



# 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:** CORPORATION YARD HAZARDOUS MATERIALS REMEDIATION

**Resolution Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Approving The Expenditure Of Up To \$150,000 During The ROPS 19-20 Cycle To Reimburse The California Environmental Protection Agency, Department Of Toxic Substances Control (DTSC), For Environmental Regulatory Oversight Services Required For Soil And Groundwater Remediation At The Corporation Yard Site, 5679 Horton Street, Emeryville, CA, Pursuant To The Terms Of An Imminent And/Or Substantial Endangerment Order And Remedial Action Order Anticipated To Be Issued To The Successor Agency By DTSC**

**Resolution Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Approving And Authorizing The City Manager To Enter Into And Execute A Professional Services Agreement With EKI Environment & Water, Inc., In An Amount Of \$2,995,000 For Environmental Engineering Services During The ROPS 19-20 Cycle Required For Soil And Groundwater Remediation At The Corporation Yard Site, 5679 Horton Street, Emeryville, CA, Pursuant To The Terms Of An Imminent And/Or Substantial Endangerment Order And Remedial Action Order Anticipated To Be Issued To The Successor Agency By DTSC**

## RECOMMENDATION

In anticipation of receipt of an Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order ("Order") from the California Environmental Protection Agency, Department Of Toxic Substances Control ("DTSC") to remediate hazardous materials contamination in soil and groundwater at the Corporation yard site, staff recommends the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency ("Successor Agency") adopt the attached resolutions approving and authorizing: (i) an expenditure up to \$150,000 during the ROPS 19-20 cycle to reimburse DTSC for their regulatory oversight services required under the terms of the Order; and (ii) the City Manager to enter into a Professional Services Agreement ("PSA") with EKI Environment & Water, Inc. ("EKI"), in an initial amount of \$2,995,000.00 for environmental engineering services necessary to address hazardous materials in soil and groundwater at the Corporation Yard site.

## 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>1</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 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 to the City of Emeryville.

Only recently did it become 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.

First and foremost, as the owner of the Corporation Yard site, the Successor Agency is a responsible party under state and federal law for the remediation of hazardous materials on the site (42 U.S.C. §9607(a) and Cal. Health & Safety Code §25323.5(a)(1)). Obligations imposed by state law are an enforceable obligation (Cal. Health & Safety Code §34171(d)(1)(C)). However, the Successor Agency notes that under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), local governmental agencies are excluded from the realm of “owner/operator” by 42 U.S.C. §9601(20)(D) and by the combined operation of 42 U.S.C. §9607(b)(3) and §9601(35)(A)(ii); see *City of Emeryville v. Elementis Pigments, Inc.*, 2001 WL 964230 (N.D. Cal.)(confirming no liability

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<sup>1</sup> Note that the Corporation Yard is 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).

for public agencies that acquire property through use of eminent domain authority).

Second, aside from its putative obligation under state and federal law noted above, to understand the obligation to remediate the Corporation Yard, it is necessary to start with the obligation of the Successor Agency to remediate South Bayfront Site B located to the west and downgradient of the Corporation Yard, as they are inextricably intertwined.

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

As part of settling the South Bayfront Site B litigation, the former Redevelopment Agency secured \$15.5 million from Chevron pursuant to the terms of the Chevron USA/Union Oil Settlement Agreement. In the settlement negotiations for South Bayfront Site B, Chevron was quite focused on the required groundwater remediation. They were savvy enough to see that as a real issue, and the Redevelopment Agency's demand at the outset of the mediation included a range of \$8-17 million to deal with the ongoing groundwater issues at/near South Bayfront Site B. The Redevelopment Agency's demand thus reinforced Chevron's focus on groundwater impacts at and flowing toward South Bayfront Site B.

Indeed, as explained in Response 25 to Comment 25 on page 20 and 21 of the Responsiveness Summary dated January 2008 and prepared by DTSC in response to public comments on the South Bayfront Site B Draft Feasibility Study/Remedial Action Plan, *"the proposed remedy includes a remedial component to address upgradient impacted off-site groundwater migrating onto Site B to protect human health for potential future land uses at Site B. This component of the proposed remedy may not be necessary if the upgradient impacted off-site groundwater is remediated or mitigated by the responsible party prior to migrating onto Site B."* Note that the soil remediation component of the South Bayfront Site B cleanup was completed on September 4, 2009 and thus for purposes of the settlement discussions the parties had actual costs of the soil remediation component, whereas the cost of future groundwater was still an estimate.

