Michael G. Biddle (SBN 139223)
E-mail: mbiddle@bwslaw.com
J. Leah Castella (SBN 205990)
E-mail: lcastella@bwslaw.com
Maxwell A. Blum (SBN 299336)
E-mail: mblum@bwslaw.com
BURKE, WILLIAMS & SORENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Michael A. Guina (SBN 203380)
E-mail: mguina@emeryville.org
Andrea Visveshwara (SBN 227412)
E-mail: avisveshwara@emeryville.org
CITY OF EMERYVILLE
1333 Park Ave.
Emeryville, CA 94608
Tel: 510.450.7801

Attorneys for Petitioner and Plaintiff
SUCCESSOR AGENCY TO THE
REDEVELOPMENT AGENCY OF THE CITY OF
EMERYVILLE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF EMERYVILLE, a public entity, Petitioner and Plaintiff, v. CALIFORNIA DEPARTMENT OF FINANCE; KEELY BOSLER, in her official capacity as Director of the State of California Department of Finance; DOES 1-50 inclusive, and ROES 1-50 inclusive, Respondents and Defendants.	Case No. **PETITION FOR WRIT OF MANDATE**

INTRODUCTION

1. This petition for Writ of Mandate ("Petition") is brought by Petitioner and Plaintiff SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF EMERYVILLE ("Successor Agency" or "Petitioner"), pursuant to Code of Civil Procedure Section 1085, and is directed to Respondents: (1) State of California DEPARTMENT OF FINANCE ("DOF"); and (2) KEELY BOSLER, in her official capacity as Director of the State of California Department of Finance ("Bosler"); (collectively, "Respondents"), seeking to compel Respondents to comply with the Dissolution Act (ABx1 26 [Assem. Bill No. 26 (2011-2012 1st Ex. Session)], AB 1484 [Assem. Bill No. 1484 (2011-2012 Reg. Session)], and SB 107 [Sen. Bill No. 107 (2015-2016 Reg. Session)], collectively ("Dissolution Law").

2. On October 5, 2009, the City of Emeryville ("City") and the former Redevelopment Agency of the City of Emeryville ("RDA") entered into a Settlement Agreement ("Settlement Agreement") with Union Oil Company of California, Chevron U.S.A. Inc. and Chevron Corporation (collectively, "Chevron") relating to recovery of costs, damages and fees incurred by the RDA in connection with the investigation and cleanup of hazardous materials on real property known as South Bayfront Site B ("Site B"). The Settlement Agreement and settlements with other defendants to the consolidated proceeding (Alameda County Superior Court, Case Nos. RG-06-267594; RG-06-267600; RG-07-332012) were approved by Order On Joint Motion For Determination Of Good Faith Determination Of Settlements And Settlement Allocation of the Alameda County Superior Court on July 23, 2010 ("Settlement Order").

3. Section VI.B. of the 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...".

4. The Settlement Agreement and the Settlement Order constitute enforceable obligations of the Successor Agency pursuant to Health & Safety Code §§ 34171(d)(1)(D) and

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OAKLAND

34171(d)(1)(E). In a May 17, 2017 letter regarding the Successor Agency's Recognized Obligation Payment Schedule ("ROPS") for July 1, 2017 –June 30, 2018 ("ROPS 17-18 Determination"), DOF acknowledged that "the Settlement Agreement is an enforceable obligation".

5. Despite that acknowledgement, on May 17, 2019 DOF in its Final Determination on ROPS 2019-2020 ("Final Determination"), DOF asserted that a cleanup agreement with EKI Environment & Water, Inc. ("EKI PSA"), approved by the Successor Agency on January 15, 2019 pursuant to authority provided by Health & Safety Code § 34177.3 and entered into in order to comply with the Settlement Agreement was not an enforceable obligation.

6. The EKI PSA is listed as Item No. 123 on ROPS 19-20 and is a $2,995,000 professional services agreement for the provision of environmental engineering services for real property located at 5679 Horton Street, Emeryville, California (known as the "Corporation Yard" and/or "FMW[1] Site"). The RDA acquired fee title to the Corporation Yard in July 1999. The EKI PSA pertains to the environmental clean-up of the Corporation Yard, a site which is upgradient of, and a source of contamination migrating to, Site B. Pursuant to authority provided by Health & Safety Code § 34177.3, the Successor Agency approved the EKI PSA in compliance with an enforceable obligation that existed prior to June 28, 2011, namely (i) the Settlement Agreement dated October 5, 2009, and (ii) obligations imposed by State environmental law (Health and Safety Code §25323.5(a)(1)) on the Successor Agency as owner of fee title to the Corporation Yard acquired in July 1999. Accordingly, the EKI PSA is a valid enforceable obligation of the Successor Agency pursuant to Health & Safety Code §§ 34171(d)(1)(E), (F).

7. A site map showing the location of Site B and the Corporation Yard in relation to each other is attached to this Petition as Exhibit A. The Successor Agency is the current owner of fee title to Site B and the Corporation Yard.

[1] The phrase "FMW Site" is an acronym for "Former Marchant-Whitney Site". The Marchant Calculating Machine Company, a California corporation, and its successors owned and conducted industrial operations at the site from approximately 1910 to 1959. The Whitney Research and Tool Company operated at the site from approximately 1960 to the late 1990s.

