



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** January 18, 2022  
**TO:** Chair Bauters and Board of Directors  
**FROM:** Christine Daniel, Executive Director  
**SUBJECT:** **Resolution Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Approving And Adopting The Administrative Budget And Recognized Obligation Payment Schedule For The Period Of July 1, 2022 Through June 30, 2023 (ROPS 22-23) Pursuant To Health And Safety Code Section 34177 And Authorizing Staff To Take Related Actions**

### RECOMMENDATION

Staff recommends the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency (“Successor Agency”) adopt the above-entitled resolution approving the Administrative Budget and Recognized Obligation Payment Schedule (ROPS) for the period of July 1, 2022 through June 30, 2023 (ROPS 22-23) pursuant to Health and Safety Code Sections 34177(j) and 34177(o), respectively.

### BACKGROUND

Pursuant to the Dissolution Act<sup>1</sup>, the Successor Agency is responsible for preparing and obtaining Oversight Board approval of an Administrative Budget and a Recognized Obligation Payment Schedule (“ROPS”) that describes payments required pursuant to “enforceable obligations” of the former Redevelopment Agency. The annual Administrative Budget and ROPS must be presented to and approved by the Oversight Board and transmitted to the State of California, Department of Finance (“DOF”) on or before February 1<sup>st</sup> of each year.

Administrative Budget 22-23 and ROPS 22-23, governing Successor Agency expenditures for the July 1, 2022 through June 30, 2023 fiscal year, is presented for the approval of the Successor Agency at its regular meeting of January 18, 2022; thereafter,

---

<sup>1</sup> On December 29, 2011, the California Supreme Court issued its decision in the matter of *California Redevelopment Association et.al. vs. Ana Matosantos et.al.* finding Assembly Bill 26 (the “Dissolution Act”) constitutional and ABX1 27 (the “Voluntary Redevelopment Program Act”) unconstitutional. The Supreme Court’s ruling also postponed all deadlines outlined in the Dissolution Act before May 1, 2012 by four months. As a result, the Emeryville Redevelopment Agency (“Redevelopment Agency”) was dissolved on February 1, 2012.

On January 17, 2012, the Emeryville City Council adopted Resolution No. 12-12 electing to have the City of Emeryville serve as the Successor Agency. The Successor Agency is responsible for winding down the affairs of the Redevelopment Agency under the direction of an Oversight Board, including paying off the Redevelopment Agency’s obligations, preparing administrative budgets and disposing of the former Redevelopment Agency’s assets. The Emeryville City Council also adopted Resolution No. 12-15 electing to have the City of Emeryville retain the housing assets and functions previously performed by the former Redevelopment Agency.

Administrative Budget 22-23 and ROPS 22-23 will be presented to the Alameda County Oversight Board<sup>2</sup> (“Oversight Board”) at their regular meeting on January 19, 2022.

### **ROPS Approval Process**

Since enacting the Dissolution Act in 2011, the California state legislature has amended it on several occasions. Generally, with respect to the ROPS, the following requirements apply:

- All ROPS must be completed “in the manner provided for by” the DOF (Section 34177(o) (1) (A))<sup>3</sup>. The DOF Internet Web site publishes the form and instructions that are to be used by a successor agency.
- Staff must submit an electronic copy of the proposed ROPS approved by the Successor Agency to the Alameda County Administrative Officer (“CAO”), the Alameda County Auditor-Controller (“A/C”), and the DOF at the same time that the proposed ROPS is submitted to the Oversight Board for approval. (Section 34177(l) (2) (B).)
- For ROPS 22-23, the deadline for the Successor Agency to submit an Oversight Board approved ROPS to DOF, the California State Controller’s Office (“SCO”) and A/C is February 1, 2022. Each successive annual ROPS is due on February 1<sup>st</sup> of each year. (Section 34177(l) (2) (C) & (o) (1).)

The review process for an Oversight Board approved ROPS by DOF is as follows:

- The deadline for DOF to request review of an Oversight Board action approving a ROPS is five business days (Section 34179(h)).
- DOF is required to make its determination of the enforceable obligations and the amounts and funding sources of the enforceable obligations no later than April 15, 2022, and each April 15<sup>th</sup> thereafter for succeeding years after the ROPS has been submitted by a successor agency (Section 34177(o)(1)).
- DOF has the authority to eliminate or modify any item on the ROPS being reviewed prior to DOF approval (Section 34179(h)).
- A successor agency may request additional review by the DOF and an opportunity to “meet and confer” on disputed items, but such a request must be made within five business days of the successor agency’s receipt of a DOF determination (Section 34177(o) (1)). Given this short time frame, the Successor Agency

---

<sup>2</sup> Pursuant to Health and Safety Code Section 34179(j), commencing on July 1, 2018, in each county where more than one oversight board was created by operation of the Dissolution Act, such as in Alameda County, there shall be only one oversight board, which will be staffed by the county auditor-controller. Accordingly, as of June 30, 2018, the Emeryville Oversight Board was disbanded and replaced with the Alameda County Oversight Board.

<sup>3</sup> All citations to “Section” are to Health and Safety Code unless otherwise indicated.

resolution approving ROPS 22-23 provides staff the authority to request the review and “meet and confer” with the DOF should they reject an item on ROPS 22-23.

- DOF is required to notify a successor agency and the A/C of the outcome of its review at least 15 days before the date of the Redevelopment Property Tax Trust Fund (RPTTF) property tax distribution (presumably by May 17 for the June 1 RPTTF distribution) (Section 34177(o)(1)). Thus, if there is a need for staff to request a meet and confer with the DOF as to ROPS 22-23, then the outside date for receipt of DOF’s determination would be no later than May 17, 2022.
- A successor agency and Oversight Board may approve amendments to a ROPS to reflect the resolution of a dispute with DOF, but such amendments will not affect a past allocation of property taxes or create a liability to any affected taxing entity with respect to past allocations (Section 34179(h)).
- An annual ROPS may be amended once, provided it is processed and approved by the Successor Agency and Oversight Board and submitted to DOF no later than October 1<sup>st</sup> (Section 34177(o)(1)(E)).

