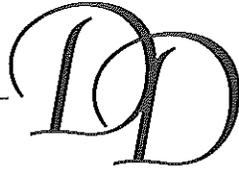


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March 16, 2015

Charles Ridenour
Branch Chief
Brownfields and Environmental Restoration Program
Department of Toxic Substances Control
8800 Cal Center Drive
Sacramento, California 95826
Attention: Martin Herrmann, Project Manager

Re: Imminent and Substantial Endangerment Determination and Remedial
Action Order (As Amended on 10/30/14), Benicia International Associates
Site, 711 Jackson Street, Solano County, Benicia, California 94510
Docket No. I/SE RAO 13/14-007 ["Amended BIA Order"]
Notice/Response Pursuant to Section 7 of the Amended BIA Order

Dear Mr. Ridenour:

Please recall that this office represents APS West Coast, Inc. dba Amports, Inc. ["Amports"] (formerly known as "Benicia Industries, Inc.") with regards to the Imminent and Substantial Endangerment Determination and Remedial Action Order for the Benicia International Associates Site, 711 Jackson Street, Solano County, Benicia, California 94510 ["the Site"], which was originally issued on June 24, 2014 and subsequently amended on October 30, 2014 to name additional respondents, including Benicia Industries, Inc. ["Amended BIA Order"].

This letter is sent to comply with the requirements as set forth in Section 7 of the Amended BIA Order, which requests written notice stating whether respondents will comply with the terms of the Amended BIA Order and describing any sufficient cause defenses asserted by respondents.

All further references herein to "Amports" mean APS West Coast, Inc. dba Amports, Inc. formerly known as "Benicia Industries, Inc."

Please note that since Benicia Industries, Inc. ["Benicia Industries"] was named as a respondent in the Amended BIA Order, Amports has been working with DTSC and the named parties to address the concerns in the Amended BIA Order. Moreover, pursuant to Section 6.1 of the Amended BIA Order, Amports provided DTSC with the requested information regarding the Project Coordinator for Amports in correspondence dated December 3, 2014.

Amports submits the following to advise DTSC that it objects to certain findings of fact in the Amended BIA Order, to request modification of the Amended BIA Order, and to provide defenses to the issuance of the Amended BIA Order against Benicia Industries or, in the alternative, to indicate why any liability for costs or expenditures should be apportioned accordingly considering Benicia Industries' minimal involvement, *if any at all*, in the alleged release or threatened release of any hazardous substance at the Site.

Background on Benicia Industries and on its Inclusion as an Allegedly Responsible Party in Amended BIA Order

Records indicate that Benicia Industries leased certain real property, including the Site, from the Surplus Property Authority of the City of Benicia ["City's SPA"] pursuant to the Master Lease dated January 7, 1964 ["Master Lease"]. However, since that time, Benicia Industries never occupied or used the Site but instead subleased the Site to International Manufacturing Company ["IMC"] and/or other affiliates owned and/or operated by Rodolfo Jacuzzi beginning on or about December 1, 1966.¹

On or about June 11, 1975, Benicia Industries acquired the Site from the City's SPA and owned the Site until about March 19, 1979 when it sold it to Shareholders Properties, Ltd. During that time, IMC leased the Site from Benicia Industries and IMC continued to use and occupy the Site for its various businesses and operations.

When the original BIA Order was issued in June of 2014, Benicia Industries was not named as a respondent. Instead, Benicia Industries was named as an additional respondent in this matter four months after the original parties had been named.

¹ With regards to this particular Site, other affiliates, entities, businesses, etc. have been associated with and/or owned or operated by Rodolfo Jacuzzi and/or his successors, including but not limited to: "Dynamic Wheels, Inc.," "Autostyles, Inc.," and "Benicia International Associates."

The Amended BIA Order Requires Modification In Order to Provide Accurate Information

At the outset, the Amended BIA Order needs to be revised because it contains inaccurate information regarding Benicia Industries and because an additional responsible party should be named.

A. The Amended BIA Order Incorrectly States that Benicia Industries was a “Lessor” Pursuant to a Master Lease Dated January 7, 1964

In describing the basis for Benicia Industries’ alleged liability as a responsible party, the Amended BIA Order alleges that Benicia Industries is a responsible party based on its alleged possession and control of the Site as a Lessor pursuant to the master lease dated January 7, 1964 [“Master Lease”] as well as on its alleged former ownership of the Site. However, it should be clarified that Benicia Industries’ status under the Master Lease is actually as a lessee and as a *sublessor* considering that the Amended BIA Order asserts that Benicia Industries subleased the Site to IMC. Therefore, the Amended BIA Order should be revised accordingly.

