WENDEL ROSEN
1111 Broadway, 24th Floor
Oakland, CA 94607-4036
T: 510.834.6600
F: 510.834.1928
www.wendel.com
cnoma@wendel.com

January 19, 2021

VIA E-MAIL
shartz@emeryville.org
city_council@emeryville.org

Sheri Hartz, City Clerk
City of Emeryville City Council for the
Successor Agency to The Former Emeryville
Redevelopment Agency
1333 Park Ave.
Emeryville, CA 94608

Re: January 19, 2021 Agenda Items ID-2021-045 and ID-2021-046: Objections to The Successor Agency to The Former Emeryville Redevelopment Agency and The City of Emeryville Resolutions

Dear Ms. Hartz and City Councilmembers:

On behalf of Mrs. Catherine Lennon Lozick, Swagelok Company and Whitney Research Tool Co. (collectively the "WRT Parties"), I am writing regarding the resolutions on the agenda for the regular meeting on Tuesday, January 19, 2021. As set forth in more detail below, we believe these resolutions are improper and based on an incorrect premise as to the migration of groundwater contamination from the Corporation Yard to Site B and the liability of the WRT Parties. Specifically, The City Of Emeryville and The Successor Agency To The Former Emeryville Redevelopment Agency (collectively "Successor Agency") has scheduled the following resolutions to be considered:

Agenda Item No. ID-2021-045

Resolution No. SA__-21. Resolution Of The City Council Of The City Of Emeryville As Successor Agency To The Emeryville Redevelopment Agency Authorizing The Executive Director To Enter Into A Professional Services Agreement With EKI Environment & Water, Inc., In An Amount Of $2,710,000 For Environmental Engineering Services During The ROPS 21-22 Cycle For Soil And Groundwater Remediation At The Corporation Yard Site, 5679 Horton Street, Emeryville, CA, Pursuant To That Certain Imminent And Substantial Endangerment Order Issued To The Successor Agency By The California Department Of Toxic Substances Control.

Agenda Item No. ID-2021-046

Resolution No. SA__-21. 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, 2021 Through June 30, 2022 (ROPS 21-22) Pursuant To Section 34177 Of The California Health And Safety Code.

These resolutions seek to declare improperly and conclusively that the DTSC's August 13, 2020 Imminent and Substantial Endangerment Order and Remedial Action Order ("2020 Order") as to the Corporation Yard, also known as the Former Marchant/Whitney Site, 5679 Horton Street, Emeryville, California is a new enforceable obligation based in full or in part upon the argument that (1) the 2020 Order relates to the July 20, 1998 (amended March 13, 2007) Enforceable Obligation as to the South Bayfront Site B ("EO Site B"), and (2) that the settlement agreement between the Successor Agency and Chevron and Union Oil in the *Emeryville Redevelopment Agency v. Howard F. Robinson, et al*, Alameda County Superior Court, Consolidated Cases Nos. RG-06-267600, RG-06-267594 and RG-06-332012 created an enforceable obligation as to the Corporation Yard which dates back to 2010 because the Site B cleanup purportedly includes cleanup of groundwater contamination from the Corporation Yard.

The Enforceable Obligation As To Site B Does Not Apply to the Corporation Yard. Contrary to the Successor Agency's position, the remediation order as to Site B does not extend to remediation of the Corporation Yard because, among other reasons, the groundwater from the Corporation Yard flows downgradient to the Southwest/West towards the Bay and does not have an upgradient northwesterly component that would transport dissolved COCs (chemicals of concern), and specifically TCE, from the Corporation Yard to Site B. Furthermore, even if the such contamination has migrated upgradient northwesterly against the groundwater flow to Site B, which the WRT Parties dispute, the Successor Agency's own consultant EKI is likely responsible for causing the contamination as a result of its negligence in installing groundwater wells across course grained units which acted as a conduit for the downward migration of TCE. Furthermore, available information points to the operations of the previous owner/operator Marchant, not the WRT Parties as the source of the TCE based upon the areas of the highest TCE concentrations which are located where Marchant conducted hardening and plating operations and the fact that the WRT Parties cannot be responsible for the contamination below the buried slab at the Corporation Yard. To support the WRT Parties objections based upon scientific and technical grounds, I refer you to the Comments on the 2016 Final Remedial Investigation Report for the Former Marchant Whitney (FMW) Site, 5679 Horton Street, Emeryville, California prepared by AMEC Foster Wheeler, environmental consultants, dated February 17, 2017 ("AMEC Report"), a copy of which is attached.

