

**Appendix B**

**Revised Cleanup Staff Report**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

**August 29, 2013  
File No. 43S1090 (NMK)**

**Revised Cleanup Staff Report**

This report provides the basis for the Water Board Cleanup staff's (Staff) recommendation to adopt Site Cleanup Requirements (SCR) naming Moonlite Associates, LLC, (Moonlite Associates) and United Artist Theater Circuit, Inc., (UATC) as Dischargers, for the former Moonlite Cleaners site (Site) located at 2640 El Camino Real, Santa Clara, Santa Clara County. This report was revised in response to comments received on a publicly noticed Tentative Order and focuses on Staff's recommendation to name UATC and Moonlite Associates as dischargers based upon the following evidence:

- A dry cleaner using tetrachloroethene (PCE) operated at the Site for approximately 35 years, from 1962 to 1997.
- The Site is contaminated with PCE, as evidenced by indoor air, soil gas, and groundwater monitoring results.
- UATC owned the property from 1961 to 1975, and then continued as the master lessor until 1978.
- Moonlite Associates has owned the property from 1977 to the present.
- Both UATC and Moonlite owned the Site at the time of the PCE discharges, had knowledge of the activities which resulted in the discharges, and had the legal ability to prevent the discharges.

**I. Background**

The Water Board has provided regulatory oversight for this case since March 2009, at which time Moonlite Associates voluntarily enrolled in our cost recovery program. Moonlite Associates has been conducting the investigation and cleanup, and has requested the Water Board to name UATC as an additional discharger. Moonlite Associates does not object to being named as a discharger in the SCR. UATC objects to being named as a discharger.

This Staff Report provides the rationale for naming UATC as an additional discharger. UATC retained Erler & Kalinowski, Inc. (EKI) to assess the likelihood of a PCE release between 1962 and 1978 and submit a report detailing their findings. This Staff Report also provides a detailed response to this March 2013 EKI report and the basis for Staff's assertion that PCE discharges did occur during the time period in question.

**II. Site Location**

The Site is located at 2640 El Camino Real in Santa Clara (Figure 1). The Site is located in the Moonlite Shopping Center (Figure 2). The Moonlite Shopping Center is bounded to the west by Kiely Boulevard, to the east by Bowe Avenue and Saratoga Creek, to the north by El Camino

Real, and to the south by an alley. Saratoga Creek is located immediately east of Bowe Avenue. El Camino Real is a large boulevard, primarily used by commercial businesses and as an east to west thoroughfare, and is flanked by residential neighborhoods located one block to the north and south.

The former Moonlite Cleaners Site is an approximately 3,000 square foot tenant space and is presently occupied by Cosmo's Gifts, a retail store. The largest tenant spaces in the Moonlite Shopping Center are occupied by Save Mart Super Market, Rite Aid Drugs, Palo Alto Medical Group, Home Town Buffet, and Office Max. There are twenty-five additional smaller tenant spaces.

### **III. Site History**

#### **A. History of Owners and Operators**

Multiple different dry cleaners using the name Moonlite Cleaners operated at the Site from 1962 to 1997.

UATC owned the shopping center from about 1961 to 1975, and then continued as the master lessor until 1978. UATC owned and, as master lessor, controlled the shopping center where the dry cleaner operated as a tenant for 17 years, from 1961 to 1978. On September 5, 2000, UATC and affiliated entities filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. The court entered an order confirming a plan of reorganization for UATC on January 25, 2001.

Moonlite Associates, the current property owner, has owned the Site since 1977. Moonlite Associates owned the shopping center during the time when the dry cleaner operated as a tenant for 20 years, from 1977 to 1997.

All previous owners and operators of the Moonlite Cleaners dry cleaning business are not named as dischargers because they are either deceased, or their current location is unknown. Cleanup Staff will send site history requirement letters to the individuals with known addresses whose contact information was recently provided. Once staff has reviewed the site history responses they will provide a recommendation to the Board about naming additional parties as dischargers.

