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OFFICE OF THE CITY CLERK
OAKLAND

2013 JUN 12 PM 4:00

AGENDA REPORT

TO: DEANNA J. SANTANA
CITY ADMINISTRATOR

FROM: Fred Blackwell

SUBJECT: Environmental Oversight Costs at
Former Oakland Army Base

DATE: June 5, 2013

City Administrator
Approval

Date

6/5/13

COUNCIL DISTRICT: 3

RECOMMENDATION

Staff recommends that the City Council adopt:

A Resolution Authorizing the City Administrator to Negotiate and Execute the Following Agreements in Order to Modify the Manner in which the California Department of Toxic Substances Control (DTSC) and the Regional Water Quality Control Board Are Paid for Environmental Oversight Costs at the Former Oakland Army Base (OARB):

- (1) An Amendment to the 2003 Consent Agreement with DTSC;**
- (2) An Amendment to the 2002 Environmental Services Cooperative Agreement With The United States Army (Army); and**
- (3) An Assumption Agreement with the Army Approving the Transfer of the OARB Property from the Oakland Redevelopment Agency to the City**

EXECUTIVE SUMMARY

The City's agreements with the United States Army (Army) and the California Department of Toxic Substances Control (DTSC) obligate the Army to pay costs incurred by DTSC and the Regional Water Quality Control Board (RWQCB) for their oversight of the environmental remediation work at the former Oakland Army Base. In July 2008, the Army stopped making payments to DTSC and RWQCB, claiming that the fund through which it was paying these costs was not a legal funding mechanism. The current unpaid costs total approximately \$880,000, and the agencies project that they will incur an additional \$520,000 in costs to conduct the oversight of the remedial work to be completed by August of this year. The Army also continues to owe

Item: _____
CED Committee
June 25, 2013

the City \$2.8 million in remediation grant funds, which it has affirmed it will pay once the agreements are executed.

- (1) Staff is requesting authorization to amend the 2002 Environmental Cooperative Services Agreement (ESCA) between the Army and the City (as successor to the Oakland Base Reuse Authority (OBRA) and the Oakland Redevelopment Agency (ORA)) to change the mechanism by which the Army will pay for the environmental oversight costs at the Army Base.
- (2) Additionally, staff is requesting authorization to amend the 2002 Consent Agreement between DTSC and the City (as successor to the Oakland Base Reuse Authority and the Oakland Redevelopment Agency) in order to: (1) acknowledge the change in method by which the Army will pay for the environmental oversight costs at the Army Base; and (2) add the Port as a party to the agreement, making it primarily responsible for the environmental remediation work on its portion of the Army Base.
- (3) Finally, staff is requesting authorization to enter into an Assumption Agreement with the Army acknowledging that the City has assumed all obligations and rights of OBRA and ORA under their agreements with the Army.

OUTCOME

Adoption of the resolution proposed with this staff report would result in the following outcomes:

- (1) The City and the Army would enter into Cooperative Agreement No. DASW 01-02-2-0004 Modification No. 2 to amend the ESCA to change the mechanism by which the Army will pay for the environmental oversight costs at the Army Base.
- (2) The City, the Port of Oakland (Port) and DTSC would enter into the Amendment to the Consent Agreement to acknowledge the change in method by which the Army will pay for the environmental oversight costs at the Army Base, and to add the Port as a party to the agreement.
- (3) The City and the Army would enter into the Assumption Agreement memorializing that the City has assumed all obligations and rights of OBRA and ORA under their agreements with the Army.

Upon execution of the above documents, the City would pay the outstanding invoices of DTSC and RWQCB for remediation oversight costs, and then invoice the Army for immediate reimbursement. The Army will also pay the outstanding \$2.8 million in remediation grant funds that it owes the City.

BACKGROUND/LEGISLATIVE HISTORY

In 2002-03, before the Army transferred the Army Base to OBRA, the Army, DTSC and the City (including the Port) negotiated and executed the following three documents regarding the Army Base remediation and DTSC's oversight of the remediation work:

- A. **Memorandum of Agreement (MOA) Between the Army and DTSC:** This agreement requires the Army to pay DTSC's oversight costs through its Defense State Memorandum of Agreement (DSMOA), or through some other appropriate funding mechanism as agreed to by the parties.
- B. **Consent Agreement between the City and DTSC:** This agreement provides that the City and the Army are jointly responsible for DTSC's oversight costs. The Consent Agreement also notes that the Army is obligated to pay for DTSC's costs through its DSMOA, or through some other appropriate funding mechanism.
- C. **Environmental Services Cooperative Agreement (ESCA) among the Army, OBRA, and ORA:** In the ESCA, the Army agreed to: (1) grant the OBRA/Agency \$13 million to cover the OARB remediation costs (the \$13M has been fully expended; the City and Port also established and funded \$11.5 million in a Joint Environmental Remediation Fund for further cleanup); and (2) in addition to the grant funds, pay DTSC for regulatory oversight costs by way of the DSMOA.

