APPENDIX C

RESPONSES TO COMMENTS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESPONSE TO COMMENTS

ADOPTION OF SITE CLEANUP REQUIREMENTS for:

CHEVRON U.S.A., INC.,
ALCATEL-LUCENT USA, INC.,
B.F. SAUL REAL ESTATE INVESTMENT TRUST, AND
6400 SIERRA COURT INVESTORS, LLC

for the property located at:

6400 SIERRA COURT, DUBLIN, ALAMEDA COUNTY

This document provides Water Board staff's response to comments received on the tentative order (TO) for Site Cleanup Requirements for the property located at 6400 Sierra Court, Dublin (Site). Water Board staff circulated the TO for public comment on February 14, 2014. We received comments on the TO from the parties shown in the table below. Below we have summarized the comments and provided responses. For the full content and context of the comments, refer to the comment letters.

Date	Commenter
3/14/14	Ralph McMurry (Esq) on behalf of Alcatel-Lucent USA, Inc., successor to former operator and lessee
3/14/14	Amy Gaylord (Esq) on behalf of Chevron U.S.A., Inc., former landowner
3/14/14	Michael Hurd (Leidos) on behalf of Alcatel-Lucent USA, Inc., and Chevron U.S.A., Inc.
3/12/14	Kurt Scheidt on behalf of Terrence Daly, receiver for real property at subject site

Alcatel-Lucent:

1. Comment

The TO Must Specify Industrial/Commercial Standards, Not Residential Standards: The TO contains many references to residential cleanup standards; please see Leidos comments dated March 14, 2014. The Site was zoned industrial/commercial at the time of Alcatel-Lucent's occupancy and alleged discharges. The Site is still zoned industrial/commercial. Under these circumstances, the TO must be modified to clarify that the cleanup standards for this TO are industrial/commercial only. Further, there is no basis in law or equity to require Alcatel-Lucent to perform any cleanup to residential standards.

Response

We disagree. The cleanup goal was appropriately set according to the procedures in Basin Plan section 4.25.2.3 which states: "Cleanup levels must be protective of human health for existing and likely future land use based on properly adopted land use designations in general plans, zoning, and other mechanisms." While the Site's current land use is currently business park/industrial, the following "other mechanisms" indicate that future residential land use is likely:

- The owner has received multiple letters of intent to purchase the Site that include residential use.

- The City of Dublin is willing to evaluate proposals for land use/zoning change to allow residential use at the site (the City has amended its General Plan 65 times since 1999; the General Plan was updated 7 times in 2013 alone).
- While the Site's land use designation is currently business park/industrial, this business park/industrial area is surrounded on three sides by residential uses: single family housing, medium- to high-density residential, and mixed use. The latter two are recent developments (2002 to 2014).
- The 2009-2014 Dublin Housing Element (2009) identifies the vast majority of residential development potential along the eastern extended planning boundary, whereas the 2013 Dublin General Plan identifies 13 areas with housing development potential, all within the primary planning area boundary (which includes the Site). This represents a major shift from Dublin's outward expansion of residential development to residential in-filling in and around the downtown Dublin area. In addition, 6 of the 13 housing development potential areas are adjacent to the business park/industrial area where the Site is located, and all have been developed to include residential use.
- Pressure for residential development in the City of Dublin is particularly high. In 2012, Dublin was the second fastest growing city in California (6.8%; CA Dept. of Finance, May 1, 2013). In 2013, Dublin was the third fastest growing city in California (7.1% increase over prior year; CA Dept. of Finance, May 1, 2014). The 2009-2014 Dublin Housing Element includes a population growth table with Dublin at 33% between 2008 and 2020 (compared to 10% for Alameda County).

There are no known physical impediments at the Site, aside from the current environmental conditions, for residential redevelopment. In addition, sensitive uses, such as hospitals or day care centers (which would be deed restricted under cleanup to only commercial/industrial levels) are allowed under current zoning and land use.

