Floor Oakland, California 94612-1837	

WTC

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 Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check boxes for additional service(s) requested.

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 C&T Trucking, Inc.
 1 Maydon Court
 Oakland, CT 94605.

4. Article Number
 2066 455 699

Type of Service:
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 Certified COD
 Express Mail Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee
 X *Kenneth A. Evans*

6. Signature - Agent
 X

7. Date of Delivery
 11-30-96

8. Addressee's Address (ONLY if requested and fee paid)



PS Form 3811, Apr. 1989 © U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

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Street and No.: 1 Maydon Court

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Postage: \$1.00

Certified Fee: \$1.00

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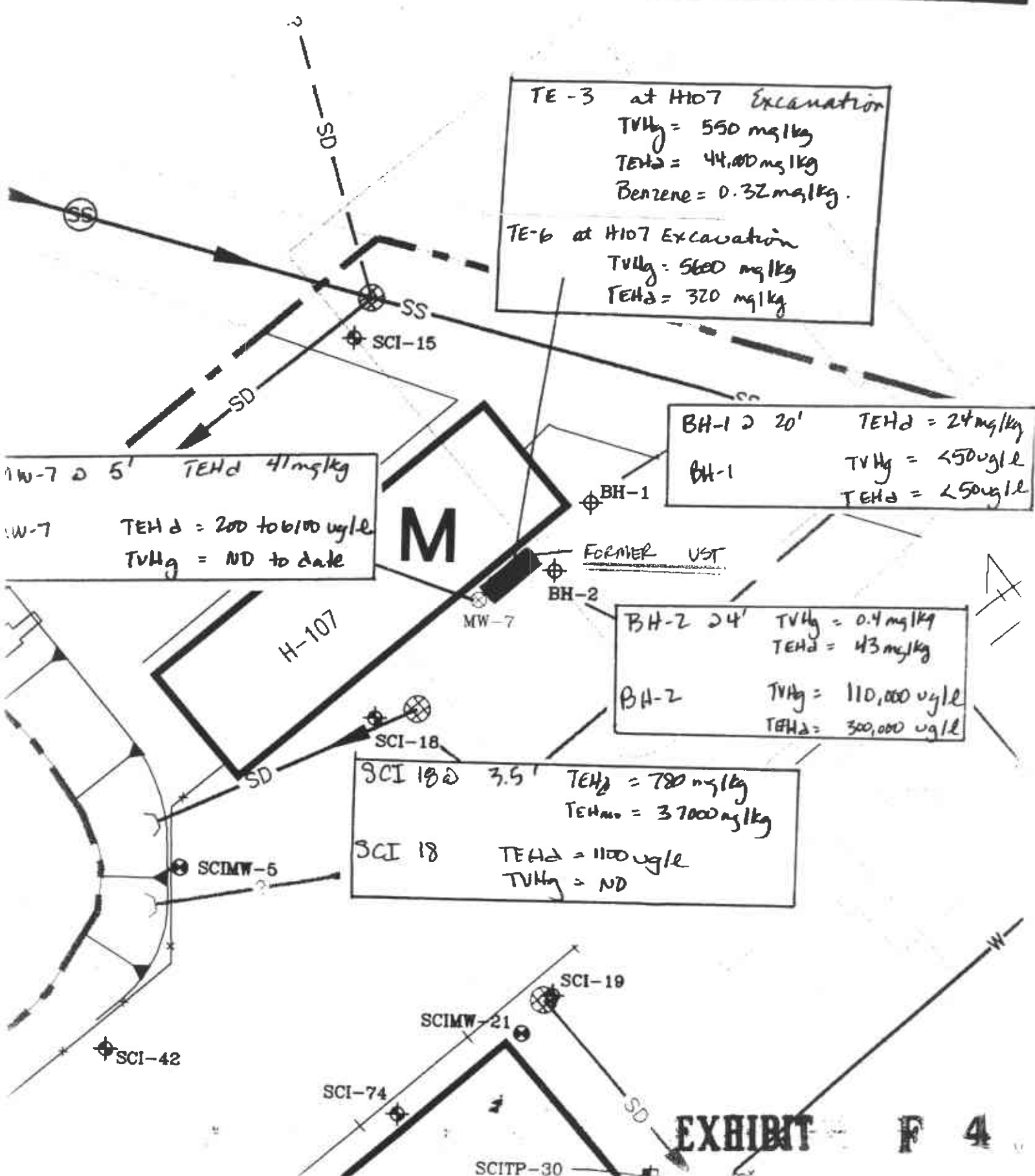
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Return Receipt Showing to Whom, Date, and Addressee's Address:

TOTAL Postage & Fees: \$

Postmark or Date: 11/25/96

PS Form 3800, March 1993



TE-3 at H107 Excavation
 TVHg = 550 mg/kg
 TEHa = 44,000 mg/kg
 Benzene = 0.32 mg/kg

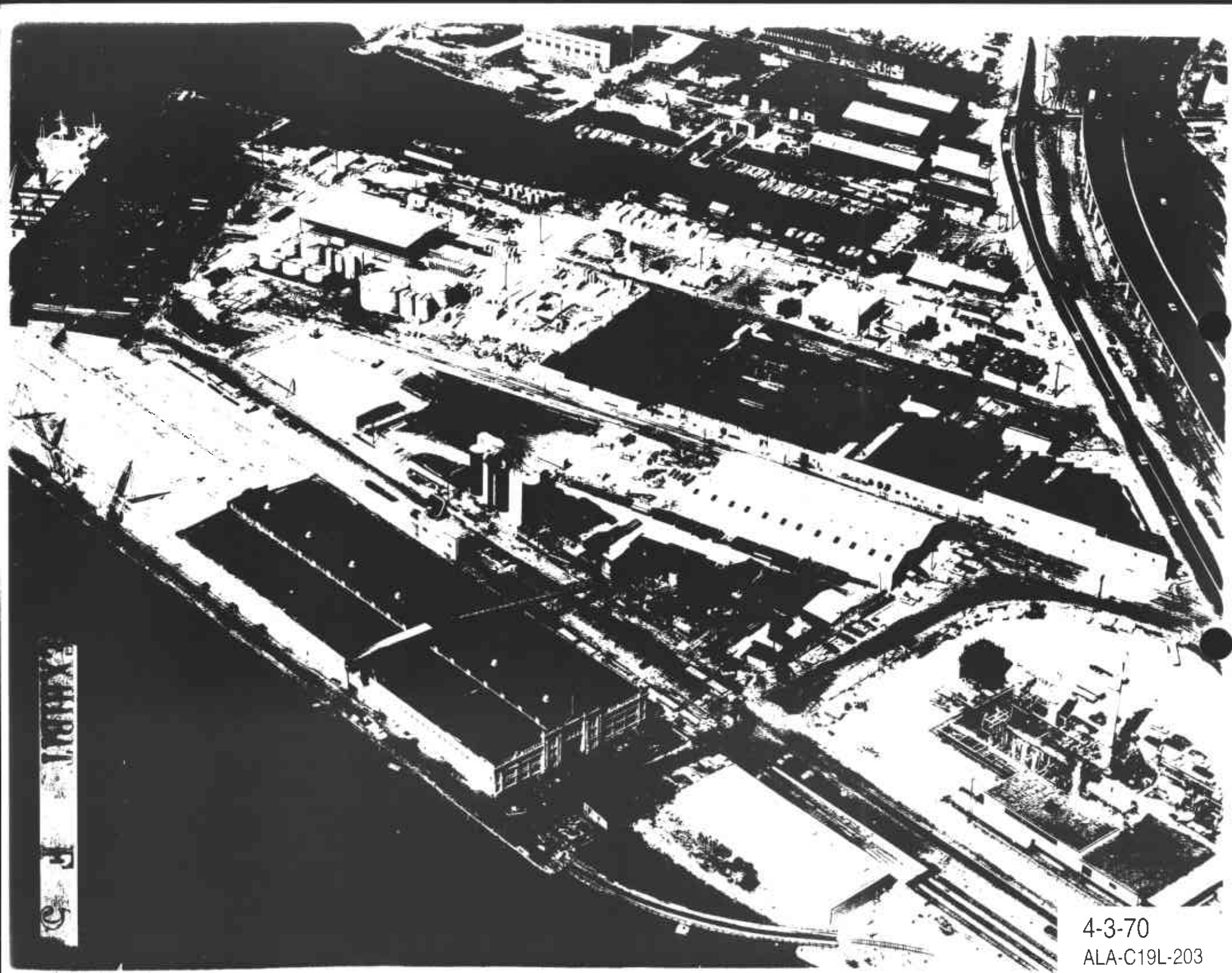
TE-6 at H107 Excavation
 TVHg = 5600 mg/kg
 TEHa = 320 mg/kg