The A/C has the authority to review and object to the inclusion of any items that are not demonstrated to be enforceable obligations and/or may object to the funding source of any items on the ROPS. While the A/C may review and object either before or after the Oversight Board approval of a ROPS, the A/C must give notice of objections at least 60 days prior to the RPTTF distribution date. (Section 34182.5.)

## **DISCUSSION**

The remaining enforceable obligations of the Successor Agency listed in ROPS 22-23 generally fall within three (3) broad categories as follows: Administrative Costs/Expenses; Bond Debt; and Hazardous Materials Remediation and Monitoring.

### **I. *Administrative Costs/Expenses (ROPS Item 1)***

ROPS item 1 provides for payment to the City of Emeryville for its administrative costs and expenses outlined in the Administrative Budget associated with the oversight of activities in connection with winding down the obligations of the Successor Agency. The Administrative Budget for ROPS 22-23 is \$450,369.

### **II. *Bond Debt/Financial Services (ROPS Items 62, 63, 64, 67, 103, 104, 116, 117)***

- **Item 62: Maze and Associates – Audit Services**
- **Item 63: Wells Fargo Bank – Bank Fees**
- **Item 64: Bank of New York Mellon – Bond Trustee Services**
- **Item 67: MuniServices – Real Property Tax Audit Services**
- **Item 103: Wildan Financial – Bond Annual Continual Disclosure Reporting**
- **Item 104: PFM Group – Bond Arbitrage/Rebate Calculations**
- **Item 116: Bank of New York Mellon – Bond 2014A Annual**

- **Item 117: Debt Service Payment  
Bank of New York Mellon – Bond 2014B Annual  
Debt Service Payment**

The former Emeryville Redevelopment Agency entered into loan agreements in 1995, 1998, 2001, 2002 and 2004 which pledged tax increment and low and moderate income housing revenues as security for bonds issued by the Emeryville Public Finance Authority. The bond funds were then used by the Redevelopment Agency to finance redevelopment activities and affordable housing projects.

Section 34177.5 (a) of the Dissolution Act provides that the Successor Agency may proceed to issue bonds to refund existing bonds or other indebtedness of its former redevelopment agency to provide savings. In 2014, the Successor Agency determined that bond market conditions allowed for the issuance of refunding bonds to refinance all of the former Redevelopment Agency's outstanding bonds. The estimated average annual debt service savings was calculated to be approximately \$500,000 per year. Since the debt service on the bonds is not level, the savings will be greater in years 2015 to 2026 and declining in years 2027 to 2034 due to the different final maturities on the existing bonds. Accordingly, in April 2014, the Successor Agency and Oversight Board approved the transaction to refund the former Redevelopment Agency's existing bonds.

The refinancing of the outstanding indebtedness of the former Redevelopment Agency generated net present value savings of approximately \$6.0 million over the remaining life of the bonds. ROPS line items 116 and 117 reflects the annual debt service payment due for the refunding bonds of \$9,583,875 and \$1,333,361 during the ROPS 22-23 cycle. ROPS line items 103 and 104 relate to professional services for continuing disclosure reporting and arbitrage calculations required in connection with the refunding bonds. ROPS line item 64 relates to annual fees paid to the bond trustee. These line items will be retired after all bond debt is fully repaid in September 2034.

ROPS line items 62, 63 and 67 relate to other financial aspects of the Successor Agency. ROPS line item 62 relates to required financial auditing services for the Successor Agency. ROPS line item 63 relates to bank fees paid in connection with the Successor Agency's accounts. Finally, ROPS line item 67 relates to property tax audit services as needed. These line items will also be retired once all Successor Agency obligations have been satisfied and the Successor Agency is dissolved.

### **III. *Hazardous Materials Remediation and Monitoring***

Actions taken to remediate hazardous materials in soil and groundwater was one of the many appropriate activities that redevelopment agencies could pursue. The City of Emeryville had a long history of industrial activity dating back to the late 1800s which left behind a legacy of contamination in soil and groundwater upon the exodus of industry from the City in the 1960s through the 1980s. The former Emeryville Redevelopment Agency was very active in the remediation of hazardous materials within the City and the following three (3) projects fall in that category. The map attached to this report as

**Attachment A** outlines the boundaries of the three (3) project sites known as South Bayfront Site A, South Bayfront Site B, and the Corporation Yard.

**A. *South Bayfront Site A Monitoring (ROPS Items 44, 45, 46, 47)***

- **Item 44: EKI - Environmental Engineering Services**
- **Item 45: CalEPA DTSC – Environmental Oversight Agreement**
- **Item 46: The Sherwin-Williams Company Settlement Agreement & Order**
- **Item 47: Bay Street CenterCal LLC – Site A Disposition & Development Agreement**

**Background**

South Bayfront Site A, also known as Bay Street, is bound by the IKEA home furnishings store to the south, Shellmound Street to the west, Union Pacific railroad tracks to the east, and South Bayfront Site B to the north, and is bisected by the Temescal Creek channel. Beginning in the mid-1990s, the former Redevelopment Agency commenced the process of acquisition of several parcels of real property making up South Bayfront Site A in order to bring about the remediation of hazardous materials impacting and curtailing the beneficial use of those parcels and redevelop the site with a mix of retail, theatre, restaurant, hotel and residential uses that currently exist today.

In 1999, the California Environmental Protection Agency, Department of Toxic Substances Control (DTSC) approved the final Remedial Action Plan (RAP) prepared by the Redevelopment Agency for South Bayfront Site A. The RAP prepared by the Redevelopment Agency did not include a portion of South Bayfront Site A located to the south of the Temescal Creek channel, which was previously owned by the Myers Drum Container Corporation (“Myers Drum”) and remediated by Myers Drum under the oversight of DTSC. Subsequent to the approval of the final RAP prepared by the Redevelopment Agency, the Agency implemented the cleanup of hazardous materials in soil and groundwater. Once the required soil and groundwater remediation under the RAP was completed, the Redevelopment Agency thereafter prepared an Environmental Risk Management Plan (RMP) for all of South Bayfront Site A, including the former Myers Drum property, consistent with the requirements of the final RAP. The RMP was approved by DTSC on July 26, 2000.