The screening level risk assessment (Finding 9) was based on the existing commercial/industrial use. To avoid any confusion with the conclusion of Finding 9, we revised the TO to include a screening level risk assessment to address unrestricted land use. The only changes as a result of this revision were the addition of vinyl chloride (soil, human health – direct contact) and trans-1,2-DCE (soil gas, vapor intrusion to indoor air), now noted as exceeding ESLs. Neither of these additions results in a new concern or medium requiring cleanup (e.g., TCE was already exceeded for both of these land uses). The conclusion has been revised to clarify that contaminants exceeding the screening level values should be addressed by remediation and risk management.

2. Comment

In the event the Board determines to require cleanup to residential standards under this TO, the TO must then specify that the Site owner and/or its authorized representatives and/or parties having legal control of the Site and their successors, who would benefit financially from this requirement, be responsible for any incremental work required to expand cleanup from commercial/industrial standards to residential standards.

Response

We disagree. Required cleanup to residential levels is based on likely future land use to protect human health, not the current landowner's wishes. Our response to Comment 1 explains why

residential is a likely future land use for the Site. In the TO, the Water Board must name all parties responsible, and the named parties are jointly and severally liable. In the Matter of the Petition of Union Oil Company of California, State Water Board Order No. WQ 90-2. The Water Board is not required to and does not apportion liability among named responsible parties. The named parties are free to fashion whatever arrangement they deem appropriate to comply with the TO.

3. Comment

The TO Lacks Necessary Definition of Final Cleanup: The TO as written provides no reasonable certainty as to the final applicable cleanup standards. In particular, the sentence in paragraph 12 of the TO, "Conversely, if new technical information indicates that cleanup levels can be surpassed, the Regional Water Board may decide that further cleanup actions should be taken", is not lawful or acceptable or appropriate or necessary for this TO. A regulatory order must identify specific tasks to be performed; this part of the TO simply presents complete unknowns and improperly requires Alcatel-Lucent to perform those unknowns.

Response

Upon consideration, we conclude that this language is not necessary. We revised the TO to remove this sentence and replace it with "Any future changes to the cleanup levels in this Order must be consistent with applicable policies and requirements."

4. Comment

The TO: 1) must allow engineering and institutional controls; 2) must specify that the Site owner, etc., be responsible to incorporate any necessary engineering controls and deed restrictions; 3) must require installation of vapor barriers for any future development; and 4) should require the deed restriction to be prepared and recorded immediately since Alcatel-Lucent believes that sufficient documentation establish that cleanup goals will not be attained in the initial foreseeable time frame.

Response

Regarding the first point, the TO currently allows for engineering controls/institutional controls (Finding 13). We revised the TO to clarify that the risk management plan shall include protocols for establishing engineering controls/mitigation as warranted for existing and proposed future site uses (except those prohibited).

Regarding the second point, we disagree, in part. With respect to proposing and implementing engineering controls and proposing deed restrictions, these tasks are the responsibility of the Dischargers collectively. We revised Finding 3 of the TO to remove 6400 Sierra Court Investors, LLC, from secondarily-liable discharger status. 6400 Sierra Court Investors, LLC, will be one of the Dischargers that will be responsible for compliance with these tasks. If it fails to grant reasonable access to allow cleanup, then it risks violation of the Order. As such, the incentives for access already exist. With respect to recordation of the deed restriction, we agree. We revised the TO to specify that this task only applies to 6400 Sierra Court Investors, LLC.

Regarding the third point, we disagree. The Water Board cannot specify any particular means of compliance, such as a vapor barrier.