Not surprisingly, when Chevron agreed to pay \$15.5M to the former Redevelopment Agency (a sum significantly driven by future groundwater work), they extracted a commitment by the former Redevelopment Agency to spend a good bit of that pot of money on the problem for which they were paying, i.e., groundwater contamination and the related soil vapor problem. More specifically, they required a firm contractual commitment that the former Redevelopment Agency would either take on directly, or cause third parties to take on, and finish the investigation and remediation of groundwater contamination at Site B, including groundwater contamination flowing to South Bayfront Site B from upstream source properties. Section VI.B. of the Chevron USA/Union Oil Settlement Agreement provides in relevant part as follows:

*"....the Redevelopment Agency shall – without cost to the Settling Defendants (or any of the released parties herein) other than the Settlement Payment – perform or cause to be performed all environmental work reasonably required to study, investigate, evaluate, and remediate the Hazardous Substances or contamination*

*within, on, under, at, or emanating from and/or migrating to or from Site B and the Powell Street CVOC Remediation to the satisfaction of DTSC. ....”.*

Once the settlements with Chevron and other defendants had been approved by the Court in July 2010, and the completion report for the soil remediation was approved by DTSC on June 15, 2010, the Redevelopment Agency turned its attention to the remediation of the groundwater at South Bayfront Site B. In June 2011 the Redevelopment Agency submitted groundwater monitoring reports and investigation reports to DTSC, which were approved by DTSC by letter dated July 12, 2011, with the note that it *“agrees that off-site sources of CVOCs affect groundwater at the site. However, DTSC feels that current data indicates that CVOCs in groundwater appear to also have come from historic on-site sources”*. Thus, as obligated by the South Bayfront Site B FS/RAP and the Chevron USA/Union Oil Settlement Agreement, the former Redevelopment Agency continued with its off-site investigation of upgradient properties through the late summer/early fall of 2011 and collected samples from within the public right of way to the east of South Bayfront Site B (Powell Street, Horton Street, Peladeau Street and Haruff Street), as well as the Corporation Yard site.

The upgradient investigation further established “that off-site sources of CVOCs affect groundwater at” South Bayfront Site B and that the Corporation Yard is a main source. In the late fall of 2011 the former Redevelopment Agency was in possession of the initial results of its upgradient off-site investigations within the aforementioned public rights of way and the Corporation Yard (aka FMW Site) and came to appreciate that the Corporation Yard was significantly contributing to groundwater contamination on South Bayfront Site B. The former Redevelopment Agency staff and EKI then met with DTSC on December 13, 2011 to share the initial results and DTSC confirmed that the contamination was a significant concern that needed to be addressed expeditiously. In fact, given the level of contamination at the Corporation Yard/FMW Site and its impact to indoor air at the existing facility, the building has been vacated in order to protect the health and safety of any building occupants and remains unoccupied since 2012.

Further, roughly a year later when DTSC reviewed and approved the Draft Remedial Action Plan Amendment and Remedial Design and Implementation Plan for Shallow Groundwater at Site B by letter dated March 7, 2013, it directed as follows:

*“In addition, it should be clearly stated in the Draft RAP that investigations conducted since the time that the Feasibility Study/Remedial Action Plan was approved have revealed the presence of CVOCs in deeper groundwater on the southeastern portion of Site B, and that these CVOCs are the result of releases from the Former Marchant Whitney (FMW) and/or potentially other upgradient sources.”*

Thus, in response to the December 2011 meeting with DTSC and the significant concerns they expressed, as the presumed property owner, the City filed a claim against the Redevelopment Agency on January 27, 2012, seeking to enforce the terms of Section 10

of the June 4, 2009 Purchase and Sale Agreement, which obligates the Redevelopment Agency to indemnify the City from all claims related to the presence of hazardous materials on the Corporation Yard/FMW Site. The former Redevelopment Agency considered the City's claim on January 31, 2012, in closed session. Thereafter, at its regular meeting of January 31, 2012, in order to resolve the claim filed by the City and consistent with its obligation under the Site B FS/RAP to "*address upgradient impacted off-site groundwater migrating onto Site B*" and the Chevron USA/Union Oil Settlement Agreement to "*perform or cause to be performed all environmental work reasonably required to study, investigate, evaluate, and remediate the Hazardous Substances or contamination within, on, under, at, or emanating from and/or migrating to or from Site B .... to the satisfaction of DTSC*", the Redevelopment Agency adopted a resolution authorizing a Voluntary Cleanup Agreement with DTSC to address the contamination at the Corporation Yard which is migrating to Site B and a contract with EKI to perform the environmental engineering services.