The approved final RAP required the implementation of extensive soil removal and the RMP a multi-year groundwater and surface water monitoring program (the “RMP Monitoring Program”) on South Bayfront Site A. The RMP Monitoring Program approved by DTSC required the installation of 17 groundwater monitoring wells located both north and south of Temescal Creek, two temporary groundwater monitoring wells, surveying of all sampling locations, quarterly sampling at all well locations, sampling within storm drains located within Shellmound Street, sampling of surface waters within the Temescal Creek channel, and preparation and submittal of a quarterly monitoring report of the

sampling results. Currently, the groundwater monitoring required by DTSC has been reduced to annual monitoring and reporting.

### **The Sherwin-Williams Company Settlement Agreement & Order**

As part of the eminent domain actions filed by the Redevelopment Agency to acquire some of the parcels comprising South Bayfront Site A, the Redevelopment Agency also initiated an action utilizing the Polanco Redevelopment Act to recover its costs of hazardous materials remediation from responsible parties. In the matter of City of Emeryville, Emeryville Redevelopment Agency v. Elementis Pigments, Inc., The Sherwin-Williams Company, Pfizer, Inc., A&J Trucking Company, Inc., Baker Hughes, Inc., Arthur M. Sepulveda and Josephine Sepulveda, United States District Court, Case No. C99-03719 WHA, the City and Redevelopment Agency entered into settlement agreements with the responsible parties to pay for their appropriate share of the costs of remediation and ongoing groundwater monitoring, which settlement agreements were approved by order of the Court.

The Settlement Agreement with The Sherwin-Williams Company is on file with the City Clerk<sup>4</sup>. As provided in Section VI of the Settlement Agreement with The Sherwin-Williams Company, the Redevelopment Agency agreed that it would pay for the first \$200,000 of costs associated with the groundwater RMP Monitoring Program<sup>5</sup>, and the next \$1,314,000 of such costs would be shared equally with The Sherwin-Williams Company. Any costs in excess of \$1,514,000 are shared 95% by The Sherwin-Williams Company and 5% by the Redevelopment Agency. The Settlement Agreement with The Sherwin-Williams Company constitutes an enforceable obligation of the Successor Agency pursuant to Section 34171(d)(1)(D). The obligation of the Successor Agency set forth in the Settlement Agreement is reflected in ROPS line item 46.

### **Site A Disposition and Development Agreement**

The Redevelopment Agency sold South Bayfront Site A to Bay Street Partners LLC, successor-in-interest to the South Bayfront Redevelopment Project Partnership, on June 12, 2001, pursuant to the Disposition and Development Agreement (Site A DDA) dated September 23, 1999. Bay Street Partners thereafter redeveloped South Bayfront Site A with the Bay Street project comprising over 300,000 square feet of retail/restaurant/theatre space, approximately 350 housing units (rental and ownership), a hotel and structured parking. As provided in Section 212, subsection 1 of the Site A DDA, as between the Redevelopment Agency and Bay Street Partners and any future property owner, the Redevelopment Agency retained the responsibility for ongoing

---

<sup>4</sup> The Settlement Agreement with The Sherwin-Williams Company was attached as **Appendix B** to the January 15, 2019 staff report to the Successor Agency regarding consideration of ROPS 19-20, and can be viewed at <https://emeryville.legistar.com/View.ashx?M=F&ID=6964105&GUID=630010D6-9FE3-4F1A-99DC-491DA6A855FC>.

<sup>5</sup> Pursuant to the terms of the purchase agreement between the Redevelopment Agency and Myers Drum, Myers Drum is obligated to implement the groundwater RMP Monitoring Program south of Temescal Creek; accordingly, the Successor Agency's obligation is limited to implementing the groundwater RMP Monitoring Program north of Temescal Creek.

groundwater monitoring and remediation<sup>6</sup>. The Site A DDA constitutes an enforceable obligation of the Successor Agency pursuant to Section 34171(d)(1)(E). The current owner of South Bayfront Site A is Bay Street CenterCal, LLC, and this obligation of the Successor Agency is reflected in ROPS line item 47.

### **Environmental Engineering Services**

ROPS line item 44 relates to the Professional Services Agreement (PSA) with the firm of Erler & Kalinowski, Inc. (EKI), to provide services on behalf of the Successor Agency that are set forth in the RMP Monitoring Program north of Temescal Creek as required by the terms of the Settlement Agreement with The Sherwin-Williams Company and to fulfill its obligation under the Site A DDA to the owner of South Bayfront Site A. The PSA constitutes an enforceable obligation of the Successor Agency pursuant to Sections 34171(d) (1) (E) and 34171(d) (1) (F).

For the ROPS 22-23 cycle and as reflected in ROPS line item 44, it is estimated that the Successor Agency will incur approximately \$100,000 for groundwater monitoring and reporting services provided by EKI pursuant to the RMP Monitoring Program. During the ROPS 21-22 cycle, the annual groundwater monitoring indicated elevated levels of arsenic, and DTSC has indicated that additional monitoring may be required. Furthermore, the costs of conducting additional monitoring have increased as well.

At present the Redevelopment Agency/Successor Agency, The Sherwin-Williams Company and the Myers Drum Container Corporation have conducted over 17 years of groundwater monitoring and reporting for South Bayfront Site A and the monitoring and reporting activities will continue for some indeterminate time. At some point in the future, depending on the data reflected in the annual monitoring and reporting, DTSC can require further groundwater remediation activities, continued groundwater monitoring, or some combination thereof, or discontinuance and termination of the RMP Monitoring Program in total or as to that part conducted to the north of Temescal Creek or that part conducted to the south of Temescal Creek. As noted above, pursuant to the Settlement Agreement with The Sherwin-Williams Company, any costs in excess of \$1,514,000 are shared 95% by Sherwin-Williams and 5% by the Successor Agency. However, any such costs in excess of this \$1,514,000 figure ***are not*** reflected in the total outstanding obligation under the PSA with EKI and shown on ROPS line item 44.