#### **B. Fire Marshal Permit and Dry Cleaning Equipment Used**

On May 11, 1961, the State Fire Marshal issued a permit (Fire Marshal Permit) for establishment of a dry cleaner facility and installation of dry cleaning equipment at the Moonlight Shopping Center. On July 10, 1962, the City of Santa Clara Building Department issued a certificate of occupancy authorizing the operation of the dry cleaning business. This Fire Marshal Permit, the Building Department permit, the equipment used, and the discussion below, support that PCE was used at the Site beginning in 1962.

The Fire Marshall Permit indicates the following equipment was installed at the Site:

- Hoffman Master Jet Cleaning Unit

- Hoyt SF-130 Reclaimer
- Per Combo Filter-Still Cooker
- Vapor-Mat Model 800

The permit also refers to solvents and contains requirements for its proper handling, such as piping and ventilation. According to an employee of Hoffman/New Yorker, Inc. (personal communication with Richard Grecco, Hoffman New Yorker, February 2013,), a manufacturer and distributor of dry cleaning equipment for over 100 years, the Hoffman Master Jet Cleaning Unit and the Hoyt SF-130 Reclaimer are machines designed to be used only with chlorinated solvent dry cleaning fluids such as PCE, and not with petroleum hydrocarbon-based fluids such as Stoddard solvent. Additionally, according to Tom Mohr (personal communication with George Cook relaying message from Tom Mohr, February 6, 2013), the principal author of the Santa Clara Valley Water District *Study of Potential for Groundwater Contamination from Past Dry Cleaner Operations in Santa Clara County*, the Per Combo Filter-Still Cooker was only used for PCE. A 1979 operation manual for the Hoyt SF-130 Reclaimer also indicates the equipment is for the use of PCE only.

There are a number of ways in which PCE releases are known to occur while performing dry cleaning operations. Some of the release mechanisms are specific to the equipment used at the Site and some relate to general practices. For example, the Per Combo Filter Still Cooker cooked down the leftover PCE mixture from the dry cleaning process, during which the PCE mixture routinely boiled over on to the floor. This cooker also produced wet PCE-laden muck waste that was messy to dispose of and would result in dripping onto the floor. The Hoyt SF-130 Reclaimer's purpose was to reclaim as much PCE as possible for reuse. It never reclaimed 100% of the PCE and the remaining PCE mixture either went into a bucket or a drain. The Vapor Mat Model 800 (a sniffer) extracted PCE that was present in the air and produced PCE-laden wastewater that needed to be disposed of. In addition, Moonlite Cleaners' operation was not a closed system, meaning that wet PCE-laden clothes were manually transferred from the wash into the Hoyt SF-130 Reclaimer for drying (and PCE reclaiming, which underscores the amount of PCE still on the wet clothes). Such transfer inevitably led to PCE dripping onto the floor.

A 1975 Bulk Transfer Agreement confirms that the original equipment identified in the 1961 Permit was still located at the facility, and includes additional equipment which suggests that facility operations expanded since 1962. This original equipment and more transferred over to a new operator, which means the same 1961 equipment was still being used in 1975 (during UATC's ownership) and resulting in PCE discharges.

#### C. PCE Discharges Occurred During UATC's Ownership and Control

The Site investigations indicate that there were substantial discharges of PCE. These discharges of PCE are consistent with common industry-wide operational practices for dry cleaners that operated from the 1960s to the 1990s. The prevalence of dry cleaner discharges is discussed in the 2007 Santa Clara Valley Water District *Study of Potential for Groundwater Contamination from Past Dry Cleaner Operations in Santa Clara County* (Water District Study). Examples of common release mechanisms from dry cleaner operations include:

- PCE spilled onto the floor from dry cleaning equipment maintenance and operation, equipment failure, solvent transfer and storage, or drips from wet clothing with residual PCE;
- PCE spilled onto the floor then seeped through concrete or cracks and reached the soil and groundwater below;
- PCE soaked into concrete and then volatilizing into indoor air;
- Spent PCE dumped onto soil behind building;
- PCE-saturated spent cartridge filters stored behind building;
- Water containing PCE (e.g., from water/solvent separator) discharged to the floor drain with leakage from the sewer lateral to soil and groundwater; and
- PCE in soil and groundwater volatilizing and intruding into indoor air.

