



City of Emeryville

C A L I F O R N I A

MEMORANDUM

DATE: October 20, 2020
TO: Christine Daniel, City Manager
FROM: Michael Guina, City Attorney
**SUBJECT: MARCHANT/WHITNEY SITE, 5679 HORTON STREET, EMERYVILLE
HAZARDOUS SUBSTANCES REMEDIATION**

Consideration Of Request By Successor Agency to Emeryville Redevelopment Agency For Short-Term Loan And Terms Thereof From the City of Emeryville To Be Used By Successor Agency For Costs Incurred In Response To Imminent And Substantial Endangerment Determination And Order and Remedial Action Order Issued By the California Environmental Protection Agency, Department of Substances Control Related To The Presence Of Hazardous Substances at the Marchant/Whitney Site, 5679 Horton Street, Emeryville, California

BACKGROUND

On August 13, 2020, the California Environmental Protection Agency, Department Of Toxic Substances Control (“**DTSC**”) issued an Imminent and/or Substantial Endangerment Determination Order and Remedial Action Order (“**Order**”) to the City of Emeryville as Successor Agency to the Emeryville Redevelopment Agency (“**Successor Agency**”) to remediate hazardous substances contamination in soil and groundwater at the Marchant/Whitney Site, 5679 Horton Street, Emeryville, California (“**Site**”)¹. The Order requires the Successor Agency to, among other matters, undertake work to finalize the Feasibility Study/Remedial Action Plan (“**FS/RAP**”) for the Site and then implement the Site cleanup. While the Order constitutes an enforceable obligation pursuant to Health and Safety Code 34171(d)(1)(C) of the Redevelopment Dissolution Act, the Successor Agency may only expend Real Property Tax Trust Funds (“**RPTTF**”) in accordance with enforceable obligations included on an approved Recognized Obligation Payment Schedule (“**ROPS**”).

At present, the Successor Agency is operating pursuant to the ROPS covering fiscal year July 1, 2020 through June 30, 2021 (“**ROPS 20-21**”), approved by the Successor Agency and Alameda County Oversight Board (“**Oversight Board**”) in January 2020, and thereafter by the State of California, Department of Finance (“**DOF**”). However, the Order is not included as an obligation of the Successor Agency on ROPS 20-21 because the Order was issued after the approval of ROPS 20-21. Further, while the Dissolution Act does include a process for amending an approved ROPS, that procedure only pertains to

¹ The Site is the location of the Corporation Yard, which has been vacated since 2012, and is often referred to as the Former Marchant Whitney (FMW) Site, in reference to the prior owners and operators at the Site who are believed to be the main contributors to the contamination at the Corporation Yard (Marchant Calculating Machine Company and Whitney Tool).

amendment of an obligation that is included on an approved ROPS. Therefore, the Successor Agency cannot avail itself of that procedure to amend ROPS 20-21 to add the Order, and a contract for professional services (“**PSA**”) with EKI Environment & Water, Inc. (“**EKI**”) for environmental engineering services needed to implement the Order.

The earliest the Successor Agency can include the Order and a PSA with EKI for remediation of the Site on a ROPS is in connection with the next cycle encompassing fiscal year July 1, 2021 through June 30, 2022 (“**ROPS 21-22**”). Note that ROPS 21-22, which must be submitted to DOF no later than February 1, 2021, will be presented to the Successor Agency and Oversight Board approximately 3 months from now in January 2021. As a result, the earliest the Successor Agency can secure funding via an approved ROPS to commence activities in response to the Order is July 1, 2021.

There is, however, an alternative approach to consider that would allow the Successor Agency to commence remedial activities earlier than July 1, 2021. The purpose of this item is to discuss and consider whether the Successor Agency desires to approach the City of Emeryville (“**City**”) for a loan, the proceeds of which would be used to fund Site remediation activities in response to the Order, and if so, the amount and terms of such a loan.

DISCUSSION

City-Agency Loan – Repayment With RPTTF

An alternative approach involves the extension of a loan to the Successor Agency by the City in which the loan proceeds would be extended by the City to the Successor Agency and expended by the Successor Agency only after the loan agreement and ROPS 21-22, which includes a line item for repayment of the loan with RPTTF, are both approved by the Oversight Board and DOF. Under this scenario, the Successor Agency could commence remedial activities in response to the Order in approximately mid-April 2021.

Loan Approval Process

If direction was provided by the Successor Agency to seek a loan from the City, and a loan was agreed to by the City and Successor Agency, staff would present the loan agreement documents to the City and Successor Agency for consideration and action at the regular meeting of either November 17 or December 1, 2020. Staff would also present to the Successor Agency, for its consideration, a PSA with EKI for environmental engineering services needed to implement the Order. Thereafter, because the loan agreement involves the creation of an enforceable obligation between the City and Successor Agency, in order to utilize RPTTF to repay the loan, the Dissolution Act requires the loan agreement to be separately approved by resolution of the Oversight Board, in addition to being included as a line item on a ROPS that is also approved by resolution of the Oversight Board. Further, per H&S 34180 (h), the loan agreement is not valid unless and until it is included on an approved ROPS.

Accordingly, the loan agreement between the City and Successor Agency would be presented to the Oversight Board for its approval in January 2021, at the same meeting of its consideration of ROPS 21-22. Thereafter, assuming the loan agreement is approved by resolution of the Oversight Board and included in ROPS 21-22 approved by the Oversight Board, both the loan agreement and ROPS 21-22 are then submitted to DOF for their review and approval.