### **Environmental Regulatory Oversight**

Oversight of the remediation of South Bayfront Site A as required by the final RAP and the ongoing groundwater monitoring required by the RMP has been provided by DTSC

---

<sup>6</sup> The DDA for South Bayfront Site A has been amended 15 times, the last occurring on January 6, 2011. The applicable provision of Section 212, subsection 1, of the Site A DDA is provided in the First Implementation Agreement between the Redevelopment Agency and the South Bayfront Redevelopment Project Partnership, dated September 8, 2000. A copy of the First Implementation Agreement to the DDA is attached as **Appendix C** to the January 15, 2019 staff report to the Successor Agency regarding consideration of ROPS 19-20, and can be viewed at <https://emeryville.legistar.com/View.ashx?M=F&ID=6964105&GUID=630010D6-9FE3-4F1A-99DC-491DA6A855FC>.

pursuant to a Voluntary Cleanup Agreement between DTSC and the former Redevelopment Agency that was entered into effective July 20, 1998, as amended on March 13, 2007. The environmental oversight agreement with DTSC constitutes an enforceable obligation of the Successor Agency pursuant to Sections 34171(d) (1) (C), 34171(d)(1)(E), and 34171(d)(1)(F). Thus, for the ROPS 22-23 cycle and as reflected in ROPS line item 45, it is estimated that the Successor Agency will incur approximately \$50,000 for the reimbursement of DTSC's costs of oversight.

**B. South Bayfront Site B Remediation and Monitoring (ROPS Items 39, 40, 41, 121)**

- **Item 39: Cox Castle & Nicholson - Legal Services**
- **Item 40: Chevron USA/Union Oil Settlement Agreement & Order**
- **Item 41: EKI – Environmental Engineering Services**
- **Item 121: CalEPA DTSC – Environmental Oversight Agreement**

**Background**

As noted above, the former Redevelopment Agency sold South Bayfront Site A to Bay Street Partners for redevelopment in June 2001 and thereafter the site was the location of significant construction activity for the next several years. On August 9, 2004, a certificate of completion was issued by the Redevelopment Agency for the South Bayfront Site A project. With the completion of redevelopment of South Bayfront Site A, the Redevelopment Agency turned its attention to the South Bayfront Site B (“Site B”) properties.

In early 2004 the former Redevelopment Agency commenced actions to acquire and remediate the properties known collectively as Site B (i.e., five parcels previously owned by 4 different owners bounded by Shellmound Street to the west, Powell Street to the north, Union Pacific railroad tracks to the east, and South Bayfront Site A to the south) for redevelopment into a mixed-use endcap to the South Bayfront Site A project. Given the knowledge gained from the process of studying, investigating, evaluating and remediating South Bayfront Site A, the Redevelopment Agency engaged the firm of Eler & Kalinowski, Inc. (“EKI”) as its environmental engineer for addressing Site B, and entered into a Professional Services Agreement (“PSA”) with EKI on October 6, 2004. In addition, in order to secure regulatory oversight services for the remedial process at Site B, the former Redevelopment Agency also entered into an environmental oversight agreement with DTSC in 2004.

After an extensive process of environmental study, investigation and evaluation, in June 2008 the Redevelopment Agency awarded a contract for soil remediation of hazardous materials contamination at Site B. Soil remediation activities at Site B were conducted in accordance with the Final Feasibility Study/Remedial Action Plan (“FS/RAP”) and Final Remedial Design and Implementation Plan (“RDIP”) prepared by EKI and approved by



DTSC. Soil remediation activities at Site B were completed in the fall of 2009 and the Soil Remediation Completion Report was approved by DTSC on June 15, 2010.

### **The Chevron USA/Union Oil Settlement Agreement & Order**

As part of the eminent domain actions filed to acquire four of the five parcels comprising Site B, the Agency also initiated an action utilizing the Polanco Redevelopment Act to recover its costs of hazardous materials remediation from responsible parties. On July 23, 2010, a month after the soil remediation had been completed, in the matter of Emeryville Redevelopment Agency v. Howard F. Robinson and Jeanne C. Robinson, PG&E, Wilson Associates, Chevron Corporation, Union Oil, Sherwin-Williams Company, Mary Lou Adam as Trustee, Christopher D. Adam, Hilary A. Jackson; Bank of America, trustee of Koeckritz Trust, Alameda County Superior Court, Consolidated Case Nos. RG-06-267600, RG-06-267594, RG-07-332012, the Alameda County Superior Court approved an Order On Joint Motion For Good Faith Determination Of Settlement and Settlement Allocations (“Settlement Order”)<sup>7</sup> approving the settlements with several defendants and approving the allocation of \$22,400,000 in settlement proceeds.

The settlement proceeds covered **known** costs incurred up to that point for soil remediation and the Redevelopment Agency’s legal fees, as well as an estimate of approximately \$9.6 million for future groundwater remediation costs. The Settlement Order confirmed the Court’s prior approval of the Chevron USA/Union Oil Settlement Agreement, and approved the Koeckritz Settlement Agreement, the Robinson Settlement Agreement, and the Adam Settlement Agreement. Completion of the **soil and groundwater** remediation in accordance with the FS/RAP and Final RDIP is an obligation of the former Redevelopment Agency pursuant to the terms of the settlement agreements approved by the Settlement Order. The settlement agreements approved by the Settlement Order constitute an enforceable obligation of the Successor Agency pursuant to Section 34171(d)(1)(D) and 34171(d)(1)(E). This obligation is reflected in ROPS line-item 40<sup>8</sup>.

### **Environmental Engineering Services**

Upon completion of the soil remediation, the next phase of remediation related to groundwater contamination commenced. With respect to groundwater remediation, the approved FS/RAP anticipated that the Redevelopment Agency would implement a remedy involving the construction of a containment trench around the northeast edge of

---

<sup>7</sup> The only defendant that did not initially settle was The Sherwin-Williams Company. The Redevelopment Agency and Sherwin-Williams went to trial, and on October 11, 2011, a judgment was entered in favor of the Redevelopment Agency resulting in a net recovery of approximately \$3.3 million to the Agency. Altogether, the Redevelopment Agency recovered \$25 million from all defendants for costs incurred for soil remediation, legal fees and future anticipated costs of groundwater remediation at Site B.

<sup>8</sup> A copy of the Chevron USA/Union Oil Settlement Agreement and the Settlement Order are attached as **Appendix D** and **Appendix E**, respectively, to the January 15, 2019 staff report to the Successor Agency regarding consideration of ROPS 19-20, and can be viewed at <https://emeryville.legistar.com/View.ashx?M=F&ID=6964105&GUID=630010D6-9FE3-4F1A-99DC-491DA6A855FC>.