For five years, pursuant to these agreements, the Army reimbursed DTSC's and RWQCB's oversight fees by way of the DSMOA. In early 2008, however, the Army notified the City, DTSC and RWQCB that it would no longer be able to pay for these costs directly because it had discovered that DSMOA was not an appropriate funding mechanism. As of July 1, 2008, the Army stopped paying DTSC and RWQCB. The total owed from July 2008 through today is approximately \$880,000, and the agencies project that they will incur an additional \$520,000 in costs to conduct the oversight of the remedial work to be completed at the Army Base by August 2013.

Staff and attorneys for the City, DTSC, and the Port have negotiated with the Army over payment of oversight fees since July 2008. Despite the Army's non-payment of its fees, DTSC has continued its oversight activities at the Army Base. However, in 2009, RWQCB suspended its oversight activities until its outstanding invoices are paid.

ANALYSIS

The Army's agreements with the City and DTSC clearly obligate the Army to pay the environmental oversight costs directly to the oversight agencies, and the City is secondarily responsible for these costs under the Consent Agreement with DTSC.

The ESCA term ends on August 7, 2013, which is also when the City is required to complete its Army Base remedial work. It is essential that this long-standing dispute with the Army be resolved before that date, in order to ensure that the oversight agencies are paid for their work, and that the agencies will award regulatory closure to the City and the Port so that development may commence.

In the last year, the City's attorneys have been able to negotiate a tentative resolution with the Army, resulting in the agreements before you for consideration. Together, they provide that:

- (1) The City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly;
- (2) The original \$13 million grant award from the Army to the City for environmental remediation will be increased by an appropriate amount to cover the regulatory oversight fees from July 2008 through January 2014;
- (3) The term of the ESCA will be extended from August 2013 to January 2014 for the sole purpose of ensuring that the oversight fees will be paid;
- (4) The Port will be added as a party to the Consent Agreement between the City and DTSC, formalizing the Port's responsibility for the remedial work on its portion of the Army Base; and
- (5) The Army acknowledges that the City has assumed all obligations and rights of OBRA and ORA under their agreements with the Army.

Even though the City's remediation program will be completed by the August 2013 deadline, the oversight work of DTSC and RWQCB attributable to that remediation work will likely extend beyond the end of the ESCA term in August 2013. Because of this, the City's attorneys have negotiated for an extension of the ESCA term by six months, for the sole purpose of covering DTSC's and RWQCB's oversight fees through January 2014. That way, the City will be certain that the Army will pay for all of the oversight by DTSC and RWQCB of the pre-development remediation activities.

It is in the City's interest to resolve its disputes with the Army and DTSC quickly for several reasons. Any delay in amending the ESCA will postpone the City's receipt of payment for the

approximately \$880,000 in oversight fees already incurred as well as the remaining \$2.8 million in remediation reimbursement owed to the City. In addition, the Army's inability or unwillingness to pay the regulatory oversight costs since 2008 threatens the City's ability to obtain regulatory closure of the Army Base remediation sites, thereby jeopardizing the City's ability to commence development. In 2009, RWQCB suspended its oversight activities for non-payment of its invoices, and both DTSC and RWQCB have indicated that they will not grant regulatory closure until the agencies' fees are paid.

If the parties fail to resolve this matter before August 2013, it could lead to litigation, which would postpone development for several years, and would be very expensive for the City in legal costs. Significant delay of the development timeline could also jeopardize the City's receipt of the federal and state grant monies.

Staff recommends that the City Council approve the attached resolution approving the two amendments and the Assumption Agreement.

PUBLIC OUTREACH/INTEREST

This item did not require any additional public outreach other than the required posting on the City's website.