8. This Petition seeks to compel DOF to comply with its mandatory statutory duties under the Dissolution Act to approve payment of Item No. 123 on ROPS 19-20.

PARTIES

9. Petitioner Successor Agency to the Redevelopment Agency of the City of Emeryville ("Successor Agency") is, pursuant to Health & Safety Code § 34173(a), the Successor Agency to the former RDA. Pursuant to Health & Safety Code § 34173(g), the Successor Agency is a separate public entity from the City and can sue and be sued in its own name.

10. Respondent California Department of Finance is, and at all relevant times mentioned herein was, an arm of the executive branch of the sovereign State of California responsible for preparing the State budget and advising the Governor on budgetary and fiscal matters.

11. Respondent Keely Bosler is the current Director of the DOF, and is named herein at all times in her official capacity as such.

12. The true names and capacities, whether individual, corporate, or otherwise, of Respondents/Defendants DOES 1 through 50, inclusive, are unknown to Petitioner at this time, who therefore sues these Respondents by such fictitious names. Petitioner will seek leave of court to amend this Petition to reflect the true names and capacities of these fictitiously named Respondents when they have been ascertained. Petitioner is informed and believe, and based thereon allege, that each of the Respondents named herein as DOES 1 through 50, inclusive, is legally responsible in some manner for the actions challenged herein, and therefore should be bound by the relief sought herein.

13. The true names and capacities, whether individual, corporate, or otherwise, of Real Parties in Interest ROES 1 through 50, inclusive, are unknown to Petitioner at this time. Petitioner therefore sues these Real Parties in Interest by such fictitious names. Petitioner will seek leave of court to amend this Petition to reflect the true names and capacities of these fictitiously named Real Parties in Interest when they have been ascertained. Petitioner is informed and believes, and based thereon alleges, that each of the Real Parties In Interest named

herein as ROES 1 through 50, inclusive, is legally responsible in some manner for the actions challenged herein, and therefore should be bound by the relief sought herein.

JURISDICTION AND VENUE

14. Pursuant to Health & Safety Code § 34168, "any action contesting the validity of [Part 1.8] or Part 1.85 (commencing with § 34170) or challenging acts taken pursuant to these parts shall be brought in the Superior Court of the County of Sacramento." The actions challenged by this Petition were taken pursuant to Parts 1.8 and/or 1.85 and therefore venue is proper in this Court.

15. This Petition is deemed verified pursuant to Code of Civil Procedure § 446.

16. Petitioner has performed all conditions precedent to filing this Petition, including exhausting all available administrative remedies, and has no other remedy other than to bring this action. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law other than to bring this action.

COMMUNITY REDEVELOPMENT LAW

17. Prior to enactment of the Dissolution Act, the Community Redevelopment Law ("CRL") (Health & Saf. Code §§ 33000 et seq.) authorized cities and counties to form redevelopment agencies to remediate urban decay and to revitalize blighted neighborhoods through publicly and privately funded redevelopment projects. Redevelopment agencies were created "to protect and promote the sound development and redevelopment of blighted areas and the general welfare of the inhabitants of the communities in which they exist . . . ." (Health & Saf. Code § 33037(a).)

18. Redevelopment agencies had the power to acquire, sell, or lease property, construct infrastructure, and improve public facilities. (Health & Saf. Code §§ 33391, 33430, 33431, 33435.) They also had the power to borrow funds and incur debt. (*See, e.g., County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262.)

19. Redevelopment agencies financed projects through "tax increment financing," and were required to incur debt in order to receive tax increment revenue. (Cal. Const. art. XVI, § 16; Health & Saf. Code § 33670.) Tax increment revenue consisted of the portion of the local

property taxes generated from within a designated redevelopment project area resulting from increases in the assessed valuation of property in that project area. (Cal. Const. art. XVI, § 16(b); Health & Saf. Code § 33670; *Craig v. City of Poway* (1994) 28 Cal.App.4th 319, 325.) On an annual basis, tax increment was calculated by subtracting the base year assessed value of project area property (i.e., the value in effect as of the date of the adoption of the redevelopment plan) from the current assessed value of property in the project area. (See *California Redevelopment Agency v. Matosantos* (2011) 53 Cal.4th 231, 246-47.)

20. Redevelopment agencies were expressly authorized under the Polanco Redevelopment Act (Health & Saf. Code §§ 33459, *et seq.*) to take any actions that the agency determines are necessary and that are consistent with other state and federal laws to remedy or remove a release of hazardous substances on, under, or from property within a project area, whether the agency owns that property or not, if the party determined by the agency to be a responsible party for the release has been provided notice and an opportunity to respond and to propose a remedial action plan and schedule, and the responsible party has not subsequently agreed to implement a plan and schedule to remedy or remove the release that is acceptable to the agency and that has been found by the agency to be consistent with the National Contingency Plan published pursuant to Section 9605 of Title 42 of the United States Code for similar releases, situations, or events.