Health and Safety Code Section 34167(f) of the Dissolution Act provides "[n]othing in this part shall be construed to interfere with a redevelopment agency's authority, pursuant to **enforceable obligations** as defined in this chapter, to (1) make payments due, (2) enforce existing covenants and obligations, and (3) **perform its obligations**." The term "enforceable obligations" is defined in Section 34167(d)(4) to include "judgements or settlements entered by a competent court of law". Similarly, Section 34169 (b) provides that redevelopment agencies shall "perform obligations required pursuant to any enforceable obligations...." Thus, in order to perform its obligations under the Chevron USA/Union Oil Settlement Agreement to remediate hazardous materials which are migrating to Site B, the Redevelopment Agency appropriately approved contracts with DTSC and EKI on Jan 31, 2012 relating to the remediation of the Corporation Yard site. Likewise, Section 34177.3 authorizes the Successor Agency to create new enforceable obligations, including those with DTSC and EKI, as required by an existing enforceable obligation, such as the Chevron USA/Union Oil Settlement Agreement. Thus the initial contracts entered into with DTSC and EKI in early 2012 to address the hazardous materials contamination at the Corporation Yard site were done so consistent with authority provided by the Dissolution Act

The Chevron USA/Union Oil Settlement Agreement is a valid contract; indeed, it was approved by the Alameda County Superior Court as a good faith settlement in a 2010 order. Furthermore the Redevelopment Agency received very substantial consideration (\$15.5 million and the end of litigation with Chevron), in exchange for the commitments made by the Redevelopment Agency in relation to undertaking (or causing others to undertake) the necessary investigation and cleanup work of contamination flowing onto South Bayfront Site B. Finally, the relevant chronology supports the enforceable obligation—the Chevron USA/Union Oil Settlement Agreement was executed by the parties and approved by the Superior Court years before the redevelopment dissolution bills were passed by the legislature and signed by the Governor.

Furthermore, Section 34169 (d) provides that redevelopment agencies shall "consistent with the intent declared in subdivision (a) of Section 34167, preserve all assets, minimize

all liabilities, and preserve all records of the redevelopment agency.” The actions of the Redevelopment Agency to address the contamination at the Corporation Yard, irrespective of the fact it is contractually obligated to do so under the Chevron USA/Union Oil Settlement Agreement, is also consistent with the directive to minimize liabilities of the former Redevelopment Agency in order that the intent of 34167(a) is fulfilled – i.e. preserve, to the maximum extent possible, the revenues and assets of redevelopment agencies so that those assets and revenues that are not needed to pay for enforceable obligations may be used by local governments to fund core governmental services. Remediation of the Corporation Yard site, which was vacated in 2012 due to concerns of impacts to indoor air from subsurface contamination on the health and safety of building occupants, is intended to not only preserve the real property asset but also to minimize liability associated with the site by (i) trying to shift liability for the nuisance that exists there to the historic polluter parties and (ii) limiting the extent to which the contamination migrates off site to adjoining properties, including South Bayfront Site B and South Bayfront Site A.

In the ensuing years since the onset of redevelopment dissolution, with funding provided pursuant to the ROPS, the Successor Agency studied, investigated and evaluated the hazardous substances at the Corporation Yard under the oversight of DTSC. In early 2017, the Successor Agency and DTSC were preparing to approve the Feasibility Study/Remedial Action Plan (“FS/RAP”) for the Corporation Yard, which set forth the means by which the hazardous substance at the Corporation Yard would be remediated. Up to that point in time, the Successor Agency had expended approximately \$7 million over the previous 5 years studying, investigating and evaluating the hazardous materials at the Corporation Yard.

Thus, as the Successor Agency was preparing ROPS 17-18 in late 2016/early 2017, it was also readying to embark on a several year remedial process at the Corporation Yard that would start in the summer of 2017. The most expensive component of the remediation would be in the first few years. Accordingly, the requested expenditures in ROPS 17-18 for remediation of the Corporation Yard reflected that reality.

ROPS 17-18 was approved by the Successor Agency and the Emeryville Oversight Board, and following a lengthy meet and confer process, on April 14, 2017, the DOF formally rejected funding for the remediation of the Corporation Yard that was set forth in a contract between the Successor Agency and EKI and listed on former ROPS line item 51.