Site B and then continuously pump the contaminated groundwater and treat it before disposal. The FS/RAP also contained, as an alternative, a bio-remediation concept.

Based on the results of the extensive soil remediation and its favorable impact to groundwater, the Redevelopment Agency and DTSC agreed to pursue the bio-remediation alternative rather than the construction of the containment trench and pumping and treating of contaminated groundwater. Further, given that the soil remediation had been successfully completed and the Redevelopment Agency was about to commence the next stage of site remediation related to the groundwater beneath Site B, the Redevelopment Agency and DTSC entered into a new Environmental Oversight Agreement on June 27, 2011, for DTSC to provide regulatory oversight services related to the remediation of groundwater. The Environmental Oversight Agreement with DTSC is an enforceable obligation of the Successor Agency pursuant to Sections 34171(d) (1) (E) and 34171(d) (1) (F), and was previously listed on the ROPS as line item 43.

Thereafter, to advance the bio-remediation remedy, EKI undertook a pilot study of enhanced reductive dechlorination (“ERD”), involving injecting organic amendments into the groundwater in order to address tetrachloroethene (“PCE”), trichloroethene (“TCE”), and its breakdown products, including vinyl chloride (“VC”). Based on the favorable results from the pilot study, the RDIP was amended to authorize the bio-remediation of groundwater contamination across Site B.

With respect to groundwater remediation, the concern relates to hazardous material impacts to both the shallow groundwater and deeper groundwater. Generally, impacts to shallow groundwater are of a greater concern because of the possibility that vapors from contaminants can more readily negatively impair indoor air within buildings constructed on the site. In the summer of 2013, EKI implemented ERD to address impacts from PCE, TCE and VC to shallow groundwater. Subsequent groundwater monitoring results have shown that ERD has been very effective at reducing the contaminant levels in shallow groundwater of PCE, TCE and VC. Given the very favorable results of ERD on shallow groundwater, in the summer of 2016 the DTSC approved the utilization of ERD to address contaminants in the deeper groundwater zone. The initial injections to deeper groundwater on Site B were completed in the fall of 2016.

In the spring of 2017 groundwater monitoring was undertaken of the shallow and deep groundwater zones to document the effectiveness of the fall 2016 ERD injections on contaminant levels in groundwater of PCE, TCE and VC. Based on the data from the spring 2017 sampling activities, it was evident that additional buffer needed to be injected in order to facilitate the further degradation of PCE, TCE and VC. Thus, in late spring 2017, supplemental injections of buffer was approved by DTSC and thereafter implemented. In the fall of 2017, sampling of monitoring wells was undertaken to ascertain the effectiveness of the supplemental injections. Based on the favorable results, a completion report related to remediation of groundwater was submitted to DTSC for approval on March 21, 2018.

Due to loss of staff to other state environmental agencies that had been assigned to Site B, as well as a number of retirements at the senior level, DTSC assigned a new project

manager to the Site B project in late 2018 and DTSC reviewed and approved the completion report in mid-2019.

As reflected in the completion report and recent Annual Groundwater Monitoring Reports, notwithstanding the effectiveness of the ERD injections to both shallow and deeper groundwater, it is evident that contaminants in groundwater from off-site sources will continue over time to migrate onto and impact the groundwater beneath Site B. Thus, in late 2019 additional injections of ERD were implemented and unless and until off-site sources of contamination from the Corporation Yard are addressed, there may need to be continued injections of ERD into the groundwater under Site B for the foreseeable future. As noted, one such off-site source is the Corporation Yard site discussed in section III.C. below.

Accordingly, with respect to Site B, in calendar year 2019, EKI undertook activities to evaluate post-injection baseline soil vapor conditions to assess whether long-term injections will be required since the data indicates the primary ongoing source of CVOCs in shallow groundwater are up gradient off-site sources (i.e., the Corporation Yard). The results of this soil vapor assessment demonstrated that engineering controls (e.g. vapor barriers, passive/active vapor systems) will be required to mitigate vapor intrusion concerns for the indoor air of future structures built on the site and thereby eliminate the need for more costly on-going ERD injections. The data obtained from this evaluation also served to inform the preparation of the long-term Operation and Maintenance Plan (“O&M Plan”) for Site B.

In calendar year 2020, EKI prepared a draft of the O&M Plan which is currently under review by staff.. The O&M Plan will address the installation of engineering controls, location of groundwater monitoring wells as well as a schedule for on-going groundwater monitoring obligations, and a soil management plan governing any future on-site excavation activities associated with site redevelopment. Further, the O&M Plan may need to allow for the placement of wells for the on-going injection of ERD until such time as impacts from off-site sources (i.e., the Corporation Yard) are controlled at the source by the responsible parties. Finally, there will be a need to enter into a land use covenant (“LUC”) with the DTSC that will place restrictions on use of groundwater beneath Site B, as well as future uses of Site B. However, it is reasonable to expect that these activities will not occur until there is further action taken by the Successor Agency to control and remediate hazardous materials at the Corporation Yard. Such action by the Successor Agency is not likely to occur until DTSC has approved the FS/RAP for the Corporation Yard.

As discussed below, once these matters are completed and the immunities under the Polanco Act are conferred upon Site B by DTSC, then the property can be transferred to the City in accordance with the terms of the Long Range Property Management Plan (“LRPMP”) for development.

The PSA with EKI has been amended several times throughout the remedial process and is an enforceable obligation of the Successor Agency pursuant to Sections 34171(d)(1)(E) and 34171(d)(1)(F). For the ROPS 22-23 cycle and as reflected in ROPS line item 41, it is estimated that the Successor Agency will incur approximately \$307,000 for the

environmental engineering services provided by EKI. These services will include the second semi-annual groundwater monitoring event and report to DTSC for 2022, and the first such semi-annual event and report for 2023.

### **Legal Services**

ROPS line item 39, a Professional Services Agreement with the firm of Cox, Castle & Nicholson and an enforceable obligation of the Successor Agency pursuant to Section 34171(d)(1)(F), may be utilized by the Successor Agency to fund the costs of legal services incurred in reviewing the O&M Plan, preparing and negotiating the terms of the O&M Agreement, if required, and LUC with DTSC, obtaining the confirmation of the immunity under the Polanco Act from DTSC discussed below, especially as it relates to any revisions that may be required due to the Feasibility Study/Remedial Action Plan and related environmental document to implement the ISE Order. For the ROPS 22-23 cycle and as reflected in ROPS line item 39, it is estimated that the Successor Agency will incur approximately \$50,000 for the services provided by Cox, Castle & Nicholson.

