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VIA EMAIL AND U.S. MAIL

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Water Quality Control Board
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**RE: Jewel Hirsch's Comments on Tentative Order for 625 Jackson Street
in Fairfield, California**

Dear Mr. Aue:

We represent Jewel Hirsch ("Mrs. Hirsch") in the environmental matters concerning her operation at various times of the former Fairfield Cleaners in Fairfield, California. Thank you for providing us with this opportunity to comment on the San Francisco Bay Regional Water Quality Control Board's ("Regional Board") Tentative Order, New Site Cleanup Requirements for 625 Jackson Street dated April 13, 2012 ("Tentative Order"). The Regional Board also issued tentative orders on April 13, 2012 for two other properties in downtown Fairfield, 712 Madison Street (the "712 Madison Tentative Order") and 622-630 Jackson Street (the "622-630 Jackson Tentative Order") (collectively, with the Tentative Order for 625 Jackson Street, the "Tentative Orders").

On October 21, 2011, Mrs. Hirsch submitted comments on the Regional Board's review draft of the Tentative Order for 625 Jackson Street and 901-915 Texas Street, which was issued on October 12, 2011. On November 28, 2011, Mrs. Hirsch provided additional comments on the Tentative Orders issued on November 7, 2011. The RWQCB withdrew the 2011 Tentative Orders pending further investigation on December 1, 2011.

On April 13, 2012, the Regional Board re-issued the Tentative Orders, with revisions and additional fact allegations. Our comments on the Tentative Orders are included below. As discussed in more detail below, we object to the Tentative Order naming Mrs. Hirsch for the following reasons:

- The RWQCB has not met its burden to demonstrate that Mrs. Hirsch caused or permitted waste to be discharged into the waters of the state as required by Water Code section 13304 for issuance of the Tentative Order;
- Currently-available data demonstrates there are at least two significant sources of contamination in groundwater at the Site other than the 625 Jackson Street property where Fairfield Cleaners and Laundry (“Fairfield Cleaners”) used to operate;
- Mrs. Hirsch is only potentially liable for contamination that the RWQCB can establish with substantial evidence was discharged into the waters of the state during her operation of Fairfield Cleaners; and,
- The Tentative Order requires Mrs. Hirsch to investigate and cleanup contamination which clearly is not attributable to her operation of Fairfield Cleaners.

Given the lack of evidentiary support for the Tentative Order as it pertains to Mrs. Hirsch and the potential impact of the Tentative Order if it is adopted on the ongoing related litigation in the Solano County Superior Court, Michael McInnis et al. v. Jewel Hirsch et al., Case No. FCS033636 (the “State Lawsuit”), we intend to notice the depositions of certain Regional Board employees with knowledge of the Regional Board’s evidentiary bases for the Tentative Order. Mrs. Hirsch reserves all rights to supplement her comments after such depositions. We will also appear on behalf of Mrs. Hirsch at the Regional Board hearing currently scheduled for July 11, 2012. In the meantime, we are happy to meet with you to discuss any of these comments.

I. Introduction

Mrs. Hirsch worked at Fairfield Cleaners as an employee only beginning in approximately the mid-to-late 1960s. At that time, all dry cleaning for Fairfield Cleaners was performed off-site, near Travis Air Force Base. Dry cleaning was not performed on-site until around 1970, during the ownership of Gene and Ruth Trumbull. Contrary to the allegations in the Tentative Order, Mrs. Hirsch did not own the Fairfield Cleaners business during the time dry cleaning operations were performed on-site until 1975 at the earliest. Dry cleaning was performed on-site for approximately five years before Mrs. Hirsch owned Fairfield Cleaners.

Beginning in approximately 1975, Mrs. Hirsch owned and operated the Fairfield Cleaners business on property leased from the property owners, Robert Dittmer and Michael McInnis (deceased) (the “Property Owners”), at 625 Jackson Street in downtown Fairfield, California. Mrs. Hirsch continued to own the Fairfield Cleaners

business until approximately 2004, with the exception of the period between 1980 and 1981, when Obie Goins and his partners owned the Fairfield Cleaners business. In addition, dry cleaning was not performed at 625 Jackson Street for several years in the 1990s when it was performed at another location in Fairfield instead.

In 2000, perchloroethylene (“PCE”) and its breakdown products, trichloroethene (“TCE”), dichloroethene (“cis-1,2-DCE”) and vinyl chloride (“VC”), and other chemicals of concern (collectively, “COCs”), including but not limited to total petroleum hydrocarbons (“TPH”) and Stoddard solvent, were identified in soil and groundwater in downtown Fairfield in the vicinity of 625 Jackson Street, 622-630 Jackson Street, 712 Madison Street and 901-905 Texas Street (collectively, the “Site”). The Property Owners have been performing investigation of COCs at and near the Site under the review of the Regional Board since 2000. This investigation and the analytical data obtained during property inspections performed in 2011 as part of the State Lawsuit clearly indicates there are three or more contributing sources of COCs identified at the Site. A diagram depicting the locations of these four properties is attached as Figure 1.