While the DOF did recognize that the Chevron USA/Union Oil Settlement Agreement entered into by the former Redevelopment Agency in connection with South Bayfront Site B obligated the Successor Agency to address groundwater contamination, they nevertheless dismissed the settlements as an obligation of the Successor Agency with respect to the Corporation Yard because the settlements did not specifically identify the Corporation Yard as a site to be addressed. DOF’s position necessarily glosses over the fact that the Corporation Yard was not a known source of contamination to Site B at the time the settlement agreements were executed as to South Bayfront Site B. Thus the

South Bayfront Site B settlement agreements obligated the former Redevelopment Agency to *investigate* the sources of contamination to Site B, an obligation DOF recognized in discussions with staff. However, DOF conveniently disregarded language in the Site B settlement agreements requiring the Successor Agency to thereafter “remediate” any identified source of contamination migrating to South Bayfront Site B. Notwithstanding the fact the Corporation Yard is adjacent and upgradient to South Bayfront Site B, the DOF reasoned that remediation of the Corporation Yard site “*seems* to go beyond the scope of the Agency’s obligation”.

Accordingly, with no funding for EKI (ROPS 17-18 line item 51) to pursue the cleanup of the Corporation Yard site, following a meeting with DTSC, the Successor Agency terminated the voluntary cleanup agreement with DTSC (ROPS 17-18 line item 50) in June 2017. It should be noted, however, that DOF has consistently approved funding for the legal services of Cox, Castle & Nicholson (ROPS line item 49) in connection with the Successor Agency’s attempt to recover costs expended to date and cause other responsible parties to pay for the cost of site remediation or undertake the work directly themselves.

### **Imminent & Substantial Endangerment Order**

However, in the meeting with DTSC, given the levels of contamination uncovered in soil and groundwater at the Corporation Yard, it expressed deep concern about leaving the site unaddressed and that they intended to issue a cleanup order to the Successor Agency. Thereafter, on October 9, 2017, DTSC issued to the Successor Agency a Request For Information And Documents. The Successor Agency thereafter provided its response to DTSC on November 30, 2017.

As of the preparation of this staff report no such order has been issued. However, a new project manager, Mr. Tom Price, has recently been assigned to the Corporation Yard, and in an email exchange dated October 25, 2018, Mr. Price confirmed that he was drafting an Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order (“Order”), pursuant to authority set forth in the California Health and Safety Code, which would be submitted to DTSC’s Office of Legal Counsel before the end of November 2017. Such an order from DTSC addressed specifically to the Corporation Yard would constitute an “***obligation imposed by state law***” and hence an enforceable obligation as set forth in Section 34171(d)(1)(C).

In anticipation of receipt of the Order from DTSC, and in order to be able to promptly restart the final stages of the FS/RAP approval process and begin implementation of remedial activities during the ROPS 19-20 cycle, pursuant to authority provided by Section 34177.3, staff is recommending that the Successor Agency authorize expenditures up to \$150,000 for the ROPS 19-20 cycle to reimburse DTSC for their costs of oversight that will be required as part of such an Order. An Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order relating to the Corporation Yard is reflected in ROPS 19-20 line item 122.

### **Environmental Engineering Services**

Additionally, in anticipation of receipt of the Order from DTSC and pursuant to authority provided by Section 34177.3, it is recommended that the Successor Agency authorize approval of a Professional Services Agreement (“PSA”) with EKI in an amount of \$2,995,000 for environmental engineering services commencing July 1, 2019. The contract with EKI for environmental engineering services related to the Corporation Yard is reflected in ROPS 19-20 line item 123.

The Draft FS/RAP submitted by the Successor Agency to DTSC for review on October 21, 2016, recommended a remedy for the Corporation Yard that included:

- Above grade building demolition of the existing building;
- Shallow site-wide soil excavation and limited deeper excavation;
- In-situ thermal treatment (“ISTT”) in conjunction with multi-phase extraction (“MPE”) for shallower groundwater in areas of the Site with elevated concentrations of volatile organic compounds (“VOCs”);
- Following completion of ISTT,
  1. In-situ polishing within the ISTT treatment area to further reduce concentrations of VOCs in groundwater, and
  2. Continued MPE and to control off-site migration of impacted groundwater from the Site and to control on-site migration of upgradient impacted groundwater and to address impacted groundwater remaining between the thermal treatment and in-situ polishing area and the property boundary; and
- Monitored natural attenuation (“MNA”) for deeper groundwater and institutional controls.