The concentrations and distribution of PCE in groundwater, soil gas, and indoor air at the Site (the highest PCE concentrations in soil gas and groundwater are beneath the Site and downgradient from the Site), indicate that the Moonlite Cleaners' dry cleaning operations were no different than the dry cleaners discussed in the Water District Study that discharged PCE.

In addition, as discussed on pages 43 – 47 and 142 – 148 of the Water District Study, older dry cleaners used more solvent and released a greater percentage of the solvent used due to relative inefficiencies of the older equipment compared to newer equipment. The year during which a dry cleaner began operations is a useful indicator of the potential amount of PCE mass released. In general, the earlier a dry cleaner operated the more likely it is that larger quantities of PCE were released to soil and groundwater due to older equipment and common PCE handling and disposal practiced for that time period. For example, Table 13 on page 47 of the Water District Study shows how typical dry cleaners from the 1960s used much more PCE per pound of clothes cleaned and had a much higher leakage rate than a typical dry cleaner from the 1990s.

Thus, based on the physical evidence at the Site and downgradient from it (see Section VI below), the history of solvent usage at the Site beginning in 1962, the common industry-wide operational practices that led to PCE discharges in the 1960s and 1970s, and the inefficiencies of older dry cleaning equipment from the 1960s, the cleanup staff conclude that there is substantial evidence that PCE discharges occurred during UATC's ownership and control of the Site from 1962 and 1978 and afterwards when Moonlite Associates took ownership.

#### **IV. Hydrogeology**

The topography of Santa Clara is predominantly flat, sloping gently to the north northeast towards the Guadalupe River and the San Francisco Bay. Locally at the Site, the topography slopes gently to the east, towards the adjacent Saratoga Creek, that flows to the north. The elevation of the Site is approximately 80 feet above mean sea level.

The headwaters of Saratoga Creek originate in Santa Cruz Mountains at 3,100 feet, approximately 10 miles to the southwest. Saratoga Creek is the principal drainage for the

Saratoga Creek Watershed. Santa Clara Valley Water District uses Saratoga Creek upstream of the Site to recharge groundwater in the reach between the city of Saratoga and Highway 280, approximately. Saratoga Creek currently is a gaining creek adjacent to the Site. Saratoga Creek joins the San Tomas Aquino Creek before joining the Guadalupe Slough, ultimately draining to the San Francisco Bay.

The sediment beneath the Site is ancestral Saratoga Creek stream channel sediment overlying older Late Pleistocene alluvial plain sediment. The ancestral Saratoga Creek sediment is fine to coarse grained channel deposits, with fine grained flood deposits outside the channels. The pattern of fine and coarse grained lenses of sediment observed at the Site represent the deposits of the meandering ancestral Saratoga Creek flowing northward over the alluvial plain sediments. These ancestral Saratoga Creek sediment has been encountered from approximately 5 to 50 feet below ground surface during investigations. The ancestral Saratoga Creek sediment was deposited in the same orientation as the present orientation of Saratoga Creek, and the north-trending ancestral stream channels of Saratoga Creek should influence the direction of groundwater flow to the north.

The depth to groundwater in Site monitoring wells is approximately 12 feet below ground surface. The calculated groundwater flow direction at the Site is northeast, with a gradient of approximately 0.005 feet per foot. The flow direction of groundwater at the Site is most likely controlled by north-trending Saratoga Creek, the north-trending ancestral Saratoga Creek stream deposits, the gently north sloping topography, the regional groundwater gradient, and deep production wells located in the vicinity.