21. All of the authority granted by the CRL remained in force until June 28, 2011 with the enactment of ABx1 26.

DISSOLUTION OF REDEVELOPMENT AGENCIES

22. On June 28, 2011, redevelopment agencies in California were radically changed as a result of the Legislature's adoption of AB x1 26. AB x1 26 added Parts 1.8 and 1.85 to Division 24 of the Health & Safety Code, and severely limited the powers exercised by all redevelopment agencies throughout the state, including the former RDA. The legislature subsequently passed AB 1484 and SB 107, which made changes to the Dissolution Law.

23. Declarations of legislative intent within the Dissolution Law recognize that obligations incurred by redevelopment agencies prior to their dissolution shall be honored. (See,

e.g. Health & Saf. Code §§ 34167(f) and 34175(a).)

24. Each successor agency is required to have an oversight board, which is a seven-member board composed of representatives of the affected taxing entities, that oversees the successor agency's actions in winding down the affairs of the former redevelopment agency. The oversight board has fiduciary responsibilities to holders of enforceable obligations and the affected taxing entities that benefit from distributions of property tax revenues. (Health & Saf. Code § 34179(i).) The oversight board is responsible for approving certain actions of the successor agency including, but not limited to, the establishment of the ROPS. (Health & Saf. Code § 34180(g).) The responsibilities of the oversight board are detailed in Section 34179 of the Dissolution Law.

25. On January 17, 2012 the City Council of Emeryville adopted Resolution No. 12-12 pursuant to which the City agreed to serve as the Successor Agency. The former RDA was dissolved by operation of law effective February 1, 2012.

REDEVELOPMENT IN THE CITY OF EMERYVILLE

26. Emeryville has a long history of industrial activity, dating back to the late 1800s. Industrial activity in Emeryville increased as a result of the United States' entry into World War II. In the post-war decades, as in other American inner cities, industries with increasingly outdated facilities began moving away from Emeryville to outlying areas where land was plentiful and cheap. As large industries began to contract and relocate to other cities, they left behind properties with toxins that had to be cleaned up before the land could be put towards other uses.

27. In July 1976, the City approved and adopted its first redevelopment plan, the Emeryville Redevelopment Plan for the Emeryville Redevelopment Project Area. A major focus of the Plan was the "Bayfront" area, which includes the area encompassing Site B.

28. In October 1987, the City approved and adopted its second redevelopment plan, the Shellmound Park Redevelopment Plan for the Shellmound Park Redevelopment Project Area. The land within both plan areas was predominantly industrial.

29. The intent of the Emeryville Redevelopment Plan and the Shellmound Park

Redevelopment Plan was, in part, to provide for the construction and installation of necessary public infrastructure and facilities, facilitate the repair, restoration, and/or replacement of existing public facilities, perform specific actions necessary to promote the redevelopment and the economic revitalization of the project areas, and take all other actions necessary to implement the redevelopment plans for the project areas, including expending tax increment to accomplish the goals and objectives of the redevelopment projects.

30. These goals are echoed in the Five-Year Implementation Plan for the Project areas that the RDA prepared in 1993 (as amended from time to time pursuant to Assembly Bill 1290, Health and Safety Code § 33490), which commits project area redevelopment funds to affordable housing, economic development, and community and commercial revitalization based on estimated tax increment revenue and debt financing structures.

31. In Emeryville, a necessary first step in accomplishing these goals was environmental remediation of the toxic legacy of the City's past. Since the adoption of the first redevelopment plan in 1976, the City and the RDA have overseen the cleanup of the majority of polluted land within the city limits, either by using their powers under the Polanco Redevelopment Act to force polluters to clean up their own messes,[2] or facilitating private cleanup activity by leveraging funding with federal grants, state loans and in some instances tax increment financing. The City and the RDA's remediation of contaminated properties has allowed the City to create a robust, livable community through commercial, residential, and public development projects, including affordable housing, community facilities, open space, and parks.

Environmental Cleanup Efforts for Site B

32. Site B is an approximately 3-acre property made up of five different parcels in Emeryville. The site has a long history of industrial uses, including serving as a manufacturing facility, metal working operation, and as a lumberyard. In the early 1900s, Union Oil operated a distribution yard on the northern portion of Site B. As of 2006, the RDA had acquired fee title or

[2] See *Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083; *City of Emeryville et al. v. Robinson et al.* (9th Cir. 2010) 621 F.3d 1251.

possession of all parcels comprising Site B through negotiation or eminent domain proceedings, and by 2009 had acquired fee title to all of Site B.

33. Commencing in 2004, investigations of the soil and groundwater at Site B were initiated by the RDA under the oversight of the California Environmental Protection Agency, Department of Toxic Substances Control ("DTSC") pursuant to an oversight agreement. The environmental assessments of Site B indicated that hazardous materials were present in concentrations requiring environmental cleanup. The assessments found that the most significant contaminants in the soil included petroleum hydrocarbons, and metals such as arsenic, antimony, and lead. After an extensive process of environmental study, investigation and evaluation, in June 2008 the RDA awarded a contract for soil remediation of hazardous materials contamination at 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.

34. As part of the eminent domain actions filed to acquire four of the five parcels comprising Site B, the RDA also initiated an action utilizing the Polanco Redevelopment Act to recover its costs of hazardous materials remediation from responsible parties.