Regarding the fourth point, we disagree. A deed restriction is not required at this time. The Risk Management Plan in Task 3 will prohibit sensitive land uses and provide protocols for establishing mitigation measures needed for protection of current land use during cleanup. Water Board staff will provide oversight during Risk Management Plan implementation. The Feasibility Study/Remedial Action Plan (FS/RAP) indicates that the anticipated duration to attain cleanup levels in the source area is four to six years (and the timeframe for the biowall is based on the source area cleanup timeframe). Task 5 (Status Report) acknowledges the potential of the non-attainment of cleanup standards and provides specific actions if they are not met and are not projected to be met within a reasonable time.

5. Comment

The TO Must Assure Access to the Site for Remediating Parties: The TO must specify that the Site owner and/or its authorized representatives and/or parties having legal control of the Site and their successors be responsible to grant reasonable access to all the remediating parties, their contractors, and appropriate agency representatives.

Response

As indicated in our response to Comment 4, we revised the TO to remove 6400 Sierra Court Investors, LLC, from secondarily-liable discharger status. As a named discharger, 6400 Sierra Court Investors, LLC, must work with the other named dischargers, including by providing reasonable access to the Site, in order to comply with the Order. Therefore, a requirement that the Water Board require that the Site owner grant access is unnecessary. Moreover, it is questionable whether the Water Board may legally compel Site access.

Chevron U.S.A.:

6. Comment

There is no evidence that Chevron caused a discharge of TCE. Similarly, there is no evidence that Chevron permitted a discharge of TCE. The Regional Board's conclusion that Chevron permitted a discharge of TCE from the tank is not supported by substantial evidence and does not form the basis for a proper CAO to Chevron.

Response

We disagree. There is substantial evidence that Chevron permitted a discharge because during Chevron's ownership of the Site, it permitted ongoing migration of known TCE at the Site, which it had the legal ability to control. There is also evidence that there may have been a release of TCE from the unmaintained Trico above ground storage tank (AST) while Chevron owned the Site.

Evidence that Chevron caused a discharge from the AST is as follows:

Chevron owned the Site from 1980 to 2008. Between 1980 and 1996, Chevron was aware of the presence of the 23 ½ foot long, unmaintained, AST adjacent to the rear entrance of the occupied building and the associated piping going into the building. Chevron had access to building plans that showed the AST and the NIOSH report of former TCE use at the Site.

In 1996, Chevron contracted E&E to have the tank removed. Two E&E reports, dated May 1 and 24, 1996, were prepared in connection with this removal. These documents were not included in

the submittal by Arcadis, on Chevron's behalf, dated June 19, 2008, to the Water Board in response to its Water Code section 13267 directive.

Chevron theorizes that the AST was emptied before Chevron acquired it based on its claim that the tank was "still liquid-tight" at the bottom when it was removed and that if there had been liquid in the tank when it was acquired, it still would have been in the tank when it was removed instead of rainwater. The 1996 E&E reports do not, however, say the tank was "still liquid-tight," and there is no evidence that it was. According to the May 24, 1996, E&E report, the top of the AST was "in poor condition (i.e., the top of the tank is rusted out) and currently contains approximately 150 gallons of liquid (believed to be accumulated rain water)." This confirms that, at the time, the top of the AST was breached. Further, slow leakage though the tank bottom or from the spigot cannot be ruled out.

While the sample of clear liquid on the top of sludge in the tank was non-detect for TCE, a "cloudy and blackish" sample taken from the spigot contained 20 µg/L TCE. In addition, the 1996 report states the supply pipe line from the AST to inside the building contained liquid with an odor characteristic of concentrated TCE. Finally, considering that the top of the AST had rusted out and was open to the atmosphere, the presence of TCE in the sample indicates that there had been product in the AST as of that time and in sufficient quantity to avoid evaporating during the typical long hot summers. All of the above is evidence that the AST had not been properly decommissioned and emptied prior to Chevron's tenure. Combined with the poor condition of the AST, TCE likely discharged into the environment during Chevron's tenure at the Site.

Evidence that Chevron permitted a discharge is as follows:

Even if Chevron did not discharge TCE from the unmaintained AST, it is nevertheless properly named to the Order because it permitted a discharge at the Site.

