



City of Emeryville

C A L I F O R N I A

MEMORANDUM

DATE: January 15, 2019
TO: Christine Daniel, City Manager
FROM: Michael A. Guina, City Attorney
SUBJECT: **Resolution Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Approving And Authorizing The City Manager To Enter Into An Environmental Oversight Agreement With The California Environmental Protection Agency, Department Of Toxic Substances Control, In An Amount Not To Exceed \$150,000.00 For The Term Of July 1, 2019 Through June 30, 2021, For Oversight Of Groundwater Remediation And Monitoring At South Bayfront Site B Pursuant To California Health And Safety Code Section 34177.3(A)**

RECOMMENDATION

Staff recommends the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency ("Successor Agency") adopt the above-entitled resolution approving and authorizing the City Manager to enter into an Environmental Oversight Agreement ("Oversight Agreement") with the California Environmental Protection Agency, Department Of Toxic Substances Control ("DTSC"), in an amount not to exceed \$150,000.00 for the term of July 1, 2019 through June 30, 2021, to provide regulatory oversight of groundwater remediation and monitoring at South Bayfront Site B. The Successor Agency has the authority to enter into this Oversight Agreement pursuant to California Health and Safety Code Section 34177.3(a).

BACKGROUND

Pursuant to the Dissolution Act¹, the Successor Agency is responsible for winding down the affairs of the former Redevelopment Agency under the direction of an Oversight Board. Effective July 1, 2018, the Emeryville Oversight Board was disbanded and their oversight responsibilities were assumed by the Alameda County Oversight Board.

On an annual basis, the Successor Agency prepares a recognized obligation payment

¹ 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 effective February 1, 2012.

schedule (“ROPS”) which lists and describes the payments required to be made by the Successor Agency pursuant to “enforceable obligations” of the former Redevelopment Agency. At the regular Successor Agency meeting of January 15, 2019, staff will present the ROPS for the July 1, 2019 through June 30, 2020 (“ROPS 19-20”) cycle; thereafter ROPS 19-20 will be presented for approval to the Alameda County Oversight Board at its regular meeting of January 23, 2019.

The remaining enforceable obligations of the Successor Agency generally fall within three broad categories: Administrative Costs/Expenses; Bond Debt; and Hazardous Materials Remediation and Monitoring. With respect to hazardous materials remediation and monitoring, actions taken to remediate hazardous materials in soil and groundwater were 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, 1970s and 1980s. The former Emeryville Redevelopment Agency was very active in the remediation of hazardous materials within the City and ROPS 19-20 will continue to list enforceable obligations of the Successor Agency with respect to three (3) remediation projects at South Bayfront Site A, South Bayfront Site B, and the former Corporation Yard.

SOUTH BAYFRONT SITE B REMEDIATION AND MONITORING

In early 2004, the former Redevelopment Agency commenced actions to acquire and remediate the properties known collectively as “South Bayfront Site B” (i.e. five parcels previously owned by four different owners, bounded by Shellmound Street to the west, Powell Street to the north, Union Pacific railroad tracks to the east, and the new Hyatt Hotel component of 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 assessing, evaluating and remediating South Bayfront Site A, also known as the Bay Street development, the Redevelopment Agency engaged the firm of Erler & Kalinowski, Inc. (“EKI”) as its environmental engineer for addressing South Bayfront 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, the former Redevelopment Agency also entered into an environmental oversight agreement with DTSC in 2004. 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).

After an extensive process of environmental investigation and assessment, in June 2008 the Redevelopment Agency awarded a contract for soil remediation of hazardous materials contamination at South Bayfront Site B. Soil remediation activities were conducted in accordance with the Final Feasibility Study/Remedial Action Plan (“FS/RAP”) and Final Remedial Design and Implementation Plan (“RDIP”) prepared EKI and approved by DTSC. Soil remediation activities were completed in the fall of 2009 and the Soil Remediation Completion Report was approved by DTSC on June 15, 2010.

As part of the eminent domain actions filed to acquire four of the five parcels comprising South Bayfront 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 mere 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 Order²”) 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 million for future groundwater remediation costs. The Settlement Order approved the Chevron USA/Union Oil Settlement Agreement, 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).

