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**REDEVELOPMENT AGENCY  
AND THE CITY OF OAKLAND**

**AGENDA REPORT**

2010 MAR 18 PM 6:11

TO: Office of the City/Agency Administrator  
ATTN: Dan Lindheim  
FROM: Community Economic Development Agency  
DATE: March 23, 2010

RE: **Supplemental Staff Report Regarding the Army Base Environmental Remediation Program and:**

**An Agency Resolution Requesting Authorization for the Agency Administrator to: 1) Execute Amendment 1 to the 2008 Amended and Restated Memorandum of Agreement between City of Oakland, Oakland Redevelopment Agency and Port of Oakland for Oakland Army Base Which Primarily Modifies the Manner in Which Reimbursements for Remediation Costs are Submitted to and Paid from Remediation Accounts, 2) Create a New Fund for the Army Base Joint Environmental Remediation Account, 3) Appropriate Five Million Seven Hundred Forty-One Thousand Four Hundred Seventy-Seven Dollars (\$5,741,477) from OBRA Leasing & Utility Fund (9575) Into the Army Base Joint Environmental Remediation Account Fund, 4) Accept Five Million Seven Hundred Forty-One Thousand Four Hundred Seventy-Seven Dollars (\$5,741,477) from the Port of Oakland for Deposit Into the Army Base Joint Environmental Remediation Account Fund; and 5) Appropriate and Expend up to Eleven Million Four Hundred Eighty-Two Thousand Nine Hundred Fifty-Four Dollars (\$11,482,954) of the Army Base Joint Environmental Remediation Account Fund for Army Base Environmental Remediation Program Activities; and**

**A City Resolution Requesting Authorization for the City Administrator to Execute Amendment 1 to the 2008 Amended and Restated Memorandum of Agreement between City of Oakland, Oakland Redevelopment Agency and Port of Oakland for Oakland Army Base Which Primarily Modifies the Manner in Which Reimbursements for Remediation Costs are Submitted to and Paid from Remediation Accounts**

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**SUMMARY**

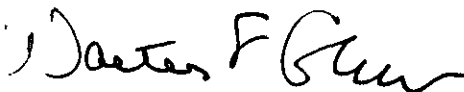
At the February 11, 2010 Rules Committee, staff was requested to provide a redlined document showing the changes Amendment #1 proposes to the 2008 Amended and Restated Memorandum of Agreement for Oakland Army Base ("ARMOA"). *Attachment A* shows the proposed Amendment #1 changes to the ARMOA in redline.

Item: \_\_\_\_\_  
CED Committee  
March 23, 2010


**ACTION REQUESTED OF THE CITY COUNCIL**

Staff is requesting that the City Council and Agency Board approve the attached resolutions.

Respectfully submitted,

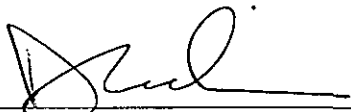


Walter S. Cohen, Director  
Community and Economic Development Agency

Reviewed by:   
Gregory D. Hunter, Deputy Director  
Economic Development and Redevelopment

Prepared by:  
John Monetta, Program Analyst  
CEDA Real Estate

FORWARDED TO THE  
COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE:



Office of the City/Agency Administrator

**ATTACHMENTS:**

Attachment A – Redlined Proposed Amendment #1 to the ARMOA

Item: \_\_\_\_\_  
CED Committee  
March 23, 2010

### 5.3 Unfunded Remediation Costs.

(a) Generally. The Parties acknowledge and agree that the following costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements shall be considered "Unfunded Remediation Costs": (1) any such costs incurred after the ESCA Funds are expended and before the Insurance Attachment Point is reached; (2) any such costs that exceed the total of the ESCA Funds and the limits of the Insurance Policy even after the Insurance Attachment Point is reached; and (3) such costs, if any, which are ultimately determined, whether before or after reimbursement from the ESCA Funds or the Insurance Policy, not to be covered by the ESCA Funds or the Insurance Policy. ~~there likely will be a shortfall between the ESCA Funds available to cover the costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements and the Insurance Attachment Point. It is also possible that the costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements may exceed the ESCA Funds and proceeds from the Insurance Policy even after the Insurance Attachment Point is reached, or may not be covered by the ESCA Funds or the Insurance Policy.~~

(b) Allocation. ~~All~~ The Unfunded Remediation Costs; as described in Section 5.3(a)(1) and (2) of the Restated MOA, ~~necessary to fulfill the Regulatory Requirements~~ shall be allocated to the City and the Port in accordance with the Allocation Proportion, ~~;~~ provided that:

(1) Unfunded Remediation Costs for abatement of asbestos or lead based paint in connection with building demolition shall not be subject to the Allocation Proportion, but instead (as between the Parties) will be the entire responsibility of the Party undertaking the demolition, ~~except as provided, however below, and provided further, that remediation costs associated with Marine Sediments shall be the responsibility of the Port in accordance with Section 5.5.~~ If there are Unfunded Remediation Costs for abatement of asbestos or lead based paint in connection with building demolition associated with a building that straddles the boundary of properties owned by both the Port and the City, then such Unfunded Remediation Costs will be shared by the Parties owning the contiguous properties proportionately, based on the amount of square footage of the building being demolished that is located on the property owned by the Port and on the property owned by the City.

(2) Unfunded Remediation Costs associated with Marine Sediments shall be the responsibility of the Port in accordance with Section 5.5 of the Restated MOA;

(3) All future costs for applications of covers after the Amendment 1 Effective Date for which either Party seeks reimbursement from the Remediation Account shall be limited to a total of Five Million Dollars (\$5,000,000.00) for each of the City and the Port, so that the aggregate amount for application of covers after the Amendment 1 Effective Date for which reimbursement is sought from the Remediation Account by the City and the Port will not exceed Ten Million Dollars (\$10,000,000.00); provided, however, that the limitation described above shall not prohibit each Party from seeking credit toward the Insurance Attachment Point or

coverage under the Insurance Policy for future costs for applications of covers after the Amendment 1 Effective Date;

(4) In addition, except as required by DTSC or another Governmental Authority, or as necessary to achieve the stated remedial objectives of the RAP and/or RMP, the costs associated with a Party's decision to excavate and transport off of the EDC Property site soil with concentrations of chemicals of concern below remedial goals described in the RAP and/or RMP, which Regulatory Requirements would permit to re-use of the soil on the EDC Property on-site, shall be deemed Unfunded Remediation Costs and shall not be subject to the Allocation Proportion, but instead (as between the Parties) will be the entire responsibility of the Party electing to excavate and dispose of the soil off-site of the EDC Property; and

(5) in the event that Chubb finally disallows a Section F Remediation Cost application toward the Insurance Attachment Point or coverage under the Insurance Policy, or the Army finally denies reimbursement of a Section F Remediation Cost reimbursement from the ESCA Funds solely because of a delay in submitting the cost information to the Army, or Chubb, then the Party incurring such cost shall be entitled to payment for such cost from the Remediation Account, but the Parties first shall be obliged to diligently pursue all appropriate remedies and efforts to dispute the disallowance of the cost based on the alleged delay.