COORDINATION

This action has been coordinated with the City Attorney's Office, the Port of Oakland, the United States Army, the California Department of Toxic Substances Control, the Regional Water Quality Control Board. This staff report has also been reviewed by the Budget Office.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION:

The ESCA Amendment will change the method by which DTSC and RWQCB will be paid for their oversight activities, in that (1) the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly; and (2) the original \$13 million grant award from the Army to the City for environmental remediation will be increased by an appropriate amount to cover the regulatory oversight fees from July 2008 through January 2014. There will likely be delay of at least several weeks between the City's payment to the oversight agencies and the Army's reimbursement of those payments. The City will also incur administrative costs due to the staff time it will take to process these

Item: _____
CED Committee
June 25, 2013

payments; however, staff does not anticipate any direct costs to the City attributable to this change.

2. COST ELEMENTS OF AGREEMENT/CONTRACT:

The City is entering into these agreements as a pass through entity to facilitate the payment of environmental oversight costs. The ESCA Amendment will provide that (1) the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly; and (2) the original \$13 million grant award from the Army to the City for environmental remediation will be increased by an appropriate amount to cover the regulatory oversight fees from July 2008 through January 2014. The City will incur administrative costs due to the staff time it will take to process these payments; however, staff does not anticipate any direct costs to the City attributable to this change.

3. SOURCE OF FUNDING:

The funding will come from additional ESCA funds that will be transferred to the City from the Army. The funding will be on a reimbursement basis as invoices are received for new oversight activities by the regulatory agencies. The initial reimbursement will be a lump sum of approximately \$880,000 for fees already owed to the DTSC and RWQCB. The cost for the ongoing oversight activities projected by the DTSC and RWQCB is approximately \$520,000. In addition, we anticipate adding a 20% contingency to the not-to-exceed amount, in case the actual costs exceed the agencies' projections.

The regulatory agencies would be paid by the City for their oversight activities from the Environmental Remediation Fund (5673), and establish a new project (TBD) to track the additional expenditures. The Army would then reimburse the City by wire-transferring the money to an existing City account for the OARB remediation. Staff is requesting Council authority to appropriate an amount not to exceed \$1,680,000 and accept reimbursement from the Army into the Environmental Remediation Fund (5673), Project (TBD).

4. FISCAL IMPACT:

There should be no direct fiscal impact to the City or the General Purpose Fund. All related expenditures will be fully reimbursed by the Army. The City will incur indirect costs due to the staff time it will take to process the payments from the Army and to the oversight agencies, but these costs are already accounted for in the budget.

FISCAL/POLICY ALIGNMENT

The proposed action aligns with the City's Army Base development program.

SUSTAINABLE OPPORTUNITIES

Economic: This proposed action does not provide any additional economic benefits or opportunities.

Environmental: This proposed action will expedite payment of fees for DTSC's and RWQCB's oversight activities at the Army Base, and will therefore help ensure that the City will be able to obtain regulatory closure from these agencies in time for development to begin.

Social Equity: This proposed action does not provide any additional social benefits or social equity to Oakland citizens.

For questions regarding this report, please contact Al Auletta, Program Manager, at (510) 238-3752, or Alix Rosenthal, the City's outside counsel at (415) 956-8500.

Respectfully submitted,



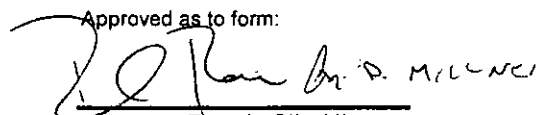
Fred Blackwell
Assistant City Administrator

Reviewed by:
Al Auletta, Program Manager
Office of Neighborhood Investment

Prepared by:
Alix Rosenthal
Law Office of Alix A. Rosenthal

Item: _____
CED Committee
June 25, 2013

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2013 JUN 12 PM 4:00

Approved as to form:

Deputy City Attorney

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

A RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO NEGOTIATE AND EXECUTE THE FOLLOWING AGREEMENTS IN ORDER TO MODIFY THE MANNER IN WHICH THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL (DTSC) AND THE REGIONAL WATER QUALITY CONTROL BOARD ARE PAID FOR ENVIRONMENTAL OVERSIGHT COSTS AT THE FORMER OAKLAND ARMY BASE (OARB): (1) AN AMENDMENT TO THE 2003 CONSENT AGREEMENT WITH DTSC; (2) AN AMENDMENT TO THE 2002 ENVIRONMENTAL SERVICES COOPERATIVE AGREEMENT WITH THE UNITED STATES ARMY (ARMY); AND (3) AN ASSUMPTION AGREEMENT WITH THE ARMY APPROVING THE TRANSFER OF THE OARB PROPERTY FROM THE OAKLAND REDEVELOPMENT AGENCY TO THE CITY