MW-7 @ 5' TEHa 41 mg/kg
 MW-7 TEHa = 200 to 6100 ug/L
 TVHg = ND to date

BH-1 @ 20' TEHa = 24 mg/kg
 BH-1 TVHg = <50 ug/L
 BH-1 TEHa = <50 ug/L

BH-2 @ 24' TVHg = 0.4 mg/kg
 BH-2 TEHa = 43 mg/kg
 BH-2 TVHg = 110,000 ug/L
 BH-2 TEHa = 300,000 ug/L

SCI 18 @ 3.5' TEHa = 780 mg/kg
 SCI 18 TEHno = 37000 mg/kg
 SCI 18 TEHa = 1100 ug/L
 SCI 18 TVHg = ND



G. F. WILKINSON

4-3-70
ALA-C19L-203



4-24-73
AV-1100-5-19



Subsurface Consultants, Inc.

R. William Rudolph, P.E.
President

February 26, 1998
SCI 133.009

Mr. Kerry Zimmerman, Esq.
Fitzgerald, Abbott & Beardsley, LLP
1221 Broadway, 21st Floor
Oakland, California, 94612-1837

**Western Tube & Conduit H107 UST Usage
Ninth Avenue Terminal
Oakland, California**

Dear Mr. Zimmerman:

Subsurface Consultants, Inc. (SCI) has reviewed numerous documents, aerial photographs and analytical data pertaining to the areas of use by Western Tube & Conduit (Western) at the Ninth Avenue Terminal. Western leased Building H107 and adjacent areas from about 1968 to 1974. Based on information provided to the Port by Western, Western sublet a portion of H107 to a transportation company named C&T Trucking from 1968 to 1973. Western has told the Port that C&T operated the UST at H107. It is unclear who actually operated the H107 tank after 1973. However, the president of the next H107 leaseholder, the C. D. Ericson Company, was also the president of Western. The tank was removed by the Port in 1994.

Aerial photographs reviewed by SCI for the Western lease period show staining in the area of the H107 dispenser stand. This type of staining is indicative of petroleum product releases which are inherent with the operation of a fuel distribution system

Review of site specific analytical data from the tank area strongly suggests that past releases of petroleum products did occur in the H107 UST area. Small ongoing releases would have occurred when the pump was activated or during vehicle and tank filling. These type of releases go virtually unnoticed or otherwise unacknowledged as an

Mr. Kerry Zimmerman, Esq.
Western UST Usage
February 26, 1998
Page 2

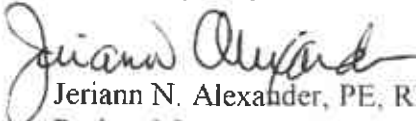
Subsurface Consultants, Inc.

environmental concern since they are releases to the subsurface, and such releases if identified were and still are expected with the operation of a fuel distribution system.

Based on our experience at numerous UST sites, the observed staining, the site specific analytical data and the industry acknowledgment that releases are inherent with the operation of petroleum product distribution systems leads us to conclude that impacts to soil and groundwater likely occurred during Westerns and their sublessee's operation of the UST. Impacts to soil and groundwater in the tank area would not have been identified if it were not for the studies performed by the Port to date.

If you have any further questions, please call the undersigned.

Yours very truly,


Jeriann N. Alexander, PE, REA
Project Manager