City of Emeryville
CALIFORNIA

MEMORANDUM

DATE: January 15, 2019

TO: Christine Daniel, City Manager

FROM: Susan Hsieh, Finance 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, 2019 Through June 30, 2020 (ROPS 19-20) Pursuant To Health And Safety Code Section 34177**

RECOMMENDATION

Staff recommends the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency ("Successor Agency") adopt the attached resolution approving the Administrative Budget and Recognized Obligation Payment Schedule (ROPS) for the period of July 1, 2019 through June 30, 2020 (ROPS 19-20) pursuant to Health and Safety Code Sections 34177(j) and 34177(o), respectively.

BACKGROUND

Pursuant to the Dissolution Act[1], 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 Successor Agency has timely prepared and secured Oversight Board approval of its Administrative Budget and ROPS for each period beginning as of January 1, 2012 through June 30, 2012 ("ROPS I") through the current ROPS period of July 1, 2018 through June 30, 2019 ("ROPS 18-19"). Each ROPS were subsequently reviewed and approved by the State Department of Finance ("DOF").

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[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 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 the Emeryville Oversight Board, and under the direction of the Alameda County Oversight Board effective as of July 1, 2018, 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.

On September 22, 2015, Senate Bill 107 was enacted which, among other matters, provides for the preparation of an annual ROPS beginning with the ROPS 16-17 period, as opposed to a semi-annual ROPS. The annual ROPS must be presented to and approved by the Oversight Board and transmitted to the DOF on or before February 1st of each year.

Administrative Budget 19-20 and ROPS 19-20, governing Successor Agency expenditures for the July 1, 2019 through June 30, 2020 fiscal year, is presented for the approval of the Successor Agency at its regular meeting of January 15, 2019; thereafter, Administrative Budget 19-20 and ROPS 19-20 will be presented to the Alameda County Oversight Board[2] ("Oversight Board") at their regular meeting on January 23, 2019.

ROPS Approval Process

Since enacting the Dissolution Act in 2011, the California state legislature has amended it on several occasions. The most recent amendment was SB 107 in 2015 noted above. 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))[3]. The DOF Internet Web site has published the form and instructions that are to be used by a successor agency.

- As with the semi-annual ROPS, 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 19-20, 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, 2019. Each successive annual ROPS is due on February 1st of each year. (Section 34177(l)(2)(C) & (o)(1).)

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[2] 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 dissolved by operation of law and replaced with the Alameda County Oversight Board.

[3] All citations to "Section" are to Health and Safety Code unless otherwise indicated.

The review process for an Oversight Board-approved ROPS has been revised, generally to extend the review period for DOF:

- 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, 2019 and each April 15th 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 resolution approving ROPS 19-20 provides staff the authority to request the review and "meet and confer" with the DOF should they reject an item on ROPS 19-20.

- 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 19-20, then the outside date for receipt of DOF's determination would be no later than May 17, 2019.

- 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 1st (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.)

ROPS 19-20 Enforceable Obligations

The remaining enforceable obligations of the Successor Agency listed in ROPS 19-20 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 19-20 is $403,130. The Successor Agency is authorized to utilize funds from the Administrative Budget to retain outside services as needed to carry out their administrative responsibilities.

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

- **Item 62: Lance Soll & Lungard – 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 Debt Service Payment**
- **Item 117: 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 reflect the annual debt service payment due for the refunding bonds of $9,769,250 and $1,350,679 per year. 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 in 2034 when the bond debt is fully repaid.

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 to Wells Fargo Bank in connection with the Successor Agency's accounts. The Successor Agency anticipates that it may change auditors and banks, and thus the Notes to the ROPS indicate this possible change in payee. 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 **Appendix 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: 5616 Bay Street Investors LLC – Site A Disposition & Development Agreement**

Background

South Bayfront Site A, also known as the Bay Street retail and residential development, 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 to redevelop the site with a mix of retail 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 separate 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 and RMP required the implementation of extensive soil removal and 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

attached to this report as **Appendix B**.

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[4], 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 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 groundwater monitoring and remediation[5.] 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 5616 Bay Street Investors 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).

[4] 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.

[5] 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 to this report as **Appendix C**.

