



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



Pete Wilson
Governor

APR 17 1998

Kerry I. Zimmerman
Fitzgerald, Abbott & Beardsley LLP
Attorneys at Law
PO Box 12867
Oakland, CA 94604-2867

Eleanor Oths
Denney & Oths LLP
130 North Brand Boulevard, Fourth Floor
Glendale, CA 91203

Dear Mr. Zimmerman and Ms. Oths:

PETITION, UNDERGROUND STORAGE TANK LOCAL OVERSIGHT PROGRAM,
SITE NO. 3335, 370 8TH AVENUE, OAKLAND, ALAMEDA COUNTY, FILE NO.
P98-190

This is in response to your letter dated April 13, 1998 regarding the subject petition
submitted on behalf of the Port of Oakland. At your request, we will hold the petition in
abeyance until further notification from you.

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

Sincerely,

Lori Casias
Local Oversight Program

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



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.*

JAMES C. SOPER, INC.
PHILIP M. JELLEY, INC.
GERALD C. SMITH
LAWRENCE R. SHEPP
RICHARD T. WHITE
MICHAEL P. WALSH
J. BRITTAIN HABEGGER
VIRGINIA PALMER
TIMOTHY H. SMALLSREED
STEPHEN M. JUDSON
STEPHEN M. WILLIAMS
JONATHAN W. REDDING
BETH E. ASPEDON
KRISTIN A. PACE
MICHAEL M. K. SEBREE
ANTONIA L. MORE
SARAH ROBERTSON McCUAIG
PHILIP E. DRYSDALE
JAY M. GOLDMAN
KERRY I. ZIMMERMAN
MICHAEL S. WARD
JEAN C. FUNG
FATIMA BRUNSON EVANS
KEVIN G. MEIN

FITZGERALD, ABBOTT & BEARDSLEY LLP

ATTORNEYS AT LAW

1221 BROADWAY, 21ST FLOOR
OAKLAND, CALIFORNIA 94612-1837

TELEPHONE: (510) 451-3300

PLEASE REPLY TO:

P. O. Box 12867
OAKLAND, CALIFORNIA 94604-2867

R. M. FITZGERALD 1858-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1882-1963
FACSIMILE: (510) 451-1527

April 13, 1998

STD
3335

Dorothy Jones, Esq. Dorothy Jones, Mstr Lori Casias Ms. Lori Casias
State Water Resources State Water Resources State Water Resources
Control Board Control Board Control Board
Department Counsel UST Programs
2014 T Street, Suite 130 2014 T Street, Suite 130
Sacramento, CA 94244-2120 Sacramento, CA 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

Dear Ms. Jones and Ms. Casias:

The undersigned parties wish to place on hold the State Water Resources Control Board ("SWRCB") review of the petition and appeal of the Port of Oakland to the petition of Western Tube & Conduit.¹ The undersigned parties have reached a tentative resolution of this matter and therefore request that the SWRCB presently suspend all procedural and evidentiary hearings and dispositions regarding this matter.

¹ A copy of the petition for review by Western Tube & Conduit dated 11/2/97, and the Port's appeal to the petition dated 3/2/98 and a preliminary response by Western Tube & Conduit dated 3/18/98, are attached hereto as Exhibit A.

Dorothy Jones, Esq.
Ms. Lori Casias

Page 2

April 13, 1998

The parties will keep you informed regarding the status of this matter.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

By Kerry I. Zimmerman 4/13/98

Kerry I. Zimmerman
Counsel for the Port of Oakland

Eleanor Oths 4/15/98

Eleanor Oths
Counsel for Western Tube & Conduit

Attachment

cc: Barney Chan
Michele Heffes
Gentaro Murakami

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)
3 130 North Brand Boulevard, 4th Floor
Glendale, CA 91203
4 tel (818) 500-9030; fax: (818) 500-8079

5 Attorneys for Petitioner
Western Tube and Conduit Corporation
6

7 STATE OF CALIFORNIA

8 STATE WATER RESOURCES CONTROL BOARD
9

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

15
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.

20
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."*

26
27 **3. Date on Which the Agency Acted:**

28 October 23, 1997

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.

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 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

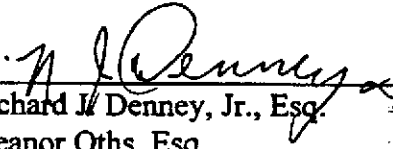
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: ReInb97M 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 CA 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**

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

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

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

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



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



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



17 BY MAIL



19 BY HAND-DELIVERY



21 * I deposited such envelope in the mail at Glendale,
22 California. The envelope was mailed with postage
23 thereon fully prepaid.