On April 13, 2012, the Regional Board issued Tentative Orders for 625 Jackson Street, 622-630 Jackson Street and 712 Madison Street to a number of potentially responsible parties (“PRPs”) for each property. If made final, the Tentative Orders would require the PRPs to investigate and cleanup groundwater contamination at the Site, under the schedule for compliance indicated by the Regional Board. Each of the Tentative Orders allege facts to support each PRP’s purported “discharger” liability.

Although currently-available evidence demonstrates there is some (low-level) PCE in shallow groundwater down-gradient of the 625 Jackson Street property, the Tentative Order does not provide substantial evidence that the presence of any such PCE is the result of discharges by Mrs. Hirsch or any of her employees, rather than by any of the other persons performing dry cleaning at Fairfield Cleaners (or for that matter, from any of the other contributing sources, as discussed below). Rather, the Tentative Order provides only that Mrs. Hirsch is “named as a discharger because she operated Fairfield Cleaners for almost 30 years, during which time pollutants were discharged. She discharged waste in the form of PCE during her operations at the Site. It was the common industry practice during her operations to use and dispose of PCE on-site.” (Tentative Order at 2-3.) None of these allegations are supported by substantial evidence that PCE was discharged to the waters of the state during Mrs. Hirsch’s operations of Fairfield Cleaners.

In addition, even if there was a discharge to groundwater during Mrs. Hirsch’s operations at Fairfield Cleaners, the data available at this time indicates the property at 625 Jackson Street is a small contributor compared to the other contributing sources at 712 Madison Avenue and 622-630 Jackson Street, as well as another possible source

up-gradient of MW-2. Sampling results down-gradient of 712 Madison Street and 622-630 Jackson Street are indicative of one or more releases of PCE from each of those properties. Furthermore, there is no pathway by which Fairfield Cleaners could have caused the levels of PCE detected immediately down-gradient of 622-630 Jackson Street. Mrs. Hirsch cannot be held legally responsible to investigate and cleanup contamination she did not cause.

The Property Owners have spent more than ten years characterizing groundwater down-gradient from Fairfield Cleaners. The small shallow plume from the 625 Jackson Street property is adequately defined at this time. The additional investigation work being required of the PRPs for Fairfield Cleaners should instead be required of the other contributing sources.

II. The Tentative Order Does Not Demonstrate Substantial Evidence that Jewel Hirsch Caused or Permitted Waste to Be Discharged Into the Waters of the State

A. The Regional Board Must Demonstrate Substantial Evidence of a Discharge by Mrs. Hirsch

The Tentative Order against Mrs. Hirsch is issued pursuant to the Regional Board's authority under Water Code section 13304, which states, in part, that:

Any person . . . who has caused or permitted . . . waste to be discharged or deposited . . . into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the [R]egional [B]oard, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

Water Code § 13304(a) (emphasis added).

Under the language of the Water Code, therefore, the Regional Board must present evidence that Mrs. Hirsch "caused or permitted . . . waste to be discharged or deposited . . . into the waters of the state." Id. The standard by which the Regional Board must demonstrate that Mrs. Hirsch caused or permitted waste to be discharged into the waters of the state is "substantial evidence." In re Exxon Co., USA, et al., Order No. WQ 85-7, 1985 WL 1120860 at *6 (Cal. St. Wat. Res. Bd. 1985) (" . . . any findings made by an administrative agency in support of an action must be based on substantial evidence in the record"), citing Topanga Assn. for a Scenic Cmty. v. County of Los Angeles, 11 Cal.3d 506, 514 (1974). The Regional Board must have "substantial evidence to support a finding of responsibility for each party named. This means

credible and reasonable evidence which indicates the named party has responsibility.” Id.; see also In re Aluminum Co. of America, Order No. WQ 93-9, 1993 WL 13672991 at *3 (Cal. St. Wat. Res. Bd. 1993); In re Sanmina Corp. et al., Order No. WQ 93-14, 1993 WL 456494 at *2 (Cal. St. Wat. Res. Bd. 1993).

The State Water Resources Control Board (“State Board”) has determined that a key question in assigning responsibility for the cleanup and abatement of a release is whether the party caused or permitted it. See In re John Stuart, DBA Stuart Petroleum, Order No. WQ 86-15, 1986 WL 1210143 at *3 (Cal. St. Wat. Res. Bd. 1986). Mrs. Hirsch objects to issuance of the Tentative Order because there is a lack of substantial evidence in the record to support a finding of the required causal relationship between the alleged pollution and nuisance condition and the conduct of Mrs. Hirsch at Fairfield Cleaners. Mrs. Hirsch should not be required to cleanup a release which the Regional Board has no evidence she caused.