Concentrations of PCE have been detected in groundwater down gradient of the Site to the north, from the northeast to the northwest. This distribution of contamination in groundwater is consistent with the controlling factors that influence the groundwater flow direction.

#### **V. Investigation and Cleanup**

Significant releases of the dry cleaning chemical PCE can be attributed to the former Moonlite Cleaners. PCE has been detected in indoor air samples, in soil gas samples, and in groundwater samples in quantities far exceeding Environmental Screening Levels (ESLs) for each media. PCE is day lighting in the adjacent Saratoga Creek. Other potential dry cleaning chemicals, such as Stoddard solvent, were not detected during the investigations.

The highest historical detections of PCE in groundwater, soil gas, and indoor air are in the immediate vicinity of or directly beneath the Site, indicating a discharge directly beneath the dry cleaner. This statement is supported by the following Site data:

- PCE has consistently been detected in groundwater immediately down gradient of the Site in MW3, MW4, MW4A, MW5, and MW5A. Recent groundwater monitoring results from June 2012 detected PCE in groundwater at 1,280 ug/L in MW4, over 200 times higher than the ESL of 5 ug/L.

- The highest soil gas concentration of PCE was detected immediately beneath the former dry cleaner at 5,700,000 ug/m<sup>3</sup>, over 2,000 times higher than the ESL of 2,100 ug/m<sup>3</sup>. Soil gas concentrations decrease with distance from the former dry cleaner.
- The highest indoor air concentration of PCE was detected in the former dry cleaner at 150 ug/m<sup>3</sup> PCE, about 70 times higher than the ESL of 2.1 ug/m<sup>3</sup>. Indoor air concentrations of PCE in the adjacent tenant spaces decrease with distance from the former dry cleaner.
- The highest surface water concentration of PCE collected from Saratoga Creek was detected downstream of the former dry cleaner at 49 ug/L, approximately half of the ESL of 120 ug/L. Surface water samples collected upstream from the former dry cleaners have never contained any PCE.

The Site data clearly indicate that the highest concentrations of PCE are immediately beneath, down gradient, and downstream of the former dry cleaner, and decrease with distance away from the former dry cleaner. This pattern indicates that significant releases of PCE occurred at the former dry cleaner.

The very high PCE indoor air concentrations in the former dry cleaning location and the very high PCE soil gas concentrations immediately beneath the former dry cleaner indicate that PCE product was most likely spilled onto the concrete floor due to the sloppy nature of the dry cleaning equipment and processes. The PCE would have slowly seeped into the concrete floor, or through cracks or perforations in the concrete floor.

This release mechanism is consistent with the most common release mechanisms identified in the 2007 SCVWD Dry Cleaner Study, which cites a 2002 Florida Department of Environmental Protection dry cleaner study (Florida Study) as an excellent, comprehensive review of release mechanisms from dry cleaners. The Florida Study identified soil beneath the floor slab in the vicinity of the dry cleaning machines and distillation units as the area within dry cleaning operations most frequently contaminated by PCE. The SCVWD Dry Cleaner Study states that the Florida Department of Environmental Protection and Florida State University study (Florida Study) "...showed that more PCE mass is released as a result of solvent transfer, storage and operations than due to sewer line discharges." The SCVWD Dry Cleaner Study also notes that leaking sewer lines can be a release mechanisms.

Based on the high soil gas concentrations beneath the facility, there is a possibility that the sewer lateral immediately beneath the dry cleaning equipment (owned by UATC and Moonlite Associates) was also a source of contamination. However, these soil gas results do not indicate that a release occurred from the City sanitary sewer lines behind the facility. The highest PCE detected in soil gas concentrations beneath the slab was 5,700,000 ug/m<sup>3</sup> PCE. The highest soil gas samples collected along the City sanitary sewer are less than 1,000 ug/m<sup>3</sup> PCE, a significant difference of over three orders of magnitude, and can be attributed to the sanitary sewer gravel pack acting as a preferential pathway from the source area beneath the slab of the former Moonlite Cleaners.