The costs of annual groundwater monitoring and reporting have been averaging about $50,000 per year, or $25,000 per year each for the Successor Agency and Sherwin-Williams. This amount tends to increase in the years coinciding with the Five Year Review required by the RMP Monitoring Program; the most recent having occurred in calendar year 2017 and the next due in 2022. For the ROPS 19-20 cycle and as reflected in ROPS line item 44, it is estimated that the Successor Agency will incur approximately $35,000 for groundwater monitoring and reporting services provided by EKI pursuant to the RMP Monitoring Program.

As of January 1, 2019, the Successor Agency and The Sherwin-Williams Company have collectively spent $693,882.15 on groundwater RMP Monitoring Program costs, leaving a balance of $820,117.85 in shared (50/50) costs before the obligation shifts to a 95/5 split. Thus, as of January 1, 2019, the Successor Agency's allocation of the remaining shared costs is one half of $820,117.85, or $410,058.92. This is the total outstanding obligation reflected in the PSA with EKI and on ROPS line item 44.

At present the Redevelopment Agency/Successor Agency, The Sherwin-Williams Company and the Myers Drum Container Corporation have conducted over 15 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. 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) 34171(d)(1)(F). Thus, for the ROPS 19-20 cycle and as reflected in ROPS line item 45, it is estimated that the Successor Agency will incur approximately $20,000 for the reimbursement of DTSC's costs of oversight.

B. *South Bayfront Site B Remediation and Monitoring (ROPS Items 39, 40, 41, 121, 124)*

- **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**
- **Item 124: Integro Insurance Brokers – Environmental Insurance**

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 properties.

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 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, 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.

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 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 by 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.

The Chevron USA/Union Oil Settlement Agreement & Order

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 Order")[6] 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. A copy of the Chevron USA/Union Oil Settlement Agreement is attached to this report as **Appendix D**, and the Settlement Order as **Appendix E**.

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 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.

[6] 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.

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 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 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), 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 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, 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 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 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 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 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 groundwater under South Bayfront Site B for the foreseeable future. One such off-site source is the Corporation Yard site discussed in section III.C. below, and as will be discussed, implicates the terms of the Chevron USA/Union Oil Settlement Agreement approved by the Settlement Order.

Accordingly, with respect to South Bayfront Site B, in calendar year 2019, EKI will evaluate post-injection baseline soil vapor conditions to determine whether long-term injections will be required since the 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 more costly on-going ERD injections. During the remainder of the ROPS 18-19 cycle and ROPS 19-20 cycle, EKI will conduct this evaluation to assist with the preparation of an Operation and Maintenance Plan ("O&M Plan") for South Bayfront Site B.

Once the results of the aforementioned evaluation is completed, EKI will be able to move forward with preparation of the 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 discussed below, once these matters are completed and the immunities under the Polanco Act are conferred upon South Bayfront 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 19-20 cycle and as reflected in ROPS line item 41, it is estimated that the Successor Agency will incur approximately $800,000 for the environmental engineering services provided by EKI.

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), and a portion of the Administrative Cost allowance in ROPS line item 1, will be utilized by the Successor Agency to fund the costs of legal services incurred in preparing and negotiating the terms of the O&M Agreement and LUC with DTSC; obtaining the confirmation of the immunity under the Polanco Act from DTSC discussed below; and transferring South Bayfront Site B to the City in accordance with the LRPMP. For the ROPS 19-20 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 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 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. Therefore, during the ROPS 18-19 period the Successor Agency had no funding with which to pay for DTSC's services. However, given the turnover at DTSC, there have been very few services provided to be paid for. Nevertheless, DTSC's services are absolutely necessary in order to gain site closure to South Bayfront 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"[emphasis added]. 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.

Therefore, pursuant to authority provided by Section 34177.3(a), on January 15, 2019, staff will recommend the Successor Agency approve and authorize the execution of 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 is an enforceable obligation of the Successor Agency pursuant to Section 34171(d)(1)(F), is reflected in ROPS 19-20, line item 121, and provides for the reimbursement of DTSC's costs of oversight and review of the ongoing groundwater monitoring. Thus, for the ROPS 19-20 cycle and as reflected in ROPS line item 121, it is estimated that the Successor Agency will incur approximately $75,000.00 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 South Bayfront Site B. Further, once DTSC approves the O&M Plan, O&M Agreement, LUC, 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 LRPMP.