B. The Facts Alleged by the Regional Board Do Not Demonstrate Substantial Evidence of a Discharge of PCE by Mrs. Hirsch or Her Employees

The Regional Board has presented no substantial evidence in the Tentative Order that Mrs. Hirsch permitted, much less caused, any release from Fairfield Cleaners. The Tentative Order provides only that Mrs. Hirsch is “named as a discharger because she operated Fairfield Cleaners for almost 30 years, during which time pollutants were discharged. She discharged waste in the form of PCE during her operations at the Site. It was the common industry practice during her operations to use and dispose of PCE on-site.” (Tentative Order at 2-3.) There are no specific factual allegations as to any discharges of PCE during Mrs. Hirsch’s operations at Fairfield Cleaners.

In addition, the only facts developed in the State Lawsuit to date which potentially evidence any discharge at Fairfield Cleaners is that separator water from Fairfield Cleaners may have been released to the sewer. However, no evidence as to whether any such separator water actually contained PCE or whether it escaped from the sewer has been introduced by the Regional Board as part of the Tentative Orders.

Speculation is not evidence. See Roddenberry v. Roddenberry, 44 Cal. App. 4th 634, 651 (Cal. App. 1996). Possibility, speculation and conjecture are not sufficient proof. See id.; Regents of Univ. of California v. Pub. Emp’t Relations Bd., 220 Cal. App. 3d. 346, 359 (Cal. App. 1990). To constitute substantial evidence, “the evidence must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.” Kasparian v. County of Los Angeles, 38 Cal. App. 4th 242, 259-60 (Cal. App. 1995) (internal citations omitted). Here, there was no contemporaneous sampling of the separator water at the

time of discharge to establish if it in fact contained any amount of PCE. There also has been no evidence presented which indicates the sewers were sampled and determined to be the sources of any releases. The mere existence of the possibility cannot meet the Regional Board's threshold of substantial evidence.

Regional Boards previously have upheld Cleanup and Abatement Orders on challenges to the causation requirement, finding substantial evidence where there were documented violations of discharge limits, where the Regional Board staff took soil and water samples which established the cause of contamination, where the contamination could only have resulted from the potentially responsible person's facilities because there was no other possible source, or where a Regional Board employee personally witnessed unlawful discharges. See In re Lloyd Walker et al., Order No. WQ 80-12, 1980 WL 590845 at *2 (Cal. St. Wat. Res. Bd. 1980); In re Atchinson, Topeka and Santa Fe Ry. Co., Order No. WQ 74-13, 1974 WL 353947 at *4 (Cal. St. Wat. Res. Bd. 1974); Machado v. State Water Res. Control Bd., 90 Cal. App. 4th 720, 727 (Cal. App. 2001). Here, the Regional Board has alleged no such direct proof as to Mrs. Hirsch. There are no documented spills of PCE during the operations of Mrs. Hirsch and no sampling of any waste water was conducted. Mrs. Hirsch "engaged in no active, affirmative or knowing conduct with regard to the passage of contamination . . . into the soil" or groundwater, "therefore [she] did not 'cause or permit' [a] discharge under section 13304." See Redevelopment Agency of City of Stockton v. BNSF Ry. Co., 643 F.3d 668, 678 (9th Cir. 2011).

C. The Regional Board Relies on Inaccurate and Incomplete Facts to Establish Mrs. Hirsch's Liability

A number of the alleged facts on which the Regional Board relies in the Tentative Order against Mrs. Hirsch are plain wrong. For example, the following are just some of the allegations of fact in the Tentative Order which are controverted by evidence obtained in the State Lawsuit and/or technical data gathered at the Site:

- Allegation: "Jewel Hirsch was operating a dry cleaning business at the Site in 1965 when Robert W. Dittmer and Michael L. McInnis purchased the property from the Reid family." (Tentative Order at 2.)
Fact: Jewel Hirsch did not own or operate an on-site dry cleaning business at the Site until 1975, at the earliest.
- Allegation: "The dry cleaning business at the Site changed owners and operators three times during the five decades it was in operation." (Tentative Order at 2.)
Fact: Fairfield Cleaners changed owners and operators at least six times. It was owned and/or operated by the Franks, Clarksons, Hirsches, Trumbulls, Hirsches, Goins and partners, Hirsches, and the Yoos. Evidence obtained in the State

Lawsuit indicates dry cleaning was not performed on-site until the operations of the Trumbulls, in 1970 at the earliest.