### **Environmental Regulatory Oversight**

As noted earlier, an environmental oversight agreement with DTSC was executed in 2011 governing the groundwater remedial process and was amended several times over the years. The oversight agreement with DTSC constitutes an enforceable obligation of the Successor Agency pursuant to Section 34171(d) (1) (E) and Section 34171(d) (1) (F) and was listed on each ROPS since the inception of the dissolution process. However, as a result of the turnover at DTSC referred to earlier, the term of the oversight agreement inadvertently expired before an extension of the term could be prepared and executed. Accordingly, as part of the ROPS 18-19 approval process, the DOF denied funding for the oversight agreement because the term had expired, and no extension of the term had been approved and executed. Therefore, during the ROPS 18-19 period, the Successor Agency had no funding with which to pay for DTSC's services. Nevertheless, DTSC's services are absolutely necessary in order to gain site closure to Site B.

Health and Safety Code Section 34177.3(a) provides that the Successor Agency "shall lack the authority to, and shall not, create new enforceable obligations or begin redevelopment work, **except in compliance with an enforceable obligation**, as defined in subdivision (d) of Section 34171, that existed prior to June 28, 2011". DTSC's services are necessary in order for the Successor Agency to complete the remediation of groundwater at Site B, which is an enforceable obligation of the Successor Agency pursuant to the terms of the settlement agreements approved by the Settlement Order of the Alameda County Superior Court on July 23, 2010.

Therefore, pursuant to authority provided by Section 34177.3(a), on January 15, 2019, the Successor Agency approved and authorized the execution of an Environmental Oversight Agreement with the California Environmental Protection Agency, Department Of Toxic Substances Control, to provide regulatory oversight of groundwater remediation and monitoring at Site B. The Environmental Oversight Agreement with DTSC is an enforceable obligation of the Successor Agency pursuant to Section 34171(d) (1) (F) and

provides for the reimbursement of DTSC's costs of oversight and review of the ongoing groundwater monitoring.

Thus, for the ROPS 22-23 cycle and as reflected in ROPS line item 121, it is estimated that the Successor Agency will incur approximately \$50,000 for DTSC oversight.

Once the Successor Agency completes the groundwater remediation efforts required by the FS/RAP and RDIP and the Settlement Order, it will obtain immunity from future regulatory actions pursuant to the Polanco Redevelopment Act, which immunity can be transferred to future owners of Site B. Further, once DTSC approves the O&M Plan, O&M Agreement (if required), LUC, and confirms the application of the immunity pursuant to the Polanco Redevelopment Act, the Site B parcels are to be transferred to the City of Emeryville for future development pursuant to the terms of the approved LRPMP.

**C. Corporation Yard Remediation/Cost Recovery (ROPS Items 49, 122, 123)**

- **Item 49: Cox Castle & Nicholson – Legal Services**
- **Item 122: DTSC – Imminent and/or Substantial Endangerment Order and Remedial Action Order**
- **Item 123: EKI – Environmental Engineering Services**

**Background**

The former Redevelopment Agency acquired the property located at 5679 Horton Street, Emeryville, in July 1999 from the Lozick Trust in order to facilitate the connection of Horton Street with former Landregan Street ("Horton Street Extension Project"), as called out in the circulation element of the City's General Plan. A portion of the property was dedicated by the Redevelopment Agency to the City for the Horton Street Extension Project, and the remainder, which includes a large warehouse structure and surface parking, was utilized by the City as a temporary location for the Public Works Department's corporation yard (hereinafter, the "Corporation Yard")<sup>9</sup>.

The City and Redevelopment Agency subsequently entered into a Purchase and Sale Agreement dated June 4, 2009 ("Purchase Agreement") regarding the transfer of the Corporation Yard, which was amended on February 25, 2011. Thereafter, title to the Corporation Yard was transferred to the City on March 4, 2011.

The Dissolution Act was enacted on June 28, 2011, and Health and Safety Code Section 34167.5 obligated the State Controller to review the activities of redevelopment agencies in the state to determine whether an asset transfer has occurred after January 1, 2011, between a city or county, or city and county that created a redevelopment agency, and the redevelopment agency. If an asset transfer did occur during that time period, and the City was not contractually committed to a third party for the expenditure or encumbrance of those assets, then to the extent not prohibited by state or federal law, the Controller

---

<sup>9</sup> Note that the Corporation Yard is also referred to as the Former Marchant Whitney (FMW) Site, in reference to the prior owners who are believed to be the main contributors to the contamination at the Corporation Yard (Marchant Calculating Machine Company and Whitney Tool).

was required to order the available assets to be returned to the Successor Agency. On April 20, 2012, the State Controller did in fact issue such an order the City of Emeryville.

At some point it became evident to staff that the Corporation Yard site, which had been transferred by the Agency to the City on March 4, 2011, had neither been approved as a “governmental purpose” asset to be transferred to the City in accordance with Section 34181, nor was it returned by the City to the Successor Agency with other real property assets pursuant to the State Controller’s order. Accordingly, the Corporation Yard was returned to the Successor Agency on July 6, 2017, as required by the State Controller’s order.<sup>10</sup>

ROPS line items 122 and 123 were each included and approved by the Successor Agency and Oversight Board as part of ROPS 19-20. ROPS line item 122 was included in anticipation of receipt of an order from DTSC to clean-up the Corporation Yard; however, no such order was received by the Successor Agency from DTSC prior to completion of the meet and confer process and DOF denied the item. Since no order had actually been issued by DTSC prior to completion of the meet and confer process, DOF’s denial of the item was based solely on the fact that no documents were submitted to DOF in support of the matter and not based on any substantive determination that an order was not an enforceable obligation. Accordingly, the Successor Agency did not contest denial of the item as part of the ROPS 19-20 meet and confer process because no order had in fact been received.