In summary, the site history and the site data, taken together with the SCVWD Dry Cleaner Study, indicate that the primary release mechanism was PCE product spilled onto the concrete floor due to the sloppy nature of the dry cleaning equipment and processes. The PCE would have then slowly seeped into the concrete floor, or through cracks or perforations in the concrete floor, and then to the soil beneath the slab. A possible secondary release mechanism could have also been a leak from the sewer lateral immediately beneath the dry cleaning equipment.

A soil vapor extraction (SVE) system was installed in February 2010 beneath the former dry cleaner facility and has been operating continuously since then. The SVE system consists of five horizontal extraction pipes and eight vertical extraction wells. The purpose of the SVE system is to provide vapor intrusion mitigation to the tenants and to remove PCE mass. Approximately 300 pounds of PCE have been removed by the SVE system as of December 2012.

#### **VI. Response to March 12, 2013, EKI Report**

UATC retained Eler & Kalinowski, Inc. (EKI) to assess the likelihood of a PCE release between 1962 and 1978. EKI concluded in its March 12, 2013, report that there is no evidence of a pre-1978 PCE release for the following reasons.

- Modeled leakage of PCE-contaminated wastewater from a hypothetical leaking sewer pipe would take six years to reach groundwater, indicating a post-1978 release.
- Groundwater at the Site would have flowed to the northwest prior to the mid-1990s; therefore, if there was a pre-1978 PCE release, there would be evidence of a northwest-trending PCE groundwater plume, which does not exist.
- Groundwater flow at the Site shifted to the northeast in the mid-1990s, and since the current groundwater plume travels to the northeast, the PCE release that caused the groundwater plume happened in the mid-1980s or early 1990s.
- Groundwater levels at the Site were deeper during the pre-1978 period, therefore if a PCE release occurred pre-1978, it would have resulted in a deeper groundwater plume, which does not exist.

These conclusions are not technically supportable, as explained below.

#### **A. Sewer Leakage Model Doesn't Consider Primary Release Mechanism**

The EKI report assumes a continual leak of wastewater from a leaking sanitary sewer line as the driver for carrying PCE through soil to groundwater. Using this assumption, EKI's model predicts that the PCE would have reached groundwater in approximately six years as a result of the flushing of wastewater. Cleanup Staff disagree that this was the primary leak mechanism and assert that the extremely high PCE indoor air concentrations more likely indicate a release directly to the floor of the dry cleaner as discussed further in Sections III and V. PCE released on the floor of the dry cleaner would have seeped into the concrete floor, or through cracks or perforations in the concrete floor, and then to the soil beneath the slab. The PCE could have been bound up for years to decades in the soil immediately beneath the concrete slab and



above any sewer lines. This probable delay from the release of PCE to when PCE entered the groundwater raises questions as to the validity of EKI's age-dating of the groundwater plume.

**B. Northwest-trending Plume Not Expected Based on Groundwater Depths**

EKI infers from a review of groundwater data that groundwater at the Site would have flowed to the northwest prior to the mid-1990s; therefore, if there was a pre-1978 PCE release, there would be evidence of a northwest-trending PCE groundwater plume, which according to EKI does not exist. EKI's assertion that if a pre-1978 release occurred there should be remnants of a northwest trending groundwater plume, is dependent on (1) shallow groundwater existing beneath the Site, and (2) enough surface water in the losing Saratoga Creek to affect shallow groundwater and to cause a northwest trending plume.