- Allegation: “Information currently available to the Regional ... Board indicates William Clarkson operated the dry cleaning business when it was first purchased by Jewel Hirsch in 1964.” (Tentative Order at 2.)
Fact: Jewel Hirsch did not own or operate an on-site dry cleaning business at the Site until 1975 at the earliest.
- Allegation: “Jewel Hirsch doing business as Fairfield Cleaners operated Fairfield Cleaners for most of the period from 1964 until 2004.” (Tentative Order at 2.)
Fact: Jewel Hirsch did not own or operate an on-site dry cleaning business at the Site until 1975, and she did not own and operate it continuously until 2004.
- Allegation: “Jewel Hirsch doing business as a Fairfield Cleaners is named as a discharger because she operated Fairfield Cleaners for almost 30 years, during which time pollutants were discharged. She discharged waste in the form of PCE during her operations at the Site.” (Tentative Order at 2-3.)
Fact: The Tentative Order does not provide any evidence or facts in support of the allegation that pollutants were discharged at Fairfield Cleaners during Jewel Hirsch’s operations.
- Allegation: “The most recent 2011 groundwater monitoring report for the Site indicates that contaminant plumes in shallow and intermediate groundwater zones extend offsite to the southeast. Groundwater samples from the farther downgradient shallow well (MW-12) approximately 350 feet from the site contained 677 micrograms per liter (ug/L, equivalent to parts per billion (ppb)), 57 ug/L TCE, and 60 ug/L DCE . . . These data indicate that these contaminants are migrating vertically through water-bearing strata and downgradient away from the Site.” (Tentative Order at 5.)
Fact: MW-12 is not down-gradient of 625 Jackson, and instead is immediately down-gradient of 622-630 Jackson. (See Figures 1 and 2.) The levels detected in MW-12 are indicative of a release from the 622-630 Jackson Street property, and not from 625 Jackson Street.
- Allegation: “Completion of Source Delineation . . . Completed.” (712 Madison Tentative Order at 8-9.)
Fact: No investigation or hot spot source identification has been performed inside or under the building at the 712 Madison Street property.
- Allegation: “While historical operations at the Site included the use and discharge of Stoddard solvent, it does not appear that PCE was used and discharged at the

Site.” (622-630 Jackson Tentative Order at 1.)

Fact: Only one witness to operations at the 622-630 Jackson Street property has been deposed in the State Lawsuit, and the witness did not know whether PCE was used at the property. (See Attachment 1, November 3, 2011 deposition of Scott Keilholtz.) In addition, as discussed below, high levels of PCE detected in MWs-12 and 15 indicate PCE was discharged at the 622-630 Jackson property.

- Allegation: “Currently available information indicates that Gillespie Cleaners used Stoddard solvent in their dry cleaning operations...” (622-630 Jackson Tentative Order at 2.)

Fact: At this time, there is little or no site-specific information about the chemicals used at Gillespie Cleaners. However, Site data indicates PCE was used at some point during the operations at 622-630 Jackson Street. PCE was detected at 670 ug/L in groundwater at 22.5 feet, adjacent to the building at 622-630 Jackson Street, and a release from 625 Jackson Street cannot be the cause. (See Attachment 2, Test America Report dated August 30, 2011.)

- Allegation: “Information provided in sworn depositions by the former operators of both Solano Printers and Fairfield Printing Company indicates that only alcohol-based cleaners were used in their operations . . . Consequently, neither Stoddard solvent nor VOCs were likely to be used as part of their business operations.” (622-630 Jackson Tentative Order at 2.)

Fact: Only one sworn deposition related to the 622-630 Jackson Street property has taken place in the State Lawsuit, and it did not relate to the operations of Fairfield Printing. (See Attachment 1 at 127, deposition of Scott Keilholtz dated November 2, 2011.) The Site data developed immediately down-gradient of 622-630 Jackson Street is indicative of a release of PCE at that property.

- Allegation: “[T]he 622-630 Jackson Street site [is] adjacent to a sanitary sewer line that serves both the 622-630 Jackson Street [and] the 625 Jackson Street properties.” (622-630 Jackson Tentative Order at 4.)

Fact: As discussed in detail below, the 8 inch sanitary sewer below Alley C does not serve both 625 Jackson Street and 622-630 Jackson Street, because it discharges into the sewer main under Jackson Street and does not continue east through to the other side of Jackson Street. (See Figure 1.)

The Regional Board’s adoption of inaccurate factual allegations in the Tentative Orders is particularly troubling because the Regional Board relies on these allegations to make conclusions about the potential liability of the PRPs named in the Tentative Orders. In addition, the parties to the State Lawsuit have relied on the Regional Board’s allegations in the Tentative Orders. All of the above factual inaccuracies should be corrected in any Final Orders.

There are a number of additional factual allegations which we do not address at this time; however, our silence as to any of these factual allegations should not be interpreted as acceptance of or any waiver of our right to challenge any such factual allegations moving forward.

III. The Tentative Orders Do Not Accurately Reflect that Properties Other than 625 Jackson Street Are The Cause Of Most of the Groundwater Contamination at the Site

The Tentative Order, if adopted, would require Mrs. Hirsch to investigate and cleanup COCs in groundwater that were not caused by any releases from Fairfield Cleaners. Instead, the available Site technical data establishes that at least two other properties have contributed significant amounts of COCs, particularly PCE, to groundwater at the Site. The Regional Board acknowledges in the Tentative Order that a “release of contaminants has been confirmed at all three of these locations [625 Jackson, 622-630 Jackson and 712 Madison]; however, the timing and quantity of these releases and the degree to which groundwater contaminant plumes from these properties may be commingled or may have impacted other properties has not been determined...” (Tentative Order at 6; see also 712 Madison Tentative Order at 5.) Figure 2, attached, depicts the suspected PCE plumes from each of the properties named in the Tentative Orders. Notwithstanding the existence of other contributing sources and the high levels of PCE detected immediately down-gradient of at least two of these properties, the Tentative Order would require Mrs. Hirsch to investigate up-gradient and cross-gradient groundwater conditions and clean up groundwater which was impacted by sources other than Fairfield Cleaners.