Chevron knew of the TCE contamination at the Site from the 1996 E&E reports and the 2007 URS report. The 1996 E&E reports stated that two soil samples, one collected adjacent to the AST (under the asphalt) and one adjacent to the building (under the French drain rock), contained measurable concentrations of TCE. One of the samples contained TCE at a concentration (0.53 mg/kg) that exceeds our current ESL and soil cleanup standard in the TO for protection of leaching to groundwater (0.46 mg/kg). While E&E stated in its report that these concentrations pose little threat to human health or the environment, it recommended that Chevron have further discussions with the Department of Toxic Substances Control and the Water Board for potential corrective actions, if any. We have no documentation from Chevron or our files that it contacted the Water Board at that time. However, the report clearly indicates that as of this time, Chevron was aware of the TCE discharge to the environment for which regulatory involvement was advised.

In addition, on October 24, 2007, URS prepared a Final Baseline Site Assessment Report for Chevron. The findings of this report included the following:

- Soil in the vicinity of the former AST contained concentrations of TCE up to 4,800 mg/kg and concentrations of cis-1,2-DCE up to 31 mg/kg, which exceed the typical regulatory action screening criteria.
- Grab groundwater samples from the AST vicinity contained concentrations of TCE up to 66 mg/L and concentrations of cis-1,2-DCE up to 2.4 mg/L.
- It is apparent that constituents of concern are present in three of the four areas where RECs [recognized environmental conditions] were identified on the Site. Of these, the release(s) of

chemicals stored in the former AST that occurred when the Site was operated by Western Electric are the most significant in terms of the environmental condition of the Site. The results of the subsurface investigation indicate that the area of the release includes the north end of the former AST and extends to a point 20 feet west of the south end of the former AST, but the current data is not adequate to evaluate the full horizontal and vertical extent of the impacted area. TCE is dense and will sink through permeable soil and the groundwater column when it is released until it comes to impermeable material, at which point it stops migrating. Although field observations indicate that the soil at the bottom of SB-7 and SB-8 registered lower readings, analysis of deeper soil samples would be needed to fully evaluate the vertical extent of the TCE contamination beneath the Site.

Thus, documentation exists that demonstrates that Chevron was aware of the TCE discharge to the environment in both 1996 and 2007. TCE is a highly mobile solvent and was and is an ongoing discharge. Chevron had the ability to control the discharge but failed to do so. It, therefore, permitted TCE to be discharged.

The TO has been revised to further provide the basis for naming Chevron as a discharger.

7. Comment

There is no evidence to suggest Gettler-Ryan was storing TCE impacted purge water, and even if they were, it does not form a valid basis for issuance of a CAO to Chevron.

Response

We disagree. There is some evidence that Gettler-Ryan's operations may have been the source of TCE found at the Gettler-Ryan lease location (see the 2013 FS/RAP). There is also substantial evidence of a TCE release elsewhere on the Site and that forms the basis for naming Chevron (see our response to Comment 6). If in future we find substantial evidence that Gettler-Ryan's operations (or another party's activities) were the source of TCE found at the Gettler-Ryan lease location, then we will consider amending the Order to reflect that new information.

8. Comment

Scope of Tentative CAO is improper because it requires cleanup to standards other than industrial use and requires Chevron to take actions it lacks the authority to undertake (prepare a risk management plan that prohibits groundwater and site uses and proposes a deed restriction if cleanup goals cannot be met).

Response

Regarding cleanup standards, we disagree. See our response to Comment 1.