Polanco Act Does Not Apply Against the WRT Parties. The WRT Parties also have several legal arguments as to why the 2020 Order does not support the Successor Agency's Polanco Act claim against them, and therefore why no enforceable obligation exists as to the Corporation Yard.

The Polanco Act was enacted in 1990 as a way for community redevelopment agencies to address contaminated properties and offer protection to the agencies in the form of immunity for their cleanup activities. However, with the abolition of community redevelopment agencies in 2012, the Polanco Act was replaced by the Gatto Act in 2014. The Gatto Act offered similar remedies and protections to cities for Brownfield cleanup but with some important differences.

Because the Corporation Yard is owned by The Successor Agency, we understand that the Successor Agency has elected to proceed under the Polanco Act. But, the Polanco Act has no application, because it applies only if a redevelopment agency had an "enforceable obligation" as of June 28, 2011 requiring cleanup of a specific property. That is not the case here. Successor agencies are charged *solely* with winding down the affairs of redevelopment agencies pursuant to Health and Safety Code Section 34177(h). The Polanco Act further provides under Section 34177.3 that successor agencies:

(a) lack the authority to, and shall not create new enforceable obligations ... or begin new redevelopment work, except in compliance with an enforceable obligation and enforceable obligation that existed prior to June 28, 2011.

(b) successor agencies may create enforceable obligations to conduct the work of winding down the redevelopment agency ... except as required by an enforceable obligation, the work of winding down the redevelopment agency does not include ... site remediation, site development or improvement, land clearance, seismic retrofits, and other similar work ...

(c) successor agencies lack the authority to, and shall not, transfer any powers or revenues of the successor agency to any other party, public or private except pursuant to an enforceable obligation on a Recognized Obligation Payment Schedule ("ROPS") approved by the Department. Any such transfers of authority or revenues that are not made pursuant to an enforceable obligation on a (ROPS) approved by the Department are hereby declared to be void, and the successor agency shall take action to reverse any of those transfers ...

(d) any actions taken by redevelopment agencies to create obligations after June 27, 2011, are ultra vires and do not create enforceable obligations.

(e) the provisions of this Section shall apply retroactively to any successor agency or redevelopment agency actions occurring on or after June 27, 2012.

Therefore, the WRT Parties disagree with the Successor Agency argument that an enforceable obligation existed prior to the dissolution of the Redevelopment Agency. That argument is flawed for several reasons.

Based upon the Staff Report supporting the resolutions, it appears that the Successor Agency is taking the position that the August 13, 2020 ISO is in furtherance of the earlier 2010 Chevron USA/Union Oil Settlement Agreement ("Chevron Settlement"). But, the Chevron Settlement is an enforceable obligation which exists on a different property (South Bayfront Site B). As stated above, the Successor Agency's assertion that the groundwater contamination at

Site B is in part caused by offsite migration from the Corporation Yard is not supported by technical or scientific evidence. Furthermore the groundwater contamination referenced in the Site B settlement was for contamination from the Chevron site, not contamination from the Corporation Yard. While there may be an enforceable obligation for the South Bayfront Site B groundwater remediation, that enforceable obligation is limited to cleanup of the contamination on Site B and the migration of contaminants from the Chevron site to Site B, and does not apply the Corporation Yard. Moreover, testimony provided by Earl James, EKI in the settled litigation indicated that the Corporation Yard was not considered a possible source of contamination for Site B.

Conclusion.

For the foregoing reasons, the WRT Parties object to resolutions to the extent that they seek to conclusively link the contamination at Site B to the contamination at the Corporation Yard, and to the extent the Successor Agency seeks to hold WRT liable under the Polanco Act for the remediation of the groundwater at Site B.

Please do not hesitate to contact me at cnoma@wendel.com or by phone at 510-622-7634 if you have any questions regarding these comments.

Sincerely,

WENDEL ROSEN LLP

Christine K. Noma

Attachment: AMEC Report

cc: Robert Doty
Michael Guina, City Attorney
Jeff Embleton
Sam Martillotta
John Parker
Joelle Berle