Further, as part of ROPS 19-20, line item 123 (a contract with EKI) was also denied by DOF by letter dated May 17, 2019, which the Successor Agency contested as part of the ROPS 19-20 meet and confer process. Thereafter, on May 21, 2019, the Successor Agency filed a Petition For Writ of Mandate (“Petition”) with the Superior Court in Sacramento County challenging DOF’s decision to deny line item 123 on ROPS 19-20, in Successor Agency To The Redevelopment Agency of the City of Emeryville v California Department of Finance, Keely Bosler, Case No. 34-2019-8000149. On February 27, 2020, the Sacramento County Superior Court granted the Petition and upheld the Successor Agency’s position that the agreement with EKI for environmental engineering services at the Corporation Yard is an enforceable obligation pursuant to Health and Safety Code 34171(d)(1)(E) and (F). Although DOF appealed the decision to the California Court of Appeal, pursuant to a Settlement Agreement dated August 3, 2021, in the aforementioned litigation, DOF dismissed the appeal after DOF and the Successor Agency agreed that DOF’s approval of Line Items 122, 123 and 126 in the ROPS 21-22 as enforceable obligations related to the Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order (discussed below) resolved the Successor Agency’s claims in the litigation.

---

<sup>10</sup> Also worth noting that the Corporation Yard is not listed in, and thus not governed by, the LRPMP. Further, as provided by Section 34191.3 (b), the time in which to have the Department of Finance consider and approve an amendment to the LRPMP expired as of July 1, 2016. Accordingly, Sections 34177(e) and 34181(a) are the operative provisions with respect to disposition of the Corporation Yard.

### **Imminent and Substantial Endangerment Order and Remedial Action Order**

On August 13, 2020, DTSC issued its Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order (“Order”) to the Successor Agency to remediate hazardous substances contamination in soil and groundwater at the Corporation Yard. The Order is an enforceable obligation pursuant to Health and Safety Code 34171(d) (1) (C) and therefore is included in line item 122 of ROPS 22-23. Furthermore, pursuant to a settlement agreement dated August 3, 2021, between the Successor Agency and DOF in Successor Agency To The Redevelopment Agency of the City of Emeryville v California Department of Finance, Keely Bosler, Case No. 34-2019-8000149, DOF agreed that the Order constituted an enforceable obligation for ROPS 21-22.<sup>11</sup> Therefore, as provided by Section 34177.3 (b), the Successor Agency is authorized to enter into contracts with EKI, an enforceable obligation pursuant to Health and Safety Code 34171(d)(1)(E) and (F), in order to implement the terms of the Order, which itself is an enforceable obligation pursuant to 34171 (d)(1)(C).

### **Environmental Engineering Services**

The ROPS 21-22 included approval of line item 123, which was a contract with EKI to provide certain environmental engineering services to the Successor Agency to implement the terms of the Order. On July 1, 2021, the Successor Agency and EKI entered into a contract in the amount of \$2.71 million for the following services: an initial scoping meeting with DTSC and related tasks, general environmental project management services, preparation and submittal of a groundwater and subsurface vapor monitoring plan, updating and resubmitting the Feasibility Study/Remedial Action Plan (FS/RAP) and associated environmental review document and updating and re-submitting the Multi-Phase Extraction (“MPE”) Pilot Tests Work Plan, as described in further detail below:

- General Environmental Project Management Services (project management and ongoing technical and legal support services; budget updates; monthly progress reports for the DTSC and Client per the Order will summarize tasks completed in the previous month and planned for the coming month; attendance of EKI representatives at meetings and conference calls with Client, its staff, other consultants, regulatory agencies, and legal counsel, when requested.)
- Groundwater and Subsurface Vapor Monitoring Plan - this task includes preparation and submittal of a groundwater and subsurface vapor monitoring (“GWM & SVM”) plan - DTSC will require the resumption of GWM & SVM after the initial scoping meeting with DTSC; and

---

<sup>11</sup> For further information about Successor Agency To The Redevelopment Agency of the City of Emeryville v California Department of Finance, Keely Bosler, Case No. 34-2019-8000149, and further analysis as to the Successor Agency’s obligation to remediate the Corporation Yard, please see the January 19, 2021 staff report to the Successor Agency regarding consideration of the ROPS 21-22, at pp. 13-22, which can be viewed here: <https://emeryville.legistar.com/View.ashx?M=F&ID=9040007&GUID=51F1E01A-A22C-48FD-91AD-68B532057175>, and such analysis is incorporated by reference.

- Multi-Phase Extraction (“MPE”) Pilot Tests Work Plan – a draft Work Plan for Multi-Phase Extraction Pilot Tests was previously prepared and submitted for DTSC review in February 2017 and DTSC provided one round of review comments in March 2017 prior to termination of funding by DOF. This task includes updating and re-submitting the MPE Pilot Tests Work Plan (“PTWP”) prior to the start of the ROPS 21-22 period. It is assumed that response to DTSC comments on and finalizing the PTWP will be conducted at the beginning of the ROPS 21-22 period. MPE was a component of each remedial alternative in the 2016 Draft FS/RAP; accordingly, no assumption is being made regarding which remedial alternative in the FS/RAP will be implemented through these steps to set up the MPE system and commence with pilot testing activities.

For the ROPS 2022-23 cycle, it is anticipated that DTSC will approve the FS/RAP in the first half of 2022, which will allow for implementation of the approved remedy to begin in the first half of 2023. The tasks for the ROPS 2022/23 cycle include preparation and submittal of the monthly summary reports as required by the ISE Order, the MPE pilot test activities in accordance with the DTSC approved work plan to be approved in May/June 2022, and submittal of reports summarizing the results of the MPE Pilot Tests, public outreach assistance, in accordance with the FS/RAP.

The EKI amendment also includes services for design and preparatory activities prior to remedy implementation. EKI will collect any additional field data, which may be required to assist with selection of the remedy. In addition, EKI will undertake preparation of the remedial design document for the first phase of the remedy implementation, consistent with the remedy approved by DTSC. The selected remedy is likely to implement multiple remedial technologies, and a Remedial Design Document will likely be required for each technology. EKI will also prepare the plans and specifications for the first phase of remedy implementation and pre-qualify remediation contractors. If sufficient funding is available, EKI will also assist with conducting the bidding process for the Successor Agency to award the remediation contract to a qualified firm.