Regarding the Risk Management Plan and deed restriction, the named Dischargers, which include Chevron, are responsible for acceptable submittals of the Risk Management Plan and proposed deed restriction. We agree that certain tasks in the TO will require action by the current landowner, notably the deed restriction tasks. We conclude that "secondarily liable" discharger status for the current landowner is not warranted in this case, in part for the reasons cited by Chevron and in part because the conditions for bestowing "secondarily liable" discharger status are not present in this case. Secondarily liable status is granted only if the primarily liable dischargers are cleaning up and the secondarily liable discharger did not initiate or contribute to the discharge. Specifically, the

other dischargers (Chevron and Alcatel-Lucent) have indicated some reluctance to implement the necessary cleanup. Chevron objects to being named, and both Chevron and Alcatel-Lucent object to cleaning up to unrestricted-use levels (see prior comments). Therefore, the current landowner is not eligible for "secondarily liable" discharger status. We revised the TO to dispense with this status for the current landowner (in Finding 3 and Provision D.11).

Regarding the deed restriction recordation task, the TO has been revised to specify that this task will be the responsibility of 6400 Sierra Court Investors, LLC, and that the Order will be amended if site ownership changes.

Leidos:

9. Comment

Soil cleanup level for vinyl chloride should be amended to be consistent with the derivation of the other specified soil cleanup levels, which are based on a groundwater protection rationale.

Response

See our response to Comment 1. For all constituents, the lowest applicable standard was selected as the cleanup level. For vinyl chloride, unlike the other listed contaminants of concern, the direct exposure standard (under a residential or unrestricted use scenario) is the lowest applicable standard. We did not revise the TO based on this comment.

10. Comment

Cleanup levels for soil gas should be amended to the commercial/industrial land use environmental screening level for soil gas. Additionally, as the cleanup levels listed are for protection of human health from vapor intrusion, these cleanup levels should only apply beneath an on-site building.

Response

See our response to Comment 1. Cleanup standards are not based on existing site use, which currently is one large unoccupied building surrounded by paved parking, but must also address likely future site uses. We did not revise the TO based on this comment.

11. Comment

Cleanup levels for indoor air should be amended to the commercial/industrial land use environmental screening level for indoor air. The property is zoned for commercial use, therefore residential cleanup levels do not apply. Also, as noted in the TO, the indoor air cleanup levels apply only to occupied on-site buildings.

Response

See our response to Comment 1. The comment is correct in stating that indoor air applies to occupied onsite buildings and will only be applied if the current building or any future buildings are considered for occupancy prior to soil gas cleanup levels being achieved. We revised Section B.4 of the TO to incorporate this last statement.

Terrence Daly-Receiver:

12. Comment

The Order does not specifically state that Chevron is responsible for the Gettler Ryan spill. We have seen no data over the years to indicate that this secondary contamination came from anywhere than on site. We understand that Chevron is prepared to clean up this area, also, but in their Feasibility Study/Remedial Action Plan dated July 1, 2013, they continue to believe this may be an offsite contamination issue. Nowhere in the Tentative Order is it clear that this is their issue.

Response

The FS/RAP included four possible explanations for a "potential second source," including offsite contamination, and three scenarios for onsite contamination. It notes that there is no strong evidence for any one of the four explanations and proposed a remedial action to address the contamination. The TO requires implementation of an amended remedial action plan that must address this "potential second source." If additional information is provided to the Water Board indicating that this contamination is from an offsite source, the parties responsible for the offsite source will be responsible for investigation and cleanup of the offsite source. We did not revise the TO based on this comment.

13. Comment

Wells Fargo Bank and the owner, 6400 Sierra Court Investors, have suffered significant losses due to this issue. Based on multiple conversations with potential buyers of the site, we believe that the highest and best use for the property is as a residential site. We have had discussions with the City of Dublin concerning residential usage and have been led to believe that the City, subject to a General Plan Amendment that requires City Council approval, would approve such a conversion. It is imperative that we are able to sell the site at some point and mitigate the damages to the Bank and the owner. Cleaning up to a residential standard will help us minimize these substantial financial losses.

Response

Comment noted. See our response to Comment 1. No change to the TO is needed to address this comment.