The DOF review and approval process in relation to the Oversight Board actions approving the loan agreement and ROPS 21-22 are different. However, in terms of timing, because of the requirements of H&S 34180 (h), the approval process related to the ROPS controls.

Timing – Loan Agreement

Within five (5) days of receipt of the Oversight Board resolution approving the loan agreement, DOF must decide whether it wishes to undertake a review of the item; if they do, they then have 40 days to make a decision. That places their decision timeline for the loan to mid-March 2021. If DOF does not approve the loan, there is no opportunity for the Successor Agency to request an opportunity to meet and confer with DOF, and their decision is final. If however, DOF approves the loan by mid-March 2021, recall that per H&S 34180 (h), the loan agreement is invalid until and unless included on an approved ROPS. So if DOF approves the loan agreement, the loan agreement still must be included on an approved ROPS before it is valid.

Timing – ROPS 21-22

Regarding ROPS 21-22, DOF has until April 15, 2021 to make its determination related to the enforceable obligations listed thereon and the RPTTF requested. If DOF approves the loan agreement as discussed above, and approves ROPS 21-22 inclusive of the loan agreement as a line item, then as of approximately April 15, 2021, the City and Successor Agency could then go forward with the loan knowing that the funds loaned by the City to the Successor Agency and expended to compensate EKI for services provided in response to the Order, will be repaid by the Successor Agency with RPTTF. However, if DOF's determination related to ROPS 21-22 denies the loan agreement, even if they had previously approved the loan agreement, then the Successor Agency could request to meet and confer with DOF regarding their denial. Thereafter, DOF will provide its final decision on ROPS 21-22 in approximately mid-May, 2021. Again, the loan agreement is only valid until and unless it is included on an approved ROPS.

Thus, under this process outlined above, ROPS 21-22 would include, among other items, line items to include:

- (i) the Order and RPTTF funding to reimburse DTSC for its cost of oversight for July 1, 2021 through June 30, 2022;

- (ii) the PSA with EKI² and RPTTF funding to compensate EKI for services rendered from July 1, 2021 through June 30, 2022, and
- (iii) the loan agreement between the Successor Agency and City and RPTTF funding to repay the City for the amount borrowed by the Successor Agency to compensate EKI for services rendered from the date DOF approves ROPS 21-22 (i.e. approximately April 15, 2021) through June 30, 2021. In this scenario, remediation on the Site could begin in mid-April or mid-May 2021.

If the Successor Agency did not undertake the step of trying to secure the loan discussed above, ROPS 21-22 would include, among other items, line items to include:

- (i) the Order and RPTTF funding to reimburse DTSC for its cost of oversight for July 1, 2021 through June 30, 2022;
- (ii) the PSA with EKI authorizing services to commence as of July 1, 2021, and RPTTF funding to compensate EKI for services rendered from July 1, 2021 through June 30, 2022. In this scenario, remediation on the Site could begin in early July 2021.

Consideration of Loan Request

Staff recommends the Successor Agency consider and discuss whether the time gained to commence work in response to the Order is worth the staff time and transactional costs to develop and process the loan agreement. Please keep in mind that either the Oversight Board or DOF could deny the loan agreement. Nevertheless, staff believes the loan agreement qualifies as an enforceable obligation, since the funding would be used to compensate EKI for services provided in response to the Order, which itself is an enforceable obligation.

Loan Terms

Loan Amount

If the Successor Agency does wish to move forward with requesting a loan from the City so that it can commence activities in response to the Order before July 1, 2021, then it is recommended that a loan amount of approximately \$250,000 should be requested to fund the remedial work from mid-April through June 30, 2021. It is anticipated that as of July 1, 2021, EKI's services will be funded directly from RPTTF authorized on ROPS 21-22.

Interest and Term

² In the event the City and Successor Agency agreed to a loan as discussed, the PSA with EKI would authorize services to commence as of the earlier of: (a) the date DOF approves ROPS 21-22 that includes a line item and funding for the loan agreement (i.e. approximately April 15, 2021; or (b) July 1, 2021.

It is anticipated that the loan from the City would be approved and authorized on ROPS 21-22, and thus RPTTF would be available as of July 1, 2021 to repay the loan. Accordingly, any funds advanced by the City and expended by the Successor Agency after April 15, 2021 (i.e. the anticipated date DOF approves ROPS 21-22 that includes a line item and RPTTF funding for the loan agreement), should be due and payable no later than July 31, 2021. Given the short term length, it is suggested that no interest be charged. However, any funds advanced by the City and expended by the Successor Agency and not repaid by July 31, 2021, interest would accrue from the actual date of the advance at the rate of 10%/year, which is the legal rate of interest set forth in Code of Civil Procedure §685.010, until paid in full.

FISCAL CONSIDERATIONS

Currently, the City has \$11 million in Capital Improvement Fund allocated to CIP Project Number CF-05, Project Number 15475010, the Corporation Yard Project Improvements. These funds may be available for purposes of a loan as discussed herein.

CONCLUSION

Staff recommends the Successor Agency consider the information contained in this report and all public testimony, and thereafter provide direction to staff whether the Successor Agency wishes to request a loan from the City to be used to fund environmental engineering services necessary to implement the Order.

PREPARED BY: Michael A. Guina, City Attorney

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



Christine Daniel, City Manager