Upon completion of the soil remediation, the next phase of remediation related to groundwater contamination commenced in accordance with the FS/RAP and Final RDIP. 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 South Bayfront 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 soil remediation and its favorable impact to groundwater, the Redevelopment Agency and DTSC agreed to pursue the bio-remediation concept 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 and more focused on the groundwater beneath South Bayfront 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

² 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 total recovery of approximately \$3.5 million. Altogether, the Redevelopment Agency recovered \$25.9 million from all defendants for costs incurred for soil remediation, legal fees and future anticipated costs of groundwater remediation at South Bayfront Site B.

the remediation of groundwater. The Environmental Oversight Agreement with DTSC was an enforceable obligation of the Successor Agency pursuant to Sections 34171(d)(1)(E) and 34171(d)(1)(F).

Thereafter, to advance the bio-remediation remedy, the Redevelopment Agency 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”). Thereafter, based on the very favorable results from the pilot study, the RDIP was amended to authorize the bio-remediation of groundwater contamination across South Bayfront 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 negatively impair indoor air within buildings constructed on the site. In the summer of 2013, the Successor Agency 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 South Bayfront 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 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 agencies that had been assigned to South Bayfront Site B, as well as a number of retirements at the senior level, DTSC has only just recently assigned a new project manager to the South Bayfront Site B project and thus DTSC has not yet provided any comment on the completion report.

As reflected in the completion report and the recently submitted First 2018 Semi Annual Groundwater Monitoring Report, notwithstanding the effectiveness of the ERD injections to both shallow and deeper groundwater, it is evident that contaminants in shallow groundwater from off-site sources will continue over time to migrate onto and impact the shallow groundwater beneath South Bayfront Site B. Thus, unless and until those off-site

sources of contamination are addressed, there may need to be continued injections of ERD into the shallow groundwater under South Bayfront Site B for the foreseeable future.

Accordingly, with respect to South Bayfront Site B, in calendar year 2019 the Successor Agency will evaluate post-injection baseline soil vapor conditions to determine whether long-term injections will be required since data indicates the primary ongoing source of CVOCs in shallow groundwater are upgradient off-site sources. It is anticipated that this evaluation will show that impacts from soil vapor conditions to indoor air of structures built on the site can be adequately and appropriately mitigated with engineering controls (e.g. vapor barriers, passive/active vapor systems) and thereby eliminate the need for costly ongoing ERD injections. During the remainder of the ROPS 18-19 cycle and ROPS 19-20 cycle, the Successor Agency will conduct this evaluation to assist with the preparation of the Operation and Maintenance Agreement, below.

Once the results of the aforementioned evaluation is completed, the Successor Agency will be able to move forward with preparation of the operations and maintenance plan (“O&M Plan”) for South Bayfront Site B. 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, depending on DTSC, there may need to be an operations and maintenance agreement (“O&M Agreement”) governing the obligation of the property owner to implement the O&M Plan. 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 the site, as well as future uses of the site.

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 constituted 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 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. Therefore, during the ROPS 18-19 period the Successor Agency had no funding with which to pay for DTSC’s services – of course given the turnover at DTSC, there have been very few services provided to be paid for.

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 South Bayfront 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.

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 South Bayfront Site B. Further, once DTSC approves the O&M Plan, O&M Agreement, land use covenant, and confirms the application of the immunity pursuant to the Polanco Redevelopment Act, the South Bayfront Site B parcels are to be transferred to the City of Emeryville for future development pursuant to the terms of the approved Long Range Property Management Plan (“LRPMP”). Once the South Bayfront Site B parcels have been successfully transferred to the City in accordance with the LRPMP, then the enforceable obligations related to South Bayfront Site B will thereafter be retired from the ROPS.

RECOMMENDATION

Pursuant to authority provided by Section 34177.3(a), it is recommended that the Successor Agency consider the information contained in this report and all public testimony, and thereafter adopt the attached resolution approving and authorizing the City Manager to enter into an Environmental Oversight Agreement with the California Environmental Protection Agency, Department Of Toxic Substances Control, in an amount not to exceed \$150,000.00 for the term of July 1, 2019 through June 30, 2021, to provide regulatory oversight of groundwater remediation and monitoring at South Bayfront Site B. The Environmental Oversight Agreement with DTSC will be reflected in ROPS 19-20 in order to provide for the reimbursement of DTSC’s costs of oversight and review of the ongoing groundwater monitoring.

Prepared By: Michael A. Guina, City Attorney

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



Christine Daniel, City Manager

ATTACHMENTS:

- Draft Resolution Approving DTSC Environmental Oversight Agreement
- Exhibit A to Resolution: South Bayfront Site B - DTSC Environmental Oversight Agreement