Environmental Insurance

In 2008, after the Redevelopment Agency had assembled all of the parcels comprising South Bayfront Site B and was readying to commence site remediation, it acquired a $10,000,000 environmental liability insurance policy for a ten-year term. The policy provides coverage for unknown contaminants uncovered in the remedial process, but more importantly coverage for known and unknown contaminants that are uncovered once site closure has been obtained from regulatory agencies. Thus, the policy provides important coverage during site development activities and is key to facilitating site development and construction. As noted above, once regulatory closure is secured from DTSC, Site B is to be transferred to the City in accordance with the LRPMP for future development. The LRPMP provides that the Successor Agency was to transfer and assign the policy to the City, which the City would thereafter assign to the developer of the site. The policy is set to expire November 3, 2018; however, in order to fulfill its obligation under the LRPMP to provide the policy to the City upon transfer of Site B, the Successor Agency is in the process of securing a ten-year renewal and negotiating the cost of the one-time premium which should not exceed $175,000. Thus, for the ROPS 19-20 cycle and as reflected in ROPS line item 124, it is estimated that the Successor Agency will incur a one-time expenditure of approximately $175,000.00 for renewal of the Integro Insurance Brokers $10,000,000 environmental liability insurance policy for a ten year term.

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

- **Item 49: Cox Castle & Nicholson – Legal Services**
- **Item 122 DTSC – Imminent & Substantial Endangerment 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")[7].

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 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.[8]

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)).

[7] 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).

[8] 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.

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 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 to remediate South Bayfront Site B located to the west and downgradient of the Corporation Yard, as they are inextricably intertwined. Further, failure to address the contamination at the Corporation Yard will only allow it to continue to migrate onto South Bayfront Site A and thereby trigger obligations of the Successor Agency under the terms of the Site A Disposition and Development Agreement. A site map showing South Bayfront Site A and South Bayfront Site B in relation to the Corporation Yard is enclosed as **Appendix A**.

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 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*." (see: **Appendix F**, Response 25 to Comment 25 on page 20 and 21). 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 (see **Appendix D**, pages 14 and 15) 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, enclosed as **Addendum G**, 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 noted above 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 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 (**Appendix H**), DTSC 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 (**Appendix I**), seeking to enforce the terms of Section 10 of the June 4, 2009 Purchase and Sale Agreement, as amended on February 25, 2011 (**Appendix J**), 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 (**Appendix K**). Thereafter, at its regular meeting of January 31, 2012 (**Appendix L**), 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 (**Appendix M**) and a contract with EKI to perform the environmental engineering services (**Appendix N**).

Health and Safety Code Section 34167(f) 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**"[emphasis added]. 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.

No one can reasonably dispute that 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 its 2010 order (**Appendix E**). Further, no one can reasonably dispute that 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, no one can dispute the relevant chronology—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) shifting 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 A and South Bayfront Site B.

Enclosed as **Appendix U** are two figures showing the concentrations of TCE in shallow (~0 to 23 feet below ground surface (bgs)) and deep (~23 to 45 feet bgs) groundwater at the Corporation Yard site and adjoining properties, notably South Bayfront Site A and South Bayfront Site B. As noted, the concentrations of TCE on the Corporation Yard site are up to 100,000 times the drinking water standard. As more particularly set forth in the draft Feasibility Study/Remedial Action Plan submitted to DTSC for the Corporation Yard site, the cleanup of the Corporation Yard involves several steps to not only excavate and remove contaminated soil that is the source of the groundwater contamination, but to also treat the groundwater to further remove contaminants in groundwater both onsite and offsite. Failure to timely address this continuing nuisance only serves to expose the Successor Agency to cleanup orders issued by DTSC (as is anticipated for the Corporation Yard), and claims from neighboring property owners and those in contract with the Successor Agency (i.e. the Site A DDA).

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 multi-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, but following a lengthy meet and confer process, on April 14, 2017, the DOF 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 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 (see **Appendix A**), 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 in June 2017, the Successor Agency terminated the voluntary cleanup agreement with DTSC (ROPS 17-18 line Item 50).