A. Currently-Available Data Establishes Up-gradient and Cross-gradient Properties are Significant Sources of PCE in Groundwater at the Site

1. THE 712 MADISON PROPERTY IS A SIGNIFICANT SOURCE OF PCE IN GROUNDWATER

On April 13, 2012, the Regional Board also issued a Tentative Order for 712 Madison Street, where Fairfield One Hour Cleaners formerly operated for more than 30 years. As the Regional Board recognized in the 712 Madison Tentative Order, soil and groundwater “in the vicinity of the former Fairfield One Hour Cleaners are significantly impacted” by PCE and other COCs. (712 Madison Tentative Order at 1.) As depicted on Figure 1, attached, the 712 Madison property is located up-gradient from Fairfield Cleaners. Since 2000, high levels of PCE detected in MW-3 during sampling indicated there was a contributing source up-gradient from the 901-905 Texas Street property and the 625 Jackson Street property. Levels of PCE in MW-3, which is down-gradient of the 712 Madison property, have been as high as 1,000 ug/L historically. However, it was not until sampling was performed at the 712 Madison property as part of the State

Lawsuit in 2011 that this was confirmed. Prior to 2011, the Regional Board never required any of the PRPs for the 712 Madison property to perform any investigation, despite repeated sampling results that were clearly indicative of a significant up-gradient source of PCE to groundwater.

Recently, the significant up-gradient source of contamination which had long been suspected was confirmed. High levels of PCE were detected in soil and groundwater in grab samples and monitoring well samples taken at and near the 712 Madison property. For example, PCE was detected at 38,000 ug/L in May 2011 in a grab sample taken at 20 feet at OHM-1, outside the back door at the property. (See Attachment 3, E₂C Preliminary Site Investigation Report of Findings, dated July 29, 2011.) The high levels of PCE detected are indicative of one or more discrete releases of PCE and are also indicative of the presence of DNAPL at the 712 Madison property. In addition, sworn testimony in the State Lawsuit evidences one or more spills of PCE occurred during deliveries of PCE to One Hour Cleaners. (See Attachment 4, deposition of Gerald Duensing dated June 10, 2011.)

Currently-available data indicates there are at least two separate areas where releases occurred at the 712 Madison property: in the rear of the building where One Hour Cleaners operated and at the sewer lateral. At this time, there has been no investigation performed within or below the actual building where dry cleaning was performed for over 30 years, in order to delineate the extent of impacts there, as has been required at 625 Jackson Street. Accordingly, we disagree with the Regional Board's conclusion that source delineation at the 712 Madison property has been completed. (See 712 Madison Tentative Order at 8.) Further delineation of the source should be required in order to identify the location of the hot spot source area(s).

In addition, the lateral and vertical extent of the plume(s) originating at the up-gradient 712 Madison Street property has not been fully characterized and it remains unclear to what extent it is impacting groundwater under and down-gradient of the 625 Jackson Street property, including in the intermediate groundwater zone. (See Figures 2, 3, 4 and 5.) The 712 Madison Tentative Order acknowledges contaminants from the 712 Madison property "are migrating vertically through water-bearing strata and down-gradient away from the Site," and "extend beyond the current monitoring well network." (712 Madison Tentative Order at 5.) Figures 2 and 3 demonstrate the unknown extent of the plume(s) originating at 712 Madison and also depict the significantly larger contribution which data suggests releases from the 712 Madison property have made to the groundwater contamination at the Site as a whole.

Despite the Regional Board's acknowledgment that COCs from the 712 Madison Street property have migrated down-gradient off the property, the 712 Madison Tentative Order only requires the PRPs to sample the wells installed in 2011 by E₂C, Mr.

Tomasini's consultant. At a minimum, MWs-3, 10, 10i and 10R should be associated with the 712 Madison Street property and the PRPs for the 625 Jackson Street property should not be required to sample these wells.

2. THE 622-630 JACKSON STREET PROPERTY IS A SIGNIFICANT SOURCE OF PCE IN GROUNDWATER

The Regional Board also issued a Tentative Order to some of the PRPs for the 622-630 Jackson Street property, where a number of businesses, including but not limited to Gillespie Cleaners, Singh Motors, Fairfield Printing and Solano Printers, all operated. The 622-630 Jackson Street property is located across Jackson Street to the east – cross-gradient (not down-gradient) – from 625 Jackson where Fairfield Cleaners used to operate. Mrs. Hirsch disagrees with a number of the allegations in the 622-630 Jackson Tentative Order, but agrees an order for the 622-630 Jackson property is warranted.