B. Autostyles, Inc. should be added to the Amended BIA Order as a Responsible Party

Our review of the records indicates that another party should be named as a responsible party subject to the Amended BIA Order. The principal of IMC, Rodolfo Jacuzzi, was also the principal of Autostyles, Inc. and/or conducted business as Autostyles, Inc. as evidenced in a lease with Benicia Industries dated May 1, 1979 as well as insurance documents listing Autostyles, Inc.’s address as Building 165, which is located on the Site and is subject to the Amended BIA Order. This is yet another reason to revise the Amended BIA Order accordingly.

In addition to the need to modify the Amended BIA Order, the following defenses exist to explain why the Amended BIA Order should not have been issued against Benicia Industries.

Benicia Industries is Not a Responsible Party or Liable Party as Defined in Health & Safety Code Section 25323.5

With regards to liability for cleanup of contaminated sites pursuant to the state’s CERCLA counterpart, the Hazardous Substances Account Act [“HSAA”], Health &

Safety Code Section 25323.5(a)(1) states that “responsible party” or “liable person” means those persons described in Section 107(a) of CERCLA (42 U.S.C. Sec. 9607(a)), including: (1) the current owner and operator of a facility; (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which there was disposal of the substances; (3) any person who contracted or arranged for the disposal, treatment, or transport of hazardous substances it owned or possessed; and (4) any person who accepted any hazardous substances for transportation to disposal or treatment facilities or sites selected by that person.²

According to the allegations in the Amended BIA Order, Benicia Industries is named as a responsible or liable party based on its possession and control of the property as a “Lessor” (although inaccurately described as such in the Amended BIA Order as discussed above) under the Master Lease and based on its former ownership of the property when release(s) to the environment allegedly occurred or continued. In other words, the Amended BIA Order names Benicia Industries as a responsible party based on being an alleged owner or operator of a facility when hazardous substances were allegedly disposed.

However, as indicated in the arguments and evidence set forth below, Benicia Industries is not a responsible or liable party upon whom HSAA liability should be imposed.

A. Benicia Industries did not own or operate the Site *at the time of disposal* of any hazardous substance

“Disposal” has been defined under CERCLA as the “discharge, deposit, injection, dumping, spilling, leaking, or placing” of hazardous material into or on land or water so that the hazardous material may *enter the environment* or be emitted into the air or discharged into any waters.³ Despite the vague allegations in the Amended BIA Order, there is no evidence indicating that Benicia Industries owned or operated the Site during any such disposal of a hazardous substance.

² For the purposes of this discussion herein, it should also be noted that because the HSAA also adopts by reference the provisions of CERCLA regarding “responsible parties” and “liable parties” pursuant to Health & Safety Code Section 25323.5(a)(1), references to CERCLA liability herein also apply to HSAA liability.

³ 42 USC §9601(29) (incorporating RCRA definition of “disposal,” 42 USC §6903(3)).

1. Benicia Industries itself did not occupy or use the Site nor did it dispose of any of hazardous substances on the Site

Given the information provided in the Amended BIA Order, there does not seem to be any evidence that Benicia Industries *disposed* of any hazardous substances on the Site during the time that it leased the Site from the City's SPA (from about January 7, 1964 to June 1975) through to the time that it owned the Site (from about June 11, 1975 to March 19, 1979).

Moreover, while it may have leased the Site under the Master Lease with the City's SPA, Benicia Industries did not itself *possess, occupy, or use* the Site. Instead, beginning in December of 1966 IMC subleased the Site from Benicia Industries, continued to lease the Site after Benicia Industries acquired the Site from the City's SPA, and during the entire time used the Site to operate various businesses as indicated in the Amended BIA Order until at least February 25, 1981. Benicia Industries ceased owning the Site after selling it to Shareholders Properties, Ltd. in about March of 1979.

Without evidence of any disposal of hazardous substances by Benicia Industries, it should not be determined to be a responsible or liable party.

2. Benicia Industries is not liable as an "operator" of the Site

For CERCLA/HSAA purposes, "an operator must manage, direct, or conduct operations *specifically related to* pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."⁴ "[O]perator" liability' only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment."⁵

Here, at no time can operator liability attach to Benicia Industries because Benicia Industries never managed, directed, or conducted any operations that may have been specifically related to the alleged contamination as indicated in the BIA Amended Order, including any contamination allegedly caused by IMC, during the time that Benicia

⁴ *U.S. v. Bestfoods* (1998), 524 U.S. 51, 66-67 (emphasis added).