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

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

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

JAMES C. SOPER, INC.
PHILIP M. JELLEY, INC.
GERALD C. SMITH
LAWRENCE R. SHEPP
RICHARD T. WHITE
MICHAEL P. WALSH
J. BRITTAIN HABEGGER
VIRGINIA PALMER
TIMOTHY H. SMALLSREED
STEPHEN M. JUDDSON
STEPHEN M. WILLIAMS
JONATHAN W. REDDING
BETH E. ASPEDON
KRISTIN A. PACE
MICHAEL M. K. SEBREE
ANTONIA L. MORE
SARAH ROBERTSON McCUAIG
PHILIP E. DRYSDALE
JAY M. GOLDMAN
KERRY I. ZIMMERMAN
MICHAEL S. WARD
JEAN C. FUNG
FATIMA BRUNSON EVANS
KEVIN G. MEIN

FITZGERALD, ABBOTT & BEARDSLEY LLP

ATTORNEYS AT LAW

1221 BROADWAY, 21ST FLOOR
OAKLAND, CALIFORNIA 94612-1837

TELEPHONE: (510) 451-3300

PLEASE REPLY TO:

P. O. Box 12867
OAKLAND, CALIFORNIA 94604-2867

R. M. FITZGERALD 1858-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1882-1963
FACSIMILE: (510) 451-1527

March 2, 1998

VIA FEDERAL EXPRESS

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

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

March 2, 1998

additional information to support its appeal¹. Based on follow-up telephone conversations with Ms. Lori Casias shortly thereafter, the Port was informed that our letters of February 2, 1998, would be deemed to be the Port's petition for review and notice of appeal.

To avoid redundant arguments, this supplement to prior appeal incorporates all of the legal arguments made by the Port of Oakland in previous correspondences to the SWRCB.

I. Procedural History/Status Of Appeals And Petitions for Review

A. Temporary Stay Of Proceedings

Pursuant to discussions this office has had with Alameda County Health Care Services Agency's ("Alameda County") regulator Barney Chan, it is our understanding that Alameda County and the SWRCB have stayed adjudication of any and all future, past or present petitions submitted by the parties who have been designated by the local agency as responsible for contamination associated with the operation and or legal control of underground storage tanks at the Ninth Avenue Terminal, Oakland (the "Site").

The Port contends that Alameda County, has applied the appropriate legal standard to determine that the designated parties at a variety of UST's at the Site are "responsible parties" for investigative and corrective action under the relevant provisions of the Water Code and Health and Safety Code. Any changes in the designation by the local agency is the result of the SWRCB's selective imposition of its interpretation of the statutory language defining "responsible party," upon the local agency. This interpretation is contrary to forty (40) years of case law and well established rules of statutory construction in the State of California.

Specifically, as contained in our letters of February 2, 1998, the Port contends that the SWRCB's interpretation of who may be designated as a responsible party is inconsistent with prior California Attorney General opinions, Regional Water Quality

¹ True and correct copies of the Port Oakland's February 2, 1998 correspondence to Alameda County and the SWRCB are attached (without exhibits; see Lori Casias for exhibits to those letters regarding the Encinal Terminals petition/appeal) hereto as Exhibit "A".

Dorothy Jones, Esq.
Ms. Lori Casias
Page 3

March 2, 1998

Control Board directives and decisions as well as the express statutory language that defines a "responsible party." Further, the SWRCB is ignoring the well established legal principal that once a term (in this case the term "responsible party") takes on a customary usage subsequent statutes that incorporate that term of art, cannot take a different interpretation, unless the Legislature has expressly defined the term so as to support such an interpretation. California Correctional Officers' Assn. v. Board of Administration, 76 Cal.App.3d 786, 794 (1978). See also: Zoecon Corporation, State of California, State Water Resources Control Board, Order No. WQ 86-2 which interpreted the term "discharge"; and: 27 Ops.Atty.Gen. 182 Opinion No. 55-236 (1956). In this case, we have found no statutory definition or evidence of an intent by the Legislature to define the term "responsible party" differently in the Local Oversight Program, than the definition applicable to every other section of the California Water or Health and Safety Codes. If there is such authority, please forward to us any legal memorandum or case citations supporting your position.

We hasten to add that the Port, although an interested party was not afforded an opportunity to be heard or to file evidence prior to the decision of the SWRCB.

B. Status Of Pending Appeals And Petitions

1. In the Matter of the Petition of Encinal Terminals:

On or about January 27, 1998, Encinal Terminals ("Encinal") served a petition for review with respect to Alameda County's designation of Encinal as a responsible party for the investigation and cleanup of the Site with respect to underground storage tank(s) it operated and/or had legal control over (State Site ID No. 5067).

On January 29, 1998, the SWRCB removed Encinal from the responsible party list because there was "no evidence that the unauthorized release occurred during the time of their involvement with the site."

March 2, 1998

By letters dated February 2, 1998 (see Exhibit "A"), and February 11, 1998² our office briefed the legal issues regarding the proper standard for naming a responsible party and provided evidentiary basis that controverted the SWRCB's deletion of Encinal from the responsible party list. The matter of the petition of Encinal is now fully briefed and the Port of Oakland is awaiting the SWRCB's reversal of its decision or the noticing of an evidentiary hearing.

2. In the Matter of the Petition of Marine Terminals Corporation:

On or about January 29, 1998, Marine Terminals Corporation ("MTC") served its petition requesting review of Alameda County's decision to name MTC as a responsible party for the investigation and cleanup of the Site with respect to underground storage tank(s) it operated and/or had legal control over (State Site ID No. 5067).