35. As noted above, on July 23, 2010, the Alameda County Superior Court approved the Settlement Order with several defendants that allocated $22,400,000 in settlement proceeds amongst costs incurred, and to be incurred, by the RDA for soil remediation, environmental investigation, assessment and engineering, legal fees and *future* groundwater remediation costs. Chevron—one of the parties to litigation initiated by the RDA with respect to Site B—agreed to pay $15,500,000.

36. With respect to the groundwater at Site B, the assessments conducted in connection with the approval of the FS/RAP found the presence of chlorinated volatile organic compounds ("CVOCs"), metals, and petroleum hydrocarbons. The properties of these contaminants result in adverse impacts to air quality within structures constructed on the site. It

was determined that the CVOCs on Site B were, in part, attributable to sources that were migrating onto Site B from other unknown surrounding contaminated sites.

37. Not surprisingly, when Chevron agreed to pay $15.5M to the RDA (a sum significantly driven by *future* groundwater work), they extracted a commitment by the RDA to spend a significant portion of the proceeds on the problem for which they were paying, i.e., groundwater contamination and the related soil vapor problem. Accordingly, as noted above, Section VI.B. of the Settlement Agreement provides that the RDA:

> "shall . . . 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/or migrating to or from Site B . . . to the satisfaction of DTSC."

38. Having completed the remediation of hazardous materials in soil at Site B to the satisfaction of DTSC, and in order to fulfill its contractual obligations under the Settlement Agreement, on June 27, 2011, the RDA and DTSC entered into a new agreement for regulatory oversight services related to the remediation of groundwater at Site B.

39. Pursuant to investigations contemplated by the Settlement Agreement and conducted in the fall of 2011 under the oversight of DTSC, it was determined that a property in close proximity to Site B, namely the Corporation Yard, was a significant source of CVOCs at Site B. In December 2011, RDA staff and EKI met with DTSC to share the investigative results conducted at the Corporation Yard.

40. Health and Safety Code § 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." 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..."

41. Thus, in order to remediate hazardous materials which are migrating to Site B, on January 31, 2012, the RDA appropriately adopted a resolution authorizing a voluntary cleanup

agreement with DTSC to address the contamination at the Corporation Yard which was, and continues to, migrate to Site B. The RDA also authorized entering into a contract with EKI for environmental engineering services to address contamination at the Corporation Yard. The RDA authorized these transactions for the purpose of performing its obligations under the Settlement Agreement and those imposed under State environmental law.

42. In 2012, following an assessment by an certified industrial hygienist of the indoor air in the building at the Corporation Yard, the building was vacated due to health concerns for workers resulting from impacts to indoor air from CVOCs in groundwater. Concentrations of trichloroethene ("TCE"), a known human carcinogen, exist in groundwater at the Corporation Yard site up to 100,000 times the drinking water standard.

43. With respect to the remediation of groundwater at Site B, roughly a year after investigations at the Corporation Yard had commenced, 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. Remediation of deeper groundwater is not included in this RAP Amendment, since EKI has determined that Site B does not contribute to the deeper groundwater contamination in the southeastern portion of the Site. Cleanup of deeper groundwater under the southeastern portion of Site B will be addressed as part of the FMW site.
>
> It should be clear that this in no way means that remediation of the deeper groundwater at Site B will not occur, but rather remediation at the Site by an upgradient responsible party may or may not be necessary at a later date."

44. Pursuant to the voluntary cleanup agreement with DTSC and the contract with EKI approved by the RDA on January 31, 2012, and as required by the Settlement Agreement and State environmental law, over the next several years the Successor Agency investigated and evaluated the hazardous substances at the Corporation Yard under DTSC's oversight.

45. In the wake of the Dissolution Act, the California state legislature enacted the

Gatto Act (AB 440)(Health and Safety Code §25403 et.seq.) effective January 1, 2014, which provides cities powers similar to those previously afforded redevelopment agencies under the Polanco Redevelopment Act. On November 12, 2014, the City sent letters to the record owner of 20 parcels of real property in an area identified as the "Horton District". A site map showing the properties in the Horton District is attached to this Petition as Exhibit B. The letter advised that the Successor Agency had undertaken and completed soil remediation activities at Site B, was implementing groundwater activities at Site B, and was investigating soil and groundwater contamination at the Corporation Yard. Further, the letter advised that the results of these activities suggest that one or more properties in the Horton District may be impacting groundwater in the area. Accordingly, the City advised that it was undertaking the preparation of a Phase 1 Environmental Assessment of the Horton District and requested the property owners to allow EKI to conduct a visual inspection of their property, respond to a questionnaire related to their property, and provide copies of all non-privileged existing environmental information related to their property.

46. Thereafter, based on the information secured by the City in response to the letters sent to the property owners in the Horton District and as set forth in the Phase 1 Environmental Assessment prepared by EKI, on June 16, 2015, pursuant to authority under the Gatto Act, the City Council of the City of Emeryville adopted Resolution No. 15-80 and designated the Corporation Yard as a "blighted property" and the Horton District as a "blighted area".