⁵ *Carson Harbor Village, Ltd. v. Unocal Corp.* (2003), 287 F.Supp.2d 1118, 1194 (quoting from *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.* (9th Cir. 1992), 976 F.2d 1338, 1341 (citing *Nurad, Inc. v. William E. Hooper & Sons Co.* (4 Cir. 1992), 966 F.2d 837, 842); *CPC Int'l., Inc. v. Aerojet-General Corp.* (W.D. Mich. 1989), 731 F.Supp 783, 788).

Industries leased the Site from the City's SPA and later subleased/leased the Site to IMC. In other words, Benicia Industries did not exercise the level of control sufficient to impose operator status on it, as it was not actively involved in a day-to-day managerial basis in running the facility or the Site where any alleged pollution may have occurred.⁶

As indicated by allegations made in the Amended BIA Order, operator status may potentially apply to IMC as Benicia Industries' subtenant/tenant which between 1966 to 1980 (the year after Benicia Industries sold the Site) owned and operated a facility that manufactured, assembled, and sold equipment and/or wheels and that may have allegedly used solvents in its operations.

In addition, because "a party must do more than stand by and fail to prevent the contamination", Benicia Industries cannot be considered an operator under CERCLA/HCAA solely because of its status as a lessee under the Master Lease and later as a sublessor/lessor with IMC as only IMC (and its affiliates/subsidiaries, such as Autostyles) actually conducted business and operations on the Site during the time that Benicia Industries leased or owned the Site (from at least 1966 to 1979).⁷

3. There is insufficient evidence to attach liability to Benicia Industries for any alleged disposal conducted by IMC

With regards to IMC's use of the Site during its lease from Benicia Industries, the Amended BIA Order states that "the location and exact chemicals used in the area are *unknown*" and that "[s]olvents *may have* been used to degrease the aluminum wheels." However, this information is insufficient to determine that Benicia Industries' subtenant (and later tenant), IMC, disposed of hazardous substances during its sublease/lease of the Site from Benicia Industries.

In essence, there is insufficient evidence cited in the Amended BIA Order to determine that there was any alleged "disposal" of hazardous substances *at the time* that Benicia Industries leased or owned the Site.

⁶ See *American Cyanamid Co. v. Capuano* (1st Cir. 2004), 381 F.3d 6, 22-23; *Browning-Ferris Industries of Ill., Inc. v. Ter Maat* (7th Cir. 1999), 195 F.3d 953, 957, cert.den. (2000) 529 U.S. 1098; *Long Beach Unified School Dist. v. Dorothy B. Godwin Calif. Living Trust* (1994), 32 F.3d 1364, 1367.

⁷ *Long Beach Unified School Dist. v. Dorothy B. Godwin Calif. Living Trust* (1994), 32 F.3d 1364, 1368.

4. Benicia Industries is not a responsible party as an intervening owner with regards to the Army's release of hazardous substances on the Site or any such alleged release by IMC

An intervening owner (i.e., a former owner or operator of contaminated property who did not own or operate the property at the time of the hazardous substance release because it either transferred its interest in the property or ceased to operate the property before any action was taken or liability imposed with respect to the contamination) would be subject to CERCLA/HSAA liability as a responsible party if the party "obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the [party] owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge".⁸

Also, for intervening owners to be responsible or liable under CERCLA and HSAA, there has to be some sort of "disposal" of hazardous waste on the property during the time they owned the property.⁹ As mentioned above, this means that for liability to attach, "there must have been a 'discharge, deposit, injection, dumping, spilling, leaking, or placing' of contaminants on the property during their ownership."¹⁰ Furthermore, depending on the specific facts, the gradual passive migration of contamination through soil is also not considered a disposal under CERCLA, especially where the prior owner of the property had no part in depositing or releasing the contaminants on the site.¹¹

Here, as indicated in the Amended BIA Order, the Army was allegedly responsible for disposing hazardous substances to the Site during its ownership of the Site. If any alleged release of such hazardous substances continued after the Army sold the Site to the City's SPA and through to the time that Benicia Industries leased and later owned the Site, such alleged contamination cannot be attributed to Benicia Industries as it does not qualify as an intervening owner and, thus, a potentially responsible party for purposes of CERCLA/HSAA liability based on criteria set forth in 42 USC §9601(35)(C).

More specifically, Benicia Industries took title to the Site *after* the alleged release of hazardous materials thereon by the Army but did not contribute to the alleged contaminated condition of the Site. When Benicia Industries owned the Site, it did not obtain actual knowledge of the alleged release or threatened release of such hazardous

⁸ 42 USC §9601(35)(C).