*B.1 Groundwater Too Deep in 1960s and 1970s to Cause Northwest-trending Plume*

Staff disagrees with many aspects of EKI's analysis. The issue regarding a time lag between PCE releases and when PCE is present in groundwater is discussed above. Furthermore EKI's analysis of historic groundwater flow directions is flawed. There were many influences on the groundwater flow direction historically, including localized pumping from three nearby water supply wells located within one-half mile of the Site that were not taken into consideration. In addition, Saratoga Creek in the vicinity of the Site probably had little influence. Staff reviewed the USGS surface water discharge records for Saratoga Creek collected at the gage located approximately 0.5 mile southwest of Saratoga (around 9 miles upstream of the Site). The flow within Saratoga Creek was intermittent from 1962 to 1978, and depth to groundwater was very deep during this period (up to 200 feet approximately below ground surface). The only flow into the creek occurred from precipitation and minor surface runoff. In other words, Saratoga Creek only had flowing water when it was raining and it was likely a losing creek, meaning that some portion of the flow was discharging to the subsurface. Whereas today it is considered a gaining creek as groundwater is much higher and is recharging the creek.

Based on the intermittent flow in Saratoga Creek and the depth to groundwater during the 1960s and 1970s, it is highly unlikely that there was enough surface water in the creek to recharge shallow groundwater beneath the Site and alter flow direction. Therefore, PCE subsurface migration during the 1960s during UATC's ownership would not have been significantly affected by Saratoga Creek, and there should not be a northwest trending contaminant plume, which is the case. During the 1970s, after the SCVWD began actively recharging groundwater, subsurface water levels rose, but were still much deeper than today. Staff conclude that in the 1970s the creek would still not have significantly altered the groundwater flow direction to the northwest in the shallow aquifer. In the early 1990s as rising groundwater levels surpassed the surface water elevation in the creek, the northerly regional gradient shifted to the northeast near the creek, as is seen today.

### *B.2 Shell Data not Representative of Moonlite Site*

EKI used time-series groundwater elevation data from a deep well to make inferences about groundwater elevations in shallow groundwater at the Site. The index well that EKI used is a deep well located approximately six miles to the southeast that appears to be a good proxy to describe historic groundwater elevations in the groundwater basin. However, the three deep production wells within on-half mile from the Site provide a closer representation of deeper groundwater conditions beneath the Site. EKI used 1990 to 2000 groundwater data from a Shell gas station 1000 feet away from the Moonlite Cleaners Site, and on the opposite side of Saratoga Creek, to estimate a northwest groundwater flow direction at the Moonlite Cleaners Site from the early 1960s to the mid-1990s. The time and distance involved in this comparison is too large and could lead to variations in the correlations of groundwater flow directions between the two sites. For instance, groundwater flow directions for the former Chevron USA station located on the Moonlite Shopping Center property flowed southwest from April 1990 until June 1991, which is opposite than what is predicted by EKI.

### *B.3 90 Degree Variation in Groundwater Flow Direction not Supported by Shell Data*

EKI's depiction of a northwest trending groundwater plume in Figure 10 of the EKI report is not supported by the groundwater flow variations seen at the Shell gas station. Staff reviewed the groundwater flow directions from the Shell gas station contained in Attachment A of the EKI report and observed a roughly 45 degree variation in the groundwater flow direction from the time when Saratoga Creek was purportedly losing or gaining. This is less than the 60 degree variation EKI cites in Attachment A of the report, and less than the 90 degree variation EKI shows on Figures 10 and 11 for a hypothetical groundwater plume under losing-creek conditions compared to the present day groundwater plume under gaining-creek conditions.

### *B.4 PCE Plume Detected to the North*

Using a 45 degree amount of variation in the groundwater flow direction from a losing to a gaining creek, the groundwater flow direction at the Moonlite Cleaners Site could have varied from its present northeast direction under gaining-creek conditions to a northerly direction under losing-creek conditions. This is consistent with the areal spread of groundwater contamination seen in the current groundwater plume with groundwater concentrations in northerly borings B2, B17, B18, and B32 at 27 ug/L PCE, 4.6 ug/L PCE, 18 ug/L PCE, and 96 ug/L PCE, respectively. Additionally EKI's depiction of a northwest trending groundwater plume in Figure 10 is not supported by the groundwater flow directions for the former Chevron USA station that was located on the Moonlite Shopping Center property and closer to the former Moonlite Cleaners than the Shell Station.