47. In recognition of the obligation in the 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/or migrating to or from Site B", on July 1, 2015, December 28, 2015 and January 12, 2016, the City and Successor Agency provided notice to "responsible parties" for the releases at and from the Corporation Yard in accordance with the Gatto Act and Polanco Redevelopment Act, respectively.

48. As required by statute, the notice provided the "responsible parties" an opportunity to undertake the work necessary to remediate the Corporation Yard. The letter

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advised that the City and Successor Agency stood ready to provide the "responsible parties" with the environmental data that had been developed to that date through the efforts of EKI in order to avoid duplication of costs. Finally, the "responsible parties" were advised if they chose not to undertake such work, the City and Successor Agency could undertake the work themselves and thereafter pursue recovery of its costs, including interest thereon, and reasonable attorneys' fees.

49. None of the "responsible parties" elected to pursue the work required to study, investigate, evaluate, and remediate the hazardous substances or hazardous materials at the Corporation Yard. Therefore, in keeping with the mandate in the Settlement Agreement to "cause to be performed" the required work, the Successor Agency filed an action in federal court against the "responsible parties" to recover its costs, interest, attorneys' fees, compensatory damages, as well as injunctive relief ordering the defendants to abate the endangerment to health and the environment at and emanating from the Corporation Yard. The expenses incurred by the Successor Agency for legal services are reflected in line item 49 of the ROPS.

50. As required by the Settlement Agreement and State environmental law, the Successor Agency continued to "perform" the work required to address the contamination migrating to Site B. In early 2017, the Successor Agency and DTSC were preparing to release for public comment a draft Feasibility Study/ Remedial Action Plan ("FS/RAP") for the Corporation Yard site, which set forth the measures necessary to remediate contamination migrating to Site B. Up to that point the Successor Agency had expended approximately $7,000,000 of RPTTF approved by the Emeryville Oversight Board, without objection by DOF, during the preceding 5 years towards the study, investigation and evaluation of hazardous materials migrating to Site B from the Corporation Yard under the oversight of DTSC. As of February 2017, the draft FS/RAP for the Corporation Yard indicated that the estimated present worth total cost range for the preferred remedial alternative (Alternative 4) to remediate the hazardous materials at the Corporation Yard at $32.4 million to $59.8 million over the next 30 years.

51. Initial funding for environmental engineering services with EKI was included on the 2017-2018 ROPS to pursue the cleanup of the Corporation Yard site. However, the ROPS

17-18 Determination issued by DOF denied the obligation as an enforceable obligation. While DOF acknowledged that "the Settlement Agreement is an enforceable obligation", notwithstanding the presentation of the foregoing evidence to them, it argued that "the Settlement Agreement does not specifically pertain to the FMW Site and the proposed remediation of the FMW Site seems to go beyond the scope of the Agency's obligations under the Settlement Agreement".

52. Upon receiving DOF's ROPS 17-18 Determination, Successor Agency staff and EKI met with representatives of DTSC on June 13, 2017, to share with them DOF's position and the resulting reality that the Successor Agency had no funds to pursue the remediation of the Corporation Yard. DTSC representatives indicated that the environmental condition of the Corporation Yard warranted issuance of an Imminent & Substantial Endangerment Order ("Cleanup Order") by DTSC to clean up the Corporation Yard site.

53. Instead of engaging in litigation to challenge DOF's ROPS 17-18 Determination, the Successor Agency opted to wait until DTSC issued a Cleanup Order to remediate the Corporation Yard site, which undoubtedly would constitute an enforceable obligation under Health and Safety Code § 34171(d)(1)(C). On October 9, 2017, DTSC issued the Successor Agency with a Request for Information and Documents. The Successor Agency provided its response to DTSC on November 30, 2017 and on October 25, 2018 DTSC confirmed that a Cleanup Order to remediate the Corporation Yard site would be forthcoming.

54. On January 15, 2019, pursuant to authority provided by Health & Safety Code § 34177.3, and in order to comply with its obligations under the Settlement Agreement and under state and federal law, the Successor Agency approved and authorized the execution of the EKI PSA commencing on July 1, 2019 through June 30, 2020, in the amount of $2,995,000, for environmental engineering services related to the remediation of hazardous materials at the Corporation Yard migrating to Site B. The EKI PSA was approved by the Successor Agency in compliance with the Settlement Agreement and obligations imposed under state and federal law, enforceable obligations that existed prior to June 28, 2011. Accordingly, the EKI PSA is an enforceable obligation of the Successor Agency pursuant to Health & Safety Code §§

34171(d)(1)(E), (F), and is reflected in ROPS 19-20 line item 123. 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 for EKI's environmental engineering services.

55. On January 23, 2019, the Alameda County Oversight Board ("Oversight Board") approved ROPS 19-20 of the Successor Agency pursuant to Resolution No. OB-2019-03, including line item 123 without exception.

DOF's Final Determination on ROPS 19-20

56. On April 15, 2019, DOF sent the Successor Agency its initial determination on ROPS 19-20. In it, DOF stated that Item No. 123 (EKI PSA) was not allowed because the Successor Agency executed the agreement without approval from the Oversight Board. DOF did not provide an explanation for why Item No. 123 required oversight board approval.