First, the Regional Board wrongly concludes the Alley C sewer is a potential pathway from 625 Jackson Street, west across Jackson Street, to the 622-630 Jackson Street property. Based on currently-available Site information, the sewer line along Alley C is not a potential pathway for PCE from Fairfield Cleaners to East of Jackson Street. As reflected in Figure 1, the 8 inch sanitary sewer under Alley C discharges into the sewer main underneath Jackson Street. In fact, the sewer line on the other side of the Jackson Street sewer main is plugged, as indicated in sewer video taken by the Property Owners in approximately 2009, as produced by the Property Owners in the State Lawsuit. (See also Attachment 5, GE&R Contributing Source Investigation dated March 20, 2008, at Figure 3.) The 8 inch sewer under Alley C is set at least several feet above the Jackson Street main sewer, so that it does not cross Jackson Street as the Regional Board alleges, but rather flows down into the main which then heads south underneath Jackson Street. Therefore, it is not true that the same “sanitary sewer line ... serves both the 622-630 Jackson Street [and] the 625 Jackson Street properties,” as alleged by the Regional Board. (622-630 Jackson Tentative Order at 4.) Fairfield Cleaners cannot be the source of PCE detected along the sewer near 622-630 Jackson Street.

Second, the Regional Board wrongly assumes “facts” about the former operations at the 622-630 Jackson Street property, which have no apparent basis as currently developed in the State Lawsuit. For example, the 622-630 Jackson Tentative Order finds that “while historical operations at the Site included the use and discharge of Stoddard solvent, it does not appear that PCE was used and discharged at the Site.” (622-630 Jackson Tentative Order at 1.) To the contrary, high levels of PCE detected in MWs-12 and 15 indicate PCE was discharged at the 622 Jackson property. At this time, there is limited knowledge of the operations at 622-630 Jackson Street, but based on

the operations of dry cleaners, printers and auto shops, it would not be unusual that PCE was used (and discharged) at the property. For example, letterpress and offset printing machines were both used during the operations of Fairfield Printing, and each of these machines commonly would have used VOCs in their inks and/or for cleaning.

The Regional Board also represents that “Information provided in sworn depositions by the former operators of both Solano Printers and Fairfield Printing Company indicates that only alcohol-based cleaners were used in their operations.” (622-630 Jackson Tentative Order at 2.) The only deposition to date in the State Lawsuit related to the former operations of the 622-630 Jackson Street property was the deposition of Scott Keilholtz, taken on November 3, 2011. Mr. Keilholtz was a former owner of the Solano Printers business but was only on the property approximately 6-12 times and was not involved in the day-to-day operations of the printers. Mr. Keilholtz had little knowledge about the actual operations of Solano Printers, and none about the operations of Fairfield Printing. (See Attachment 1, Deposition of Scott Keilholtz dated November 3, 2011.) Further, we understand that the former operators of Fairfield Printing, Jack Whalley and his wife, died in the 1990s. Therefore, unless the RWQCB is relying on depositions taken in other litigation, and not provided to the PRPs subject to the Tentative Orders, “sworn depositions by the former operators” at 622-630 Jackson simply do not exist.

The Regional Board relies on these false assumptions regarding the construction of the Alley C sewer and the prior operations at the 622-630 Jackson property to wrongly conclude the following:

The location of the soil, soil gas, and groundwater samples collected at this Site, together with laboratory analytical data for these samples, suggests that VOCs have been discharged near the Site, possible from the adjacent sanitary sewer line or a potential upgradient source. The absence of VOCs in soil, soil gas, and shallow groundwater samples adjacent to the building but away from the sewer suggests that VOCs were not discharged at this Site. The significant concentrations of Stoddard solvent reported in groundwater samples indicate that this contaminant was discharged at this Site. Investigation is needed to identify the source(s) of contamination, delineate contaminant pathways, identify and evaluate potential sensitive receptors, and characterize the vertical and lateral extent of contamination in soil and groundwater at the Site and downgradient of the Site.

(622-630 Jackson Tentative Order at 5, emphasis added.)

In 2011, groundwater samples taken from adjacent to the building at 622-630 Jackson revealed PCE at 670 ug/L in groundwater at 22.5 feet. (See Attachment 2, Test

America Report dated August 30, 2011) Historically, levels of PCE identified in MW-12 and MW-15 indicate a source of PCE emanating from a location north of these locations, which could not be associated with operations or potential releases from Fairfield Cleaners. MW-12 and 15 are not down-gradient of Fairfield Cleaners. (See Figure 2.) Instead, they are hydrogeologically down-gradient of the 622-630 Jackson Street property. The Regional Board's conclusion that MW-12 is down-gradient of Fairfield Cleaners is wrong.