## C. Northeast-trending PCE Plume Partially Caused by PCE Discharges from the 1960s and 70s

EKI infers from a review of groundwater data that groundwater flow at the Site shifted to the northeast in the mid-1990s, and since the current groundwater plume travels to the northeast, the PCE release that caused the groundwater plume happened in the mid-1980s or early 1990s. This conclusion is incorrect because the PCE could have been bound up for years to decades in

the soil immediately beneath the concrete slab and above any sewer line. This would cause a delay in PCE reaching groundwater. Therefore, PCE released during UATC's ownership and control from 1962 to 1978 would not have started to migrate in groundwater until the northeast gradient was established.

D. PCE Contamination is Found at Deeper Depths Beneath the Site

EKI infers from a review of groundwater data that groundwater levels at the Site were deeper during the pre-1978 period, therefore if a PCE release occurred pre-1978, it would have resulted in a deeper groundwater plume, which according to EKI does not exist. This is incorrect. Groundwater in boring B32 located 50 feet north of the Site contained 96 ug/L PCE at approximately 40 feet below ground surface. Groundwater monitoring well MW5A located 50 feet northeast of the Site contained 1,130 ug/L PCE at approximately the same depth. These concentrations of PCE at depth are immediately above a relatively thick clay layer that extends from approximately 40 to 60 feet bgs at B32 that would slow any further downward vertical migration of PCE regardless of the time of release.

**VII. UATC is a Discharger under Water Code section 13304**

Water Code section 13304 authorizes the Water Board to issue cleanup and abatement orders to any person who caused or permitted waste to be discharged or deposited where it is, or probably will be, discharged into waters of the State and creates, or threatens to create, a condition of pollution or nuisance. Whether a person caused or permitted such waste discharges has been broadly construed by the State Water Resources Control Board (State Water Board) in numerous precedential orders to include owners and operators at the time of discharge. A prior landowner and lessees may be named as a discharger if it (1) owned or were in possession of the property at the time of discharge, (2) had knowledge of the activities which resulted in the discharge, and (3) had the legal ability to prevent the discharge. State Water Board Orders WQ 85-7, 86-15, and 93-13. In this case, UATC meets all the criteria to be named as a discharger as discussed below.

A. UATC Owned the Property during the Time of Discharge

As discussed previously, UATC owned the property from 1961 to 1975 and then continued as master lessor until 1978. During this time, Moonlite Cleaners used PCE in its dry cleaning business and discharged PCE to soil and groundwater, as previously discussed.

B. UATC had Knowledge of Activities that Resulted in the Discharge

UATC had knowledge of the activities that resulted in the discharge. As previously stated, on May 11, 1961, the State Fire Marshall issued a permit to Moonlite Cleaners for the establishment of a dry cleaning business, which required numerous interior and exterior building improvements such as the installation of a piping system and exhaust fans and ducts. In furtherance of this, on June 27, 1961, UATC obtained a building permit for Moonlite Cleaners. On July 10, 1962, UATC received, on behalf of Moonlite Cleaners, a certificate of

occupancy from the City of Santa Clara. UATC was therefore actively involved in the establishment of the dry cleaner site. Importantly, the Fire Marshall Permit put UATC on notice that the business had risks related to solvent handling not inherent in other businesses. The permit required all processes to take place only in the equipment approved by the Fire Marshall and required reclaimed solvent to be transferred only through an approved piping system. The permit also alerted UATC of the potential for “toxic concentration of vapor” developing around the cleaning equipment and the need for floor level ventilation or an approved “breathing mask.” Thus, UATC had actual knowledge of the hazardous nature of solvent handling at the Site and the need for careful handling of solvents. Even if one accepts that UATC did not have actual knowledge, the historical record shows that UATC should have known of the use of chemicals at the Site and its dangers, including the potential for unauthorized discharges. As the State Water Board held, actual knowledge of contamination need not be shown where it is reasonable for a person to be aware of the dangers generally inherent in the activity. State Water Board Order No. 86-15.