⁹ See 42 USC §9607(a)(2) and *Carson Harbor Village, Ltd. v. Unocal Corp.* (9th Cir. 2001), 270 F.3d 863, 875.

¹⁰ *Id.*

¹¹ See *Carson Harbor Village, Ltd. v. Unocal Corp.* (9th Cir. 2001), 270 F.3d 863, 879-880.

substances on the Site due to the Army's use/ownership of the Site nor did Benicia Industries subsequently transfer ownership without disclosing such knowledge of the environmental condition of the Site to the subsequent buyer of the Site because Benicia Industries did not have knowledge of such condition in the first place.

Moreover, Benicia Industries cannot be held liable as an intervening owner with regards to any alleged release caused by IMC, if any, prior to Benicia Industries owning the Site because there is no evidence that Benicia Industries had actual knowledge of any alleged hazardous substances which may be *possibly* attributable to its lessee, IMC, and/or Autostyles, Inc.

In addition, Benicia Industries is not a responsible party based on any alleged theory of gradual passive migration of contamination of the Site (due to either the activities of the Army or IMC) because such passive migration does not qualify as a disposal which would impose liability under CERCLA/HSAA, especially considering that Benicia Industries is the prior owner of the Site and had no part in depositing or releasing any alleged contaminants on the Site.

Benicia Industries Has Statutory Defenses to Any Alleged HSAA Liability

In general, Health and Safety Code Section 25323.5(b) indicates that for the purposes of HSAA, the defenses available to a responsible party or liable person shall be those defenses specified in Sections 101(35) and 107(b) of CERCLA, namely: (1) act of war defense; (2) act of God defense; (3) the third party defense; and (4) the "innocent landowner defense".¹² In this specific matter, the third party defense and innocent landowner defense apply to provide Benicia Industries with defenses for liability pursuant to the Amended BIA order.

1. The Release and/or Threatened Release of Hazardous Substances Was Caused Solely by a Third Party: the Army

According to the third party defense set forth in 42 U.S.C. Section 9607(b)(3), there shall be no liability if it can be established by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in

¹² See 42 USC §§ 9601(35) and 9607(b).

connection with a contractual relationship, existing directly or indirectly, with the defendant...”

Benicia Industries did not have any contractual relationship with the Army, which by itself as a third party, caused the release or threatened release of a hazardous substance during the Army’s ownership and operation of the Site as discussed in the Amended BIA Order. There is insufficient evidence to indicate that there were multiple causes of the release or threatened release of hazardous substances which would negate this third party defense. Furthermore, there is insufficient evidence to indicate that there was any other release of hazardous substances allegedly attributable to IMC considering that the Amended BIA Order simply states that “the location and exact chemicals used in the area are unknown” and that “[s]olvents *may have* been used to degrease the aluminum wheels”.

In addition, Benicia Industries can prove that it (a) exercised due care with respect to the alleged hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.¹³

2. The Innocent Landowner Defense May be Available to Benicia Industries

This defense entails an owner showing that: (1) it acquired the Site *after* the disposal or placement of the hazardous substance on, in or at the Site; (2) at the time it acquired the property, the owner did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the Site (or it acquired the property by inheritance or bequest); (3) it exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of the hazardous substance, in light of all relevant facts and circumstances; (4) it took precautions against the foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions; (5) it provided *full cooperation, assistance and access* to the property to persons authorized to conduct response actions at the property (including the cooperation and access necessary for the installation, integrity, operation and maintenance of any complete or partial response action); (6) it complied with any land

¹³ 42 USC § 9607(b)(3).

use restrictions established or relied on in connection with the response action at the property; and (7) it has not impeded the effectiveness or integrity of any “institutional control” employed at the property in connection with a response action.¹⁴

Based on the information discussed above, Benicia Industries can show that it meets the requirements set forth above, especially considering that it acquired the Site *after* the alleged disposal or placement of the hazardous substance on, in, or at the Site and that it did not know and had no reason to know that any hazardous substance was disposed of on, in, or at the Site.

Benicia Industries cannot be liable under HSAA for acts prior to January 1, 1982 that did not violate any state or federal laws

Unlike CERCLA, there is no unlimited retroactive HSAA liability as the “HSAA does not impose liability for acts that occurred prior to January 1, 1982, if those acts did not violate existing federal laws at the time they occurred.”¹⁵

Therefore, considering that Benicia Industries either leased or owned the Site from approximately 1964 to 1979, HSAA liability cannot be attributed to Benicia Industries retroactively if any alleged acts occurred before the January 1, 1982 threshold date. This is applicable to any of the Army’s acts on the Site that resulted in a disposal or release of hazardous substances, especially if any such acts may have been legally permissible as they had occurred during wartime.