The anticipated services to be provided by EKI during the ROPS 19-20 cycle are described in greater detail in their proposal dated December 13, 2018, and attached as an exhibit to the PSA included with this report:

- Task 1 – Finalize Draft FS/RAP and Draft IS/MND - Review and update the Draft FS/RAP, as needed based on current site conditions and estimated remediation costs, and submit to DTSC for review. Also, review and update the Draft Initial Study/Mitigated Negative Declaration (“IS/MND”), as needed based on current site conditions, and submit to DTSC’s CEQA Unit for review. Finally, review and update the Draft Fact Sheet and Public Notice required to publicize the public comment period for the Draft FS/RAP and IS/MND
- Task 2 – MPE Pilot Tests - The recommended remedy in the Draft FS/RAP includes the use of MPE during and after in-situ thermal treatment (“ISTT”) to control groundwater and soil vapor plume migration. MPE Pilot Tests will be conducted to



better understand the hydrogeology of the area and to assist with designing the hydraulic and vapor control requirements during ISTT and long-term plume remediation.

- Task 3 – Above Grade Building Demolition - The recommended remedy in the Draft FS/RAP includes above grade building demolition of the existing building as a preparatory activity for conducting shallow soil excavation and ISTT at the Site. EKI will prepare plans and specifications for above grade building demolition activities, and subcontract with a contractor to perform the demolition activities.
- Task 4 – Well Abandonment - The recommended remedy in the Draft FS/RAP includes ISTT with MPE for shallower groundwater in the area of Site with elevated concentrations VOCs and the existing groundwater monitoring wells located within the ISTT area need to be abandoned.
- Task 5 – Preparatory Activities for Shallow Soil Excavation - The recommended remedy in the Draft FS/RAP includes shallow soil excavation (~5 ft. bgs) across the entire Site to address non-volatile chemicals of concern (“COCs”) in shallow soil and limited deeper excavation (~10-15 ft. bgs) of VOC-impacted soil where SPL was encountered at shallow depths. Among other tasks, a Remedial Design and Implementation Plan (“RDIP”) will be prepared for review and approval by DTSC and plans and specifications prepared in order to solicit public bids for the award of a contract to undertake the shallow soil excavation activities.
- Task 6 – Planning for In-Situ Thermal Treatment (“ISTT”) - The recommended remedy in the Draft FS/RAP includes ISTT with MPE. Long-term planning activities related to ISTT include coordination with PG&E to ensure adequate power to the Site for implementation of ISTT, coordination with architects with respect to placement of electrical facilities in relation plans for future re-use of the site, and preparation of an RDIP related to ISTT for DTSC review and approval, as well as other needed permitting.
- Task 7 – Public Outreach Assistance - Assist the Successor Agency, as needed, with public outreach efforts with the owners and tenants of adjacent properties to the north of the Site which would be most directly impacted by implementation of remedial actions at the Site.
- Task 8 – General Environmental Project Management Services – Provide general project management services and ongoing technical and legal support services.

Note that the draft Feasibility Study/Remedial Action Plan for the Corporation Yard site has previously been submitted to DTSC and the first order of work for EKI would be to work with DTSC to finalize their review of the FS/RAP pursuant to the California Environmental Quality Act (CEQA) and thereafter release the draft FS/RAP and CEQA analysis for public comment. Once the FS/RAP is approved, the Successor Agency will thereafter be able to solicit public bids for the first remedial stage involving the excavation and off-haul of

hazardous materials in soil. The intent is to be able to secure a bid before the end of 2019, so that a contract can be awarded and funding for the excavation and off-haul of hazardous materials in soil can be listed on ROPS 20-21, which will be presented to the Successor Agency and Alameda County Oversight Board for consideration in January 2020.

## CONCLUSION

An Order issued by DTSC to the Successor Agency with respect to the Corporation Yard site will clearly constitute an “***obligation imposed by state law***” and hence an enforceable obligation as set forth in Health and Safety Code Section 34171(d)(1)(C). Thus, in anticipation of receipt of such an Order, it is recommended that the Successor Agency consider the information contained in this report and all public testimony, and thereafter adopt the attached resolutions approving and authorizing the reimbursement of DTSC for their costs of regulatory oversight and entering into the PSA with EKI pursuant to California Health And Safety Code Section 34177.3(a).

**PREPARED BY:** Michael A. Guina, City Attorney

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



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Christine Daniel, City Manager

## ATTACHMENTS

- Draft Resolution Approving Reimbursement of DTSC Oversight Costs
- Draft Resolution Approving EKI Professional Services Agreement
  - Exhibit A to Resolution – EKI Professional Services Agreement
  - Attachment to EKI PSA – December 13, 2018 EKI Proposal