57. The Successor Agency and DOF met and conferred on April 25, 2019 regarding Item No. 123 (EKI PSA). The Successor Agency advised DOF that it did submit the EKI PSA to the Oversight Board for its review and approval as part of its consideration and approval of ROPS 19-20 on January 23, 2019. Further, the Successor Agency advised DOF that no provision of the Dissolution Law requires submission of the EKI PSA to the Oversight Board prior to and separate and apart from ROPS 19-20. To the contrary, Health and Safety Code § 34180 outlines actions of the Successor Agency that "shall first be approved by the oversight board" and the EKI PSA does not fall within that list.

58. The Successor Agency explained that, to fulfill its obligation under the terms of the Settlement Agreement, an enforceable obligation, it authorized the EKI PSA pursuant to authority conferred on it in Health and Safety Code § 34177.3. The Successor Agency also explained that, as the owner of fee title to the Corporation Yard, it is a responsible party under state and federal environmental laws for the remediation of hazardous materials on the site (42 U.S.C. 9607(a) and Health and Saf. Code § 25323.5(a)(1)), and obligations imposed by state law constitute an enforceable obligation under Health and Safety Code § 34171(d)(1)(C), and that the EKI PSA is necessary for the Successor Agency to fulfill its obligations under state law.

59. Subsequent to the April 25, 2019 meet and confer meeting, the DOF issued

several follow up questions to the Successor Agency on May 3, 2019, and the Successor Agency responded on May 7, 2019. Thereafter the DOF requested additional information on May 8, 2019 and the Successor Agency responded on May 13, 2019.

60. DOF issued its Final Determination on ROPS 19-20 on May 17, 2019. It continued to deny Item No. 123 (EKI PSA), but it modified the basis for denial. Instead of asserting that the EKI PSA needed to be approved by the Oversight Board separate and apart from the 2019-2020 ROPS process, DOF concluded that the EKI PSA is not an enforceable obligation.

DOF's Denial Impedes the Successor Agency from Performing Mandated Cleanup

61. Once the Successor Agency completes the groundwater remediation efforts to Site B as required by the Settlement Agreement and Settlement Order, it will obtain immunity from future regulatory actions pursuant to Health and Safety Code § 33459.3, which immunity can be transferred to future owners of Site B. Further, once DTSC confirms the application of the immunity pursuant to the Polanco Redevelopment Act, the Site B parcels are to be transferred by the Successor Agency to the City for future development pursuant to the terms of the DOF approved Long Range Property Management Plan ("LRPMP").

62. In the absence of an agreement to remediate the Corporation Yard as provided in the EKI PSA, the groundwater remediation of Site B cannot be completed "to the satisfaction of DTSC" as required by the Settlement Agreement. Further, the immunity under the Polanco Redevelopment Act cannot be confirmed by DTSC, and thus the condition precedent to the transfer of the Site B parcels to the City pursuant to the LRPMP will not be satisfied. As a result, the Site B parcels will remain an asset of the Successor Agency, the expenses related thereto will remain an obligation of the Successor Agency, and the process of redeveloping the Site B parcels and putting them back into productive use for the benefit of the taxing entities is further delayed. Regulatory closure from DTSC for Site B is also dependent on the assurance that upgradient off-site groundwater that is impacting Site B is being addressed. As explained in the Responsiveness Summary dated January 2008 and prepared by DTSC in response to public comments on the Site B Draft FS/RAP:

> "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."

Further, as previously noted, in DTSC's letter of March 7, 2013, approving the Draft Remedial Action Plan Amendment and Remedial Design and Implementation Plan for Shallow Groundwater at Site B, DTSC advised:

> "[c]leanup of deeper groundwater under the southeastern portion of Site B will be addressed as part of the FMW site. It should be clear that this in no way means that remediation of the deeper groundwater at Site B will not occur, but rather remediation at the Site by an upgradient responsible party may or may not be necessary at a later date."

63. Thus, unless and until groundwater contamination migrating from the Corporation Yard and impacting the deeper groundwater at Site B is addressed "to the satisfaction of DTSC", regulatory closure from DTSC for Site B will not be obtained. As a result, the recurring expenses associated with treating contaminated groundwater that continues to migrate onto Site B will remain an obligation of the Successor Agency. Until the source of the groundwater problem at the Corporation Yard is addressed, the Successor Agency will continue to incur ongoing groundwater remediation expenses at Site B, and the Site B parcels will not be transferred to the City for future development in accordance with the LRPMP. Since the Site B parcels are currently an asset of the Successor Agency, the recurring expenses associated with treating contaminated groundwater that continues to migrate onto Site B will remain an obligation of the Successor Agency and the process of redeveloping the Site B parcels and putting them back into productive use for the benefit of the taxing entities will be further delayed.

64. To the south of Site B is the Bay Street development, often referred to as South Bayfront Site A or Site A, comprising approximately 300,000 square feet of retail/restaurant/ theatre space, 350 housing units (rental and ownership), a hotel and structured parking. Site A was redeveloped as a result of the efforts of the RDA that initially commenced in 1994 and pursuant to the terms of a Disposition and Development Agreement dated September 23, 1999

("DDA"). As between the RDA and the Site A property owner, Section 12, subsection 1 of the DDA provides that the "Agency shall be responsible for performing and paying the costs of all monitoring, remediation and other response actions for groundwater".