Site A Disposition and Development Agreement

As noted above, the Redevelopment Agency/Successor Agency has conducted over 15 years of groundwater monitoring and reporting at South Bayfront Site A. While

concentrations of contaminants of concern have decreased over time, the data at some monitoring points on South Bayfront Site A located down-gradient from the Corporation Yard have seen recent increases in the levels of TCE. Indeed, the Third Five Year Review Report conducted for South Bayfront Site A, dated June 2018, determined that *"the results of the investigations conducted at FMW and on downgradient properties (including the northern end of the Bay Street Project Area) indicate that FMW is likely the source of VOCs detected in shallow and deeper groundwater in this area."*

The ninth full paragraph in Section 12, subsection 1, of the Site A DDA (see **Appendix C**) provides in relevant part as follows:

> "The Agency has prepared an Environmental Risk Management Plan (hereinafter referred to as the "Long-Term Risk Management Plan") for the entire Site, and obtained approval of the Long-Term Risk Management Plan from the DTSC on July 26, 2000. Developer hereby acknowledges it had an opportunity to review and comment on the Long- Term Risk Management Plan and does hereby advise the Agency that it has no objection to the Long-Term Risk Management Plan for the entire Site. As between Agency and Developer and subject to paragraph 7 hereof, Developer shall be responsible and liable for all costs and expenses of complying with the terms and conditions of the Long-Term Risk Management Plan, provided however, that, ***as between the Agency and Developer as respects groundwater and/or surface water monitoring and any remediation for the Site the Agency shall be responsible for performing and paying the costs of all monitoring, remediation and other response actions for groundwater*** and/or surface water required under the Long-Term Risk Management Plan, and the Remedial Action Plan for the Sepulveda/McKinley/Harcros Site, and the Remedial Action Plan for the Myers Drum Site. Notwithstanding the foregoing, the Agency shall no responsibility whatsoever for performing or paying the costs of the design, construction, fabrication, installation, repair, reconstruction or maintenance of engineering controls, barriers, or systems necessary to prevent the migration of hydrogen sulfide (H2S) and/or other organic vapors into structures placed on the Site [emphasis added]."

Thus, to the extent contamination from the Corporation Yard impacts groundwater at South Bayfront Site A, irrespective of what remedial activities occur at the Corporation Yard, if any, the DTSC can order remedial actions to be undertaken at South Bayfront Site A to address hazardous materials in the groundwater. Under the terms of the Site A DDA, the obligation to undertake those remedial actions would fall to the Successor Agency.

Imminent & Substantial Endangerment Order

In the June 2017 meeting with DTSC, given the levels of contamination uncovered in soil

and groundwater at the Corporation Yard, DTSC expressed deep concern about leaving the site unaddressed and that they intended to issue a cleanup order to the Successor Agency. Thus, rather than immediately challenge DOF's erroneous decision denying funding for remediation activities at the Corporation Yard, the Successor Agency opted to delay remedial activities and wait for DTSC to issue an order specific to the Corporation Yard which would clearly constitute an enforceable obligation pursuant to Section 34171(d)(1)(C).

Thereafter, on October 9, 2017, DTSC issued to the Successor Agency a Request For Information And Documents (see **Appendix O**). The Successor Agency thereafter provided its response to DTSC on November 30, 2017 (see **Appendix P**).

As of the preparation of this staff report the order has not been issued. However, a new project manager, Mr. Tom Price, has recently been assigned to the Corporation Yard, and in an email 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 2018 (see **Appendix Q**). 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, at their January 15, 2019, regular meeting the Successor Agency authorized 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. The anticipated 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, at their January 15, 2019 meeting, the Successor Agency will consider approval of an agreement with EKI in an amount of $2,995,000 for environmental engineering services commencing July 1, 2019. Thus, for the ROPS 19-20 cycle and as reflected in ROPS line item 123, it is estimated that the Successor Agency will incur approximately $2,995,000.00 for environmental engineering services to be provided by EKI related to the remediation of the Corporation Yard.

The Draft FS/RAP previously submitted by the Successor Agency to DTSC for review 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 (see **Appendix R**) and include the following:

- 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 to 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 will be to work with DTSC to finalize their review of the FS/RAP and analysis of impacts pursuant to the California Environmental Quality Act (CEQA) and thereafter release the draft FS/RAP and IS/MND 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 Alameda County Oversight Board for its consideration in January 2020.

Legal Services

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

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. 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 enclosed as **Appendix S**.

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; at the time of publication, the District Court's decision is still pending.

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 (see **Appendix T**), and accordingly have filed cross-complaints against the Successor Agency. Thus, for the ROPS 19-20 cycle and as reflected in ROPS line item 49, it is estimated that the Successor Agency will incur approximately $3.7 Million to pursue the Successor Agency's claims against these PRPs and to defend against their counter-claims. Note that it is anticipated that the Federal Court will likely set a trial date during the ROPS 19-20 cycle for late 2019 or early 2020 and the aforementioned estimated costs reflect this assumption.