### **Remediation**

It is anticipated that DTSC will approve the final FS/RAP to implement the ISE Order by the conclusion of the 21-22 ROPS cycle. Approval of the FS/RAP will determine the scope of the remediation to be performed at the Corporation Yard and neighboring properties, such as Site B, to remove the hazardous substances both from the ground and groundwater. Once there is final approval of the FS/RAP, the Successor Agency will bid the work for remediation and other construction work necessary to comply with the ISE Order and implement the approved FS/RAP.



### **Legal Services**<sup>12</sup>

During calendar year 2015 and 2016, potential responsible parties (“PRPs”) were notified of the existence of the contamination at the Corporation Yard and provided the opportunity to undertake the cleanup themselves. Notices were sent by the City and Successor Agency to PRPs pursuant to authority contained in the Gatto Act (AB 440) and the Polanco Redevelopment Act. None of the PRPs responded to the City and Successor Agency’s notice with a stated desire to assume the responsibility to clean up the Site. Accordingly, the Successor Agency and City Council authorized the filing of a complaint<sup>13</sup> against the PRPs to obtain an order requiring said parties to implement the site cleanup and to also recover costs of remediation, which includes all the aforementioned investigative costs and attorney fees.

ROPS line item 49 provides funding to the Successor Agency’s legal counsel (Cox Castle & Nicholson) to pursue this action to recover costs expended and/or to require the PRPs to clean up the site or provide the funds to do so. An important hearing on the question of jurisdiction over one of the PRPs, Hanson Building Materials Limited (“Hanson”), was heard on December 12, 2018; the Court denied Hanson’s motion to dismiss the complaint against them<sup>14</sup>.

In connection with the litigation, the PRPs identified by the Successor Agency have, in fact, already staked out their position that the Successor Agency is liable for the groundwater contamination at the Corporation Yard site, and accordingly have filed cross-complaints against the Successor Agency. All parties engaged in a two-day mediation on December 15 and 16, 2020, via the zoom platform, and a sub-set of the parties and the Successor Agency engaged in another virtual mediation session on October 25, 2021. No resolution was reached. Trial for this matter is scheduled to begin on February 6, 2023. Thus, for the ROPS 22-23 cycle and as reflected in ROPS line item 49, it is estimated that the Successor Agency will incur approximately \$4.85 million to pursue the Successor Agency’s claims against these PRPs and to defend against their counterclaims. The estimate assumes that there will be both pre-trial and post-trial briefing, as well as payments to experts who will testify at trial.

---

12 Cox Castle and Nicholson also provides legal services related to the implementation of the ISE Order, and those costs are captured in line item 39.

13 A copy of the Second Amended Complaint filed in the matter of *Successor Agency To The Former Emeryville Redevelopment Agency, City of Emeryville v Swagelok Company, an Ohio corporation; Whitney Research Tool Co., a dissolved California corporation; Hanson Building Materials Limited, a British Corporation; and Catherine Lennon Lozick, an individual residing in Ohio*; United States District Court, Northern District of California, Case No. 17-cv-00308-WHO, is attached as Appendix S to the January 15, 2019 staff report to the Successor Agency regarding consideration of ROPS 19-20, and can be viewed at <https://emeryville.legistar.com/View.ashx?M=F&ID=6964105&GUID=630010D6-9FE3-4F1A-99DC-491DA6A855FC>.

14 The Court order denying Hanson’s motion to dismiss the complaint is attached as Appendix T to the January 15, 2019 staff report to the Successor Agency regarding consideration of ROPS 19-20, and can be viewed at <https://emeryville.legistar.com/View.ashx?M=F&ID=6964105&GUID=630010D6-9FE3-4F1A-99DC-491DA6A855FC>.

Finally, for the ROPS 22-23 cycle and as reflected in ROPS line item 122, it is estimated that the Successor Agency will incur approximately \$100,000 for DTSC oversight for implementation of the ISE Order.

### **Report of Estimated Available Cash Balances – July 1, 2019 through June 30, 2020**

This section of the ROPS requires available cash balances by funding source to be reported over a twelve-month period.

The report shows that as of June 30, 2020, there are no bond proceeds being held by the Successor Agency.

The report also shows that as of June 30, 2020, the Reserve Balance and Other Funds are \$141,694 and \$1,319,131, respectively. The Reserve Balance reflects RPTTF funds previously requested on prior ROPS and not fully expended, whereas Other Funds reflect revenues received by the Successor Agency (e.g., Bay Street Site A Note Repayment; interest income).

The Reserve Balance was scheduled to be expended on enforceable obligations during the ROPS 21-22 period (July 1, 2021 through June 30, 2022). The \$1,319,131 in Other Funds was scheduled to be fully expended on enforceable obligations during the ROPS 21-22 period. Note that all available Reserve Balance and Other Funds must be allocated to enforceable obligations before requesting additional RPTTF funds.

### **ROPS 22-23 Summary**

The ROPS 22-23 has a cover sheet called “ROPS 22-23 Summary” which details the amounts requested by the Successor Agency for July 1, 2022 through June 30, 2023. This summary states a request for DOF to approve total obligations of \$17,944,155, with \$1,000,000 to be funded from Other Funds, and \$16,944,155 from new Redevelopment Property Tax Trust Fund (RPTTF) money. It should be noted that the A/C may also make adjustments during its review of the ROPS.

### **STAFF COMMUNICATION WITH THE PUBLIC**

None.

### **CONFLICT OF INTEREST**

None.

## **CONCLUSION**

It is recommended that the Successor Agency consider the information contained in this report and all public testimony, and thereafter adopt the attached resolution thereby approving the Administrative Budget and Recognized Obligation Payment Schedule of the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency for the period of July 1, 2022 through June 30, 2023 (ROPS 22-23).

**PREPARED BY:** Andrea Visveshwara, Interim General Counsel

**APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE AS SUCCESSOR AGENCY TO THE  
EMERYVILLE REDEVELOPMENT AGENCY:**



---

Christine Daniel, Executive Director

## **ATTACHMENTS**

- Attachment A – Map of South Bayfront, Site B and Corporation Yard
- Draft Resolution Approving Administrative Budget 22-23 and ROPS 22-23
  - Exhibit A – Administrative Budget 22-23
  - Exhibit B – Recognized Obligation Payment Schedule July 1, 2022 through June 30, 2023 (ROPS 22-23)