65. The RDA and Successor Agency have conducted over 15 years of groundwater monitoring and reporting at Site A under the oversight of DTSC. Recent testing data from groundwater monitoring points on Site A located down-gradient from the Corporation Yard have revealed elevated levels of TCE, the main contaminant of concern at the Corporation Yard. Thus, to the extent contamination from the Corporation Yard impacts groundwater at Site A, the DTSC has the authority to order remedial actions to be undertaken at Site A to address hazardous materials in the groundwater, such as TCE. Under the terms of the Site A DDA, the obligation to undertake those remedial actions would fall to the Successor Agency. Accordingly, failure of the DOF to recognize the obligation of the Successor Agency to undertake remedial work at the Corporation Yard, as contemplated by the EKI PSA and required by the Settlement Agreement, allows contaminants in groundwater to migrate off-site onto Site A and thereby exacerbate existing obligations of the Successor Agency.

66. The migration of contaminants in groundwater from the Corporation Yard onto Site B (and Site A) is well documented. After years of investigation and assessment undertaken by EKI on behalf of the Successor Agency, DTSC, whose mission is to protect public health and the environment from toxic harm, has acknowledged that contaminants from the Corporation Yard are migrating to Site B. Rather than accept the facts as determined by DTSC, DOF has taken the erroneous position that "the Settlement Agreement does not specifically pertain to the FMW Site and the proposed remediation of the FMW Site seems to go beyond the scope of the Agency's obligations under the Settlement Agreement".

67. DOF's position ignores the fact that at the time the Settlement Agreement was executed, Chevron and the RDA did not know that the Corporation Yard was a source of contamination to Site B. Hence, the very reason for the broad language in the Settlement Agreement obligating the RDA "to study, investigate, evaluate, and remediate the Hazardous Substances or contamination within, on, under, at, or emanating from/or migrating to or from

Site B". To accept DOF's interpretation would render a significant provision of the Settlement Agreement, and the central bargain struck by Chevron, meaningless.

68. The ongoing failure of the DOF to recognize the obligation of the Successor Agency, as set forth in the Settlement Agreement and State environmental law, to address the source of the problem at the Corporation Yard migrating onto Site B and Site A, provides time for the contaminants to spread like cancer, inflict damage further afield, and ultimately increase the cost to the Successor Agency to remediate an ever widening problem at the expense of the taxing entities.

FIRST CAUSE OF ACTION
Petition for Writ of Mandate - Code of Civil Procedure § 1085

(May 17, 2019 Final Determination Denying Item No. 123 on ROPS 2019-2020.)

69. The Successor Agency hereby re-alleges and incorporates by reference all of the above paragraphs of this Petition.

70. Pursuant to Health and Safety Code § 34177.3, the Successor Agency is authorized to enter into the EKI PSA (ROPS Item No. 123), in compliance with an enforceable obligation that existed prior to June 28, 2011, namely (i) the Settlement Agreement dated October 5, 2009, and (ii) obligations imposed by State environmental law (Health and Safety Code §25323.5(a)(1)) on the Successor Agency as owner of fee title to the Corporation Yard acquired in July 1999. Accordingly, the EKI PSA (ROPS Item No. 123) is a valid enforceable obligation under Health and Safety Code §§ 34171(d)(1)(E) and (F).

71. The DOF's arbitrary and capricious refusal to approve Item No. 123 violates the Dissolution Act and Respondent DOF's mandatory duty to interpret and implement the Dissolution Act in a legally accurate manner.

72. Petitioner is beneficially interested in the performance of Respondent DOF's mandatory duty, and will be materially injured if DOF's ROPS 19-20 Determination as to Item No. 123 on the ROPS 19-20 is not overturned.

73. There is no adequate remedy at law to protect the Successor Agency other than the issuance of the writ of mandate.

BURKE, WILLIAMS & SORENSEN, LLP
ATTORNEYS AT LAW
OAKLAND

PRAYER FOR RELIEF

1. A peremptory writ of mandate ordering Respondent/Defendant to approve Item No. 123 on ROPS 19-20 as an enforceable obligation in accordance with Health & Safety Code §§ 34171(d)(1) (E) and (F).