In addition, the levels of PCE and breakdown products identified in MW-12 and MW-15 historically have been significantly higher than those identified immediately down-gradient of Fairfield Cleaners. This distribution also supports the conclusion that Fairfield Cleaners is not the source of those levels of PCE in groundwater. Instead, based on the levels of PCE from the grab sample(s) at the 622-630 Jackson property, the high levels in MW-12 and MW-15, and the construction of the sewer system which would not result in any releases from Fairfield to the sewer system along the Alley C sewer east of Jackson Street, the data strongly suggests the 622-630 Jackson Street property is a discrete source of PCE at the Site. Indeed, Figures 2, 3 and 5 (attached) demonstrate the anticipated contributions of the 622-630 Jackson Street property to groundwater based on currently-available Site data.

At a minimum, the contamination detected in MWs-8, 11, 12, 13, 15 and 21 should be associated with the 622-630 Jackson Street property, rather than 625 Jackson where Fairfield Cleaners operated. In addition, levels detected in MWs-16 and 19 are more likely associated with 622-630 Jackson Street than with alleged releases from Fairfield Cleaners at 625 Jackson Street.

3. AN ADDITIONAL UP-GRADIENT SOURCE LIKELY EXISTS AS REFLECTED BY MW-2

Based on currently-available data, it appears very likely there is another source of PCE up-gradient from 625 Jackson Street, as evidenced by the levels of PCE and its breakdown products (specifically, high levels of Cis-1,2-DCE) in MW-2. It is unclear whether the levels seen in MW-2 are indicative of a release at the 901-905 Texas Street property or from another up-gradient source (possibly along the sewer main, to the north). It is clear, however, there is contamination impacting MW-2 that is not related in any way to releases from Fairfield Cleaners. Figure 4 depicts the plumes of Cis-1,2-DCE. Figures 3 and 4 both indicate that another source, clearly distinct from 625 Jackson Street, is impacting MW-2.

The source of the impacts detected at MW-2 remain unknown at this time. The prior Tentative Order for 625 Jackson Street (dated November 2011) contained allegations specifically pertaining to the former operations at the 901-905 Texas Street property, which no longer is included as part of the Tentative Order. The Regional

Board acknowledges that the 901-905 Jackson Street property “has been used for a variety of businesses over a period of many years, including a car dealership and a gasoline station with auto repair facilities,” and these businesses “may also have used VOCs and petroleum solvents to wash parts and clean equipment.” (Tentative Order at 2.) It also is possible MW-2 may be indicative of another up-gradient release(s) from the 712 Madison property, which could have entered the Jackson Street sewer main north of MW-2. Although the source of the COCs regularly detected at high levels in MW-2 is unclear, it is clear they are not related to the operations of Fairfield Cleaners and the PRPs for the Tentative Order should not be responsible for sampling MW-2, nor should they be required to perform further investigation or any cleanup up- or cross-gradient of the 625 Jackson Street property.

B. Any Contribution to PCE in Groundwater from Fairfield Cleaners was Minor in Comparison

Levels of PCE and breakdown products detected in soil and groundwater at and immediately down-gradient of the 625 Jackson Street property have been significantly lower than those detected both up-gradient and cross-gradient, which are more likely related to the other properties at issue in the Tentative Orders. As evidenced by the diagram of the total PCE equivalent plumes in Figure 3, the contribution from Fairfield Cleaners is at least an order of magnitude less than the contribution from releases arising from either 712 Madison or 622-630 Jackson. (See Figure 3, attached.) Further, as depicted in Figure 5, the contributions (if any) to the intermediate groundwater zone from Fairfield Cleaners had little or no impact on current groundwater conditions in the intermediate zone. Instead, it appears there only is a relatively small plume limited to the shallow groundwater zone which could possibly be associated with the 625 Jackson Street property.

As a result, the Regional Board’s finding that “Based on the high concentrations of the contaminants reported in groundwater samples from monitoring wells farthest from the Site, the contaminant plumes in the shallow and intermediate groundwater zones extend down-gradient beyond the current monitoring well network,” is not correct. (See Tentative Order at 5.) The high concentrations detected in the wells farthest down-gradient from the 625 Jackson Street property are those which should be associated with the 622-630 Jackson Street property. Likewise, the Regional Board’s conclusion that “Laboratory analytical reports for groundwater samples collected from these wells indicate that PCE, TCE, DCE and vinyl chloride are present in the shallow and intermediate zones at concentrations more than two orders of magnitude above California maximum contaminant levels for these contaminants,” should be associated with the 622-630 Jackson Street property as well. (See Tentative Order at 4-5.)

C. Groundwater Down-gradient from Fairfield Cleaners has been Sufficiently Characterized

The Property Owners of 625 Jackson Street have performed extensive investigation and monitoring of groundwater in the vicinity of the Site, including construction of monitoring wells down-gradient of the 625 Jackson property to characterize groundwater conditions in the shallow and intermediate zones. Down-gradient groundwater is adequately defined at this time to remediate any contribution from Fairfield Cleaners.