WHEREAS, the Department of Toxic Substances Control (DTSC) and the Regional Water Quality Control Board (RWQCB) are the public agencies responsible for overseeing the environmental remediation work at the former Oakland Army Base; and

WHEREAS, in 2002, before the Army transferred the former Oakland Army Base to the Oakland Base Reuse Authority (OBRA), DTSC and the City (including OBRA and the Port of Oakland) entered into a Consent Agreement providing that the City and the Army are jointly responsible for DTSC's and RWQCB's oversight costs; and

WHEREAS, the Consent Agreement covers the environmental remediation for the entire former Army Base, now owned by the City and the Port of Oakland, though the Port is not currently a party to the Consent Agreement; and

WHEREAS, in 2002, the Army, OBRA and the Oakland Redevelopment Agency (ORA) entered into the Environmental Services Cooperative Agreement (ESCA) in which the Army agreed to: (1) grant OBRA/ORA \$13 million to cover the Army Base remediation costs; and (2) in addition to the grant funds, pay DTSC and RWQCB for regulatory oversight costs; and

WHEREAS, from 2003-08, the Army reimbursed DTSC's and RWQCB's oversight fees, but in 2008, it notified the City, DTSC and RWQCB that it would no longer be able to pay for these costs directly; and

WHEREAS, from 2008 through today, the Army owes DTSC and RWQCB approximately \$880,000 for their oversight costs, and the agencies project that they will incur an additional \$520,000 in costs to conduct the oversight of the remedial work to be completed at the Army Base by August 2013; and

WHEREAS, in order to facilitate the payment of the environmental oversight costs at the Army Base, the ESCA and the Consent Agreement must be amended; and

WHEREAS, the Army has asked that the City execute an Assumption Agreement memorializing the transfer of the City's portions of the Army Base property to the City; and

WHEREAS, staff recommends that the City Administrator be authorized to negotiate and execute an amendment to the 2003 Consent Agreement with DTSC to provide that the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly, and adding the Port as a party, thus formalizing the Port's responsibility for the remedial work on its portion of the Army Base; and

WHEREAS, staff recommends that the City Administrator be authorized to negotiate and execute an amendment to the 2002 Environmental Services Cooperative Agreement with the Army to provide that (a) the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly; (b) the original \$13 million grant award from the Army to the City for environmental remediation will be increased by an appropriate amount to cover the regulatory oversight fees from July 2008 through January 2014; and (c) the term of the ESCA will be extended from August 2013 to January 2014 for the sole purpose of ensuring that the oversight fees will be paid; and

WHEREAS, staff recommends that the City Administrator be authorized to negotiate and execute an Assumption Agreement with the Army affirming the transfer of the Army Base property from ORA to the City; now, therefore be it

RESOLVED: The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this resolution; and be it

FURTHER RESOLVED: That the City Council hereby authorizes the City to negotiate and execute the following documents:

(1) An amendment to the 2003 Consent Agreement with DTSC to provide that the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly, and adding the Port as a party;

(2) An amendment to the 2002 Environmental Services Cooperative Agreement with the Army to provide that (a) the City, and not the Army, will pay for DTSC and RWQCB's oversight costs directly; (b) the original \$13 million grant award from the Army to the City for environmental remediation will be increased by an appropriate amount to cover the regulatory oversight fees from July 2008 through January 2014; and (c) the term of the ESCA will be extended from August 2013 to January 2014 for the sole purpose of ensuring that the oversight fees will be paid; and

(3) An Assumption Agreement with the Army affirming the transfer of the Army Base property from the Oakland Redevelopment Agency to the City; and be it

FURTHER RESOLVED: That the City Council hereby authorizes the City Administrator to appropriate an amount not to exceed \$1,680,000 from the Environmental Remediation Fund (5673), and accept reimbursement from the Army into the Environmental Remediation Fund (5673), and to establish a new project (TBD) to track the additional expenditures; and be it

FURTHER RESOLVED: That the City Administrator or her designee is hereby authorized to negotiate and execute all agreements and to take whatever other action is necessary with respect to the transaction(s), consistent with this Ordinance and its basic purposes; and be it

FURTHER RESOLVED: That the City Attorney shall review and approve all documents and agreements related to the approvals above as to form and legality, and a copy shall be placed on file with the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, GIBSON-MCELHANEY, KALB, KAPLAN, REID, SCHAAF AND PRESIDENT KERNIGHAN

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California