2. For costs of suit incurred herein;

3. Attorneys' fees as permitted by law; and

4. For such other further relief as the Court deems just and proper.

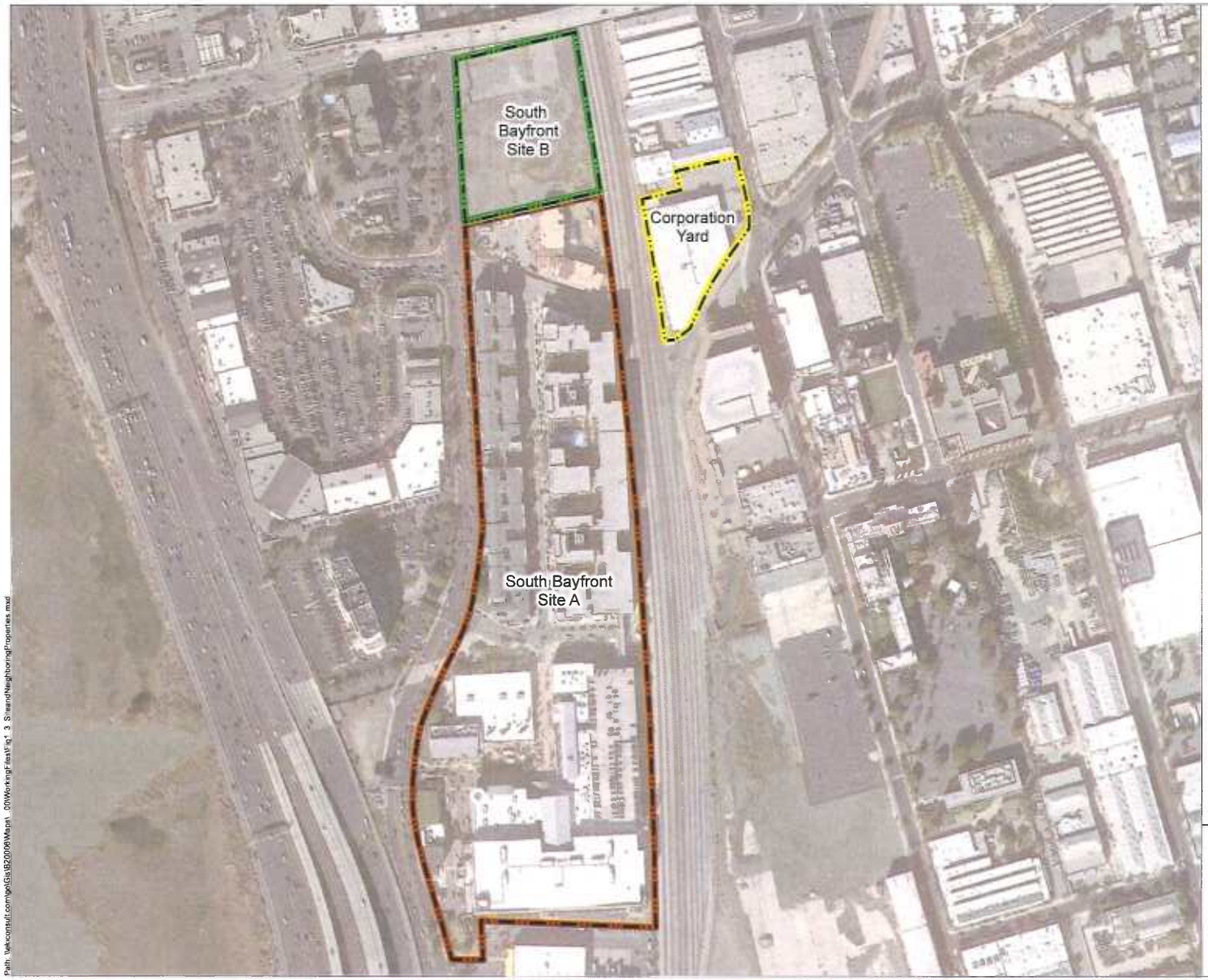
Dated: May 21, 2019

BURKE, WILLIAMS & SORENSEN, LLP

By: _____

Michael G. Biddle
J. Leah Castella
Maxwell Blum
Attorneys for Petitioner/Plaintiff
SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF EMERYVILLE

EXHIBIT A



N

0 250 500

(Approximate Scale in Feet)

Legend

- Corporation Yard Property Boundary
- South Bayfront Site B Property Boundary
- South Bayfront Site A Property Boundary

Notes

1. All property boundaries are approximate.

Source

Google Earth Pro, Date of Imagery, October 2015.

Erler & Kalinowski, Inc.

Successor Agency Properties

Former Marchant/Whitney Site
Emeryville, CA
December 2018
EKI B20006.00
Figure 1

Path: \\ekcorpfs1.com\gis\GIS\B20006\Maps\...00WorkingFiles\Fig1_3 SI and Neighboring Properties.mxd

EXHIBIT B

N

0 120 240

(Approximate Scale in Feet)

Legend

Emeryville Horton District Boundary

Parcel	APN
1	049-1318-002-02
2	049-1318-001-002
3	049-1318-007-005
4	049-1318-007-004
5	049-1319-001-015
6	049-1319-002-002
7	049-1552-01
8	049-1319-001-011
9	049-1319-001-20
10	049-1319-001-06
11	049-1320-004
12	049-1320-003
13	049-1320-001
14	049-1321-003-02
15	49-1321-001-02
16	049-1321-001-04
17	049-1321-005
18	049-1321-004-04
19	049-1038-017
20	049-1038-018

Abbreviations
APN = Assessor's Parcel Number

Notes
1 All parcel boundaries are approximate

Reference Google Earth Pro July 2010

Erler & Kalinowski, Inc.

Subject District Location

Emeryville Horton District
Emeryville, CA
January 2015
EKI B20008.01
Figure 1