Report of Estimated Available Cash Balances – July 1, 2016 through June 30, 2017

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, 2017 there are no housing bond proceeds being held by the Successor Agency, as all such housing bond proceeds have been transferred to the City's housing asset fund for use on affordable housing projects. Thus, all Successor Agency housing bond funds have now been completely expended.

The report also shows that as of June 30, 2017, the Reserve Balance and Other Funds are $748,567 and $2,094,064, 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 (i.e. Amtrak annual sublease payment, Bay Street Site A Note Repayment, and interest income). Of the $748,567 Reserve Balance, $666,960 was scheduled to be expended on enforceable obligations during the ROPS 17-18 period (July 1, 2017 through June 30, 2018), leaving an estimated available Reserve Balance of $81,607 for the ROPS 19-20 period. Of the $2,094,064 in Other

Funds, $827,647 was scheduled to be expended on enforceable obligations during the ROPS 17-18 period, leaving $1,266,417 for the ROPS 19-20 period. Note that all available Reserve Balance and Other Funds must be allocated to enforceable obligations before requesting additional RPTTF funds.

ROPS 19-20 Summary

The ROPS 19-20 has a cover sheet called "ROPS 19-20 Summary" which details the amounts requested by the Successor Agency for July 1, 2019 through June 30, 2020. This summary states a request for DOF to approve total obligations of $19,562,059, with $81,607 to be funded from Reserve Balance, $1,266,417 from Other Funds, and $18,214,035 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.

RECOMMENDATION

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, 2019 through June 30, 2020 (ROPS 19-20).

PREPARED BY: Susan Hsieh, Finance Director

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

Christine Daniel, City Manager

ATTACHMENTS

1. Resolution Approving Administrative Budget 19-20 And ROPS 19-20
   Exhibit A to Resolution – Administrative Budget 19-20
   Exhibit B to Resolution - Recognized Obligation Payment Schedule July 1, 2019 through June 30, 2020 (ROPS 19-20)

Appendix:

A. Map of South Bayfront Site A, South Bayfront Site B and Corporation Yard
B. South Bayfront Site A – Redevelopment Agency/Sherwin-Williams Company Settlement

Agreement

C. South Bayfront Site A – First Implementation Agreement to DDA – Redevelopment Agency and South Bayfront Redevelopment Project Partnership
D. South Bayfront Site B – Chevron USA/Union Oil Settlement Agreement
E. South Bayfront Site B – Settlement Order
F. South Bayfront Site B – FS/RAP Responsiveness Summary
G. July 12, 2011 – DTSC Letter Approving South Bayfront Site B Reports
H. March 7, 2013 – DTSC Approval of South Bayfront Site B RAP Amendment and RDIP For Shallow Groundwater
I. January 27, 2012 – City Claim Against Redevelopment Agency re: Corporation Yard
J. June 4, 2009 – Purchase And Sale Agreement re: Corporation Yard / February 25, 2011 Amendment
K. January 31, 2012 – Emeryville Community Development Commission Closed Session Agenda
L. January 31, 2012 - Emeryville Community Development Commission Regular Meeting Agenda
M. Corporation Yard – DTSC Voluntary Cleanup Agreement
N. Corporation Yard – EKI Professional Services Agreement
O. Corporation Yard - October 9, 2017, DTSC Request For Information And Documents
P. Corporation Yard - November 30, 2017, Successor Agency Response to Request For Information And Documents
Q. Corporation Yard - October 25, 2018, Tom Price/DTSC email re: Corporation Yard Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order
R. Corporation Yard - December 13, 2018, EKI Environmental Engineering Services Proposal
S. Corporation Yard – Second Amended Complaint, October 5, 2017, *Successor Agency, et.al. v Swagelok Company, et.al.;* United States District Court, Northern District of California, Case No. 17-cv-00308-WHO.
T. Corporation Yard – February 15, 2016, Baker & Hostetler Letter re: Notice of Intent To File Citizen Suit Under RCRA Against Successor Agency
U. Corporation Yard - TCE Concentrations in Groundwater (~0’ to 23’ bgs) and (~23’ to 45’ bgs)