UATC was more than a movie theater company. UATC was a large corporation that owned large commercial properties similar to the Moonlite Shopping Center, and rented space to commercial operations such as dry cleaners. For example, UATC also owned a shopping center at 39-49 El Camino real, Millbrae, California, where a dry cleaner also operated from approximately 1958 to 1989 and where a release of PCE has occurred. Given that UATC was a large property owner renting space to commercial operations, it should have known of the hazardous nature of PCE and other chemicals used by the many commercial operators at its multiple properties.

### C. UATC had the Legal Ability to Prevent the Discharge

As the owner of the Site (as well as master lessor) and landlord to Moonlite Cleaners, UATC exercised ultimate control over the property and had the legal ability to prevent the discharge. UATC would have had several different leases with the several different operators at Moonlite Cleaners for operation of the dry cleaning business. These leases would have given UATC legal control over Moonlite Cleaners’ activities and would have given UATC the legal ability to prevent the discharge.

On November 7, 1975, UATC concurrently sold the Site to Hanson Holding, Inc. and leased it back as a master lessor under a master lease agreement. See Tab 3 and 4 of March 11, 2011, Lori Gualco Letter to Nathan King. Under section 4.02 of that agreement, it specifically refers to existing leases between UATC and its tenants and affirms UATC’s rights as landlord under those leases. In that section, UATC also represents that it supplied correct copies of those existing leases. Moreover, under the master lease agreement, UATC’s initial rent as master lessor was \$400,000 (in 1975 dollars) a year for the shopping center, so it is not credible to think UATC had no leases for the shopping center tenants given the magnitude of money involved. In addition, under the master lease agreement, UATC had full control of its sublessees as landlord. The State Water Board has held that the contractual position of a party as sublessor and lessee of a service station gave him enough legal control over the property to hold him responsible for

what took place there. In the Matter of John Stuart. The same is true here: UATC was in a contractual position to legally control what went on the Site. Thus, UATC had the legal ability to prevent the PCE releases at the Site.

**IX. UATC Did Not Discharge its Cleanup Obligations as a Result of its Bankruptcy**

UATC filed for bankruptcy in 2000 and emerged from Chapter 11 bankruptcy as a newly reorganized entity in 2001. An obligation to cleanup and ameliorate ongoing pollution is not a claim that is dischargeable through bankruptcy. (*In re Chateaugay* (2d Cir. 1991), 944 F.2d 997). Even if it were a claim that could be discharged through bankruptcy, the claim never arose in time for it to be discharged. The Regional Water Board was not aware of the Site and its contamination until 2009—almost a decade after UATC filed for bankruptcy. Under the “fair contemplation” test commonly used by bankruptcy courts, all future response costs and natural resource damages costs based on prepetition conduct gave rise to claims to the extent such claims could be ‘fairly contemplated’ by the parties at the commencement of the debtor’s bankruptcy. (*In re National Gypsum Co.* (N.D. Tex 1992 139 B.R. 397; *In re Jensen* (9<sup>th</sup> Cir. 1993) 995 F.2d 925.) Knowledge, notification, investigation, cleanup activities, and incurring response costs are all indicia of “fair contemplation.” (*In re Gypsum Co.* at 407.) None applies here since the Regional Water Board only became aware of the Site and the contamination nine years after the bankruptcy filing. In sum, UATC’s cleanup obligation was not a claim that could be discharged and even if it could be, the claim never arose for it to be discharged by the bankruptcy proceeding and UATC remains liable for cleaning up the Site.

**X. Conclusion**

Based on a review of all relevant information Staff recommends that the Regional Water Board adopt Site Cleanup Requirements naming Moonlite and UATC as dischargers for the Site.

Attachments:

Figure 1: Site Vicinity Map

Figure 2: Site Location Map

Figure 1: Site Vicinity Map



Figure 2: Site Location Map