If liability were to still be imposed on Benicia Industries as a responsible or liable party, any liability attributed to Benicia Industries should be apportioned accordingly considering that at most it contributed minimally, *if at all*, to any alleged release or threatened release of hazardous at the Site

Generally, the “HSAA provides for the apportionment of recoverable costs and expenditures between parties based on the portion of costs attributable to each party.”¹⁶

Furthermore, the DTSC is authorized to make “de minimis” administrative or judicial settlements with potentially responsible parties who have contributed a minimal amount of hazardous substances to a site, if either of the following conditions are met:

¹⁴ 42 USC § 9601(35)(A).

¹⁵ Health & Safety Code § 25366; also see *United Alloys, Inc. v. Baker* (C.D. Cal. 2011) 797 F.Supp.2d 974, 1005.

¹⁶ *Coppola v. Smith* (2013), 935 F.Supp.2d 993, 1037.

(1) The amount of hazardous substances and the toxic or other hazardous effects of the hazardous substances contributed by the potentially responsible party to the facility are minimal in comparison to the amount and effects of other hazardous substances at the facility;

(2) The potentially responsible party is the owner of the real property on or in which the facility is located, did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, and did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission. This paragraph does not apply if the potentially responsible party, at the time of the purchase of the real property, knew or should have known that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.¹⁷

With all of this in mind and given the discussion above, if DTSC still determines that Benicia Industries is a responsible or liable party with regards to the Amended BIA Order, only a minimal amount of any alleged recoverable costs and expenditures should be attributed to Benicia Industries considering that, if it can be proven only a minimal amount, *if any at all*, of hazardous substances to the Site was contributed by Benicia Industries.

Benicia Industries Intends to Demand Indemnification and Tender Insurance With Regards to its Prior Sublease/Lease Agreements with IMC and Autostyles

Please note that Benicia Industries intends to seek indemnification and contribution as well as to tender insurance from its former lessees, IMC and Autostyles, in order to address any alleged liability that may be imposed upon Benicia Industries under the Amended BIA Order.

Amports/Benicia Industries reserves the right to supplement this notice with additional information regarding responsible parties, additional evidence, and applicable defenses

As this notice provides our initial submission of the notice required pursuant to Section 7 of the Amended BIA Order, we reserve the right to do additional review and research

¹⁷ Health & Safety. C §25360.6.

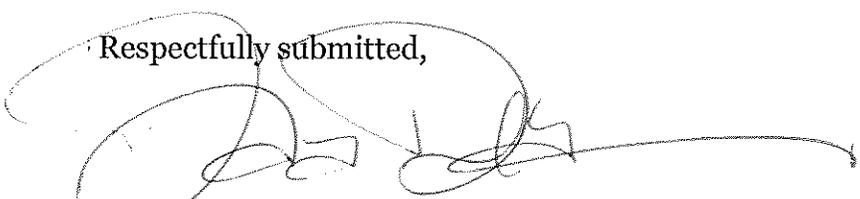
in order to name and include other responsible parties and/or to provide additional evidence proving that it is not a responsible party and/or that it has other applicable defenses. This point is especially important considering that Benicia Industries as a respondent was named only in the Amended BIA Order (four months after the initial issuance of the BIA Order) and we have, thus, had less time to research and review the issues as compared to the other named parties.

Again, please note that we reserve all of the rights pertaining to the Amended BIA Order, including but not limited to the right to present any and all objections, defenses, and challenges to the Amended BIA Order and/or any Remedial Action Plan related to the Amended BIA Order and the right to request an administrative hearing and/or seek judicial review of the Amended BIA Order and/or any Remedial Action Plan related to the Amended BIA Order.

If you have any questions or would like to discuss the matter further, please feel free to contact me at the above-listed number.

Thank you for your courtesy and cooperation with this matter.

Respectfully submitted,



DANA DEAN

- cc: Cecelia C. Fusich, Vernon Law Office (Benicia International Associates)
Rodolfo Jacuzzi (Dynamic Wheels, Inc. FKA International Mfg. Co. Inc.)
Alarice R. Hansberry (U.S. Army Corps of Engineers)
Vivian S. Murai (Office of Legal Counsel, DTSC)
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- cc: *(By email only)*
Heather McLaughlin (City of Benicia) (Surplus Property Authority of the City of Benicia)