On or about February 10, 1998, our office was informed by Barney Chan of Alameda County that Alameda County was not removing MTC from its designation as a responsible party because he had ample evidence of releases during MTC's period of occupancy at the Site.

3. In the Matter of the Petition of Gold Shield Distributors:

On or about February 4, 1998, Gold Shield Distributors ("Gold Shield") filed a petition requesting review of Alameda County's decision to name Gold Shield as a responsible party for the investigation and cleanup of the Site with respect to underground storage tank(s) it operated and/or had legal control over (State ID No. 6894).

As discussed in Section A above, it is our understanding that Barney Chan of Alameda County is staying adjudication of the designation of responsible parties with respect to Gold Shield until the SWRCB gives Alameda County further direction with respect to the legal standard that should be applied to the determining who is a responsible party. The Port of

² A true and correct copy of the Port of Oakland's February 11, 1998, correspondence to the SWRCB and Alameda County is attached hereto as Exhibit "B".

March 2, 1998

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. 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.

March 2, 1998

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
Page 9

March 2, 1998

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)

DENNEY & OTHS LLP

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

March 13, 1998

Ms. Lori Casias
Local Oversight Program
State Water Resources Control Board
Post Office Box 944212
Sacramento, CA 94244-2120

Re: Port of Oakland v. Keep on Trucking, et al.
Our Client: Western Tube & Conduit Corporation

Dear Ms. Casias:

This letter responds to Jonathan Redding's letter to you and Dorothy Jones dated March 2, 1998. Mr. Redding's letter seeks to "appeal" the rulings of both the Alameda County Health Care Services Agency ("ACHCSA") and the State Water Resources Control Board ("SWRCB") to remove Western Tube as a responsible party for the 9th Avenue Terminal.

At the outset, we note that Mr. Redding's letter is untimely. Under California law, a petitioner must file a petition within 30 days of an agency's decision. 23 CCR § 2050. This deadline is mandatory because the SWRCB "will not accept any petition received after the 30-day period" has expired. SWRCB Resolution No. 88-23.

The SWRCB ruled on December 11, 1997 that Western Tube is not a responsible party for this site since no evidence indicated a release during Western Tube's tenancy. The ACHCSA concurred with the SWRCB's decision on December 16, 1997. However, neither the Port's March 2, 1998 letter nor its February 2, 1998 letter were filed within the statutorily-prescribed 30-day period. The March letter was filed over 75 days after the decisions. The February letter, which our firm never received, was filed over 50 days after the decisions. Because the Port significantly exceeded the 30-day period to file these letters, they are time-barred.

By way of background, the Port has sued Western Tube and various other parties for alleged contamination of the 9th Avenue Terminal. At the request of the Port, the lawsuit has

Ms. Lori Casias

March 13, 1998

Page 2

Re: Port of Oakland v. Keep on Trucking, et al.

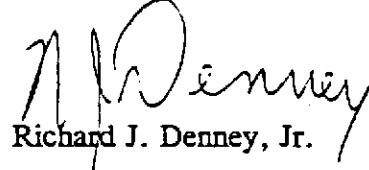
been stayed during efforts to mediate among the parties. The Port was apparently hoping to use the ACHCSA to make the Port's case against Western Tube while the litigation and discovery is stayed. We understand that the Port asked the ACHCSA to name Western Tube as a responsible party, which the ACHCSA did. Under SWRCB Resolution No. 88-23, Western Tube appealed the decision. In preparing its appeal, Western Tube sought to find out on what evidence the ACHCSA was relying. The ACHCSA did not cite any such evidence, and therefore, Western tube was unable to respond to any specific evidence. We so noted in our appeal to the SWRCB; the SWRCB agreed with us and ordered the ACHCSA to remove Western Tube as a "responsible party."

Since the Port's attempt to get Western Tube named as a liable party without having to make the Port's case in litigation did not work, the Port, in its March 2, 1998 letter to the SWRCB states that we "duped" the SWRCB by not making a case against ourselves, since ACHCSA had none. The Port then attempts to correct our oversight (or "duping") by throwing in a number of allegations of its own. We believe that they are wrong and are prepared to so prove. However, as we noted, the Port's appeal is out of time. Furthermore, neither ACHCSA nor the SWRCB should permit itself to be used by the Port as an alternative forum for finding parties liable while the court stays litigation at the request of the Port. The Port will have ample opportunity when the stay is lifted to prove all of its allegations in court, just as we will have an opportunity in court to rebut them.

Thank you for your consideration of this matter.

Very truly yours,

DENNEY & OTHS LLP


Richard J. Denney, Jr.

RJD:br

Ms. Lori Casias

March 13, 1998

Page 3

Re: Port of Oakland v. Keep on Trucking, et al.

cc: ✓ Mr. Barney Chan
Jonathan W. Redding, Esq.
Mitchell S. Griffin, Esq.
Carol A. Woo, Esq.
Gary A. Angel, Esq.
Frear Stephen Schmid, Esq.