Based on the available Site data, there currently is no indication of a contribution from Fairfield Cleaners of PCE to the intermediate groundwater zone. Figure 5 demonstrates the distribution of PCE in the intermediate zone as indicated by current data. Further, the extent of PCE in shallow groundwater down-gradient of the 625 Jackson property has been adequately characterized, as evidenced by the fact that concentrations of PCE at MW-7 are at or below drinking water standards. This is reflected in Figure 2.

Finally, as discussed above, based on all available Site information, the PRPs for 625 Jackson Street should not be required to monitor wells which are up- or cross-gradient from the property, regardless of who originally installed the wells. Enough data has been generated to date to clearly establish Fairfield Cleaners is not the source of any COCs detected in the wells other than those hydrogeologically down-gradient of the 625 Jackson property – specifically, MWs-17 and 18. Future monitoring by the PRPs for 625 Jackson Street should be limited to MWs-17 and 18.

IV. Mrs. Hirsch is Not Jointly and Severally Liable Under the Water Code for Releases by Other PRPs

A. Water Code Section 13304 Liability is Not Joint and Several

California law imposes a general presumption against joint and several obligations unless there are express words to the contrary. See Civ. Code § 1431. In light of this presumption, the plain language of Water Code section 13304 imposes only a several obligation, because the text of Section 13304 requires the Regional Board to demonstrate that each responsible person caused or permitted, or threatens to cause or permit, waste to be deposited or discharged where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance. Water Code § 13304(a). Section 13304 further provides that each such responsible person “shall upon order of the regional board, clean up the waste or abate the effects of the waste . . .” Id. The language of Section 13304 does not require each responsible person to clean up and abate the waste caused by all other discharges or

dischargers that ever occurred at the Site. Thus, a several obligation under Water Code section 13304 is mandated by the conspicuous lack of text in that section making reference to or intention to impose a “joint and several” obligation. This interpretation of a several obligation, as opposed to one that is joint and several, is consistent with the policy adopted by the People of the State of California, as codified at Civil Code section 1431.1, viewing the imposition of joint and several liability as frequently inequitable and unjust.

B. Mrs. Hirsch is Not Potentially Responsible for Releases from 712 Madison Street, 622-630 Jackson Street or any Property other than 625 Jackson Street

The analytical data available at this time indicates one or more discharges occurred at 712 Madison Street and 622-630 Jackson Street. It also appears likely an additional source exists somewhere up-gradient of MW-2. It is undisputed that Mrs. Hirsch never owned or operated any business at any of those other properties and never discharged at those properties. Nonetheless, the Tentative Order would require Mrs. Hirsch to address groundwater contamination caused by discharges from other properties at the Site.

In the Tentative Order, the Regional Board makes a finding that Mrs. Hirsch is a “discharger” because “she operated Fairfield Cleaners for almost 30 years, during which time pollutants were discharged. She discharged waste in the form of PCE during her operations at the Site. It was the common industry practice during her operations to use and dispose of PCE on-site.” (Tentative Order at 2-3.) While the Tentative Order itself acknowledges Water Code section 13304 authorizes the Regional Board to order a discharger to clean up waste which the discharger “has caused or permitted . . . to be discharged or deposited . . .”, the Tentative Order nonetheless orders Mrs. Hirsch to investigate and cleanup contamination in groundwater caused by releases from other persons at other properties. Failure to comply with the Order if adopted would subject Mrs. Hirsch to enforcement action, including but not limited to civil liability and/or criminal liability. These requirements that Mrs. Hirsch perform investigation and cleanup of discharges of waste she did not cause or permit is contrary to the statutory language of the Water Code, as well as the public policy as enacted by the People of the State of California.

V. Conclusion

In light of the above, Mrs. Hirsch objects to the Regional Board’s finding that she is a discharger and its requirements that she investigate and cleanup discharges alleged to be from Fairfield Cleaners. Please be advised, we plan to appear on behalf of Mrs. Hirsch at the hearing on the Tentative Order scheduled for July 11, 2012.

Please also note that an absence of a comment in response to any fact or conclusion in the Tentative Orders should not be construed as an agreement or waiver as to any fact or conclusion. Mrs. Hirsch reserves her right to challenge any Cleanup and Abatement Order before the Regional Board or the State Board pursuant to Water Code section 13320 or other applicable law.

Please let us know if you have any questions about any of our comments on the Tentative Order. We would be happy to meet with you at your offices to discuss any questions and/or concerns. I can be reached at (925) 284-0840 or amcadam@hgdlaw.com.

Very truly yours,
Hunsucker Goodstein & Nelson PC



Allison E. McAdam

AEM:mdb

Enclosures:

Figures 1-5

Attachment 1: November 3, 2011 Deposition of Scott Keilholtz

Attachment 2: Test America Report, August 30, 2011

Attachment 3: E₂C Prelim. Site Investigation Report of Findings, July 29, 2011

Attachment 4: June 10, 2011 Deposition of Gerald Duensing

Attachment 5: GE&R Contributing Source Investigation, March 20, 2008, Figure 3

cc: Bruce H. Wolfe (via Email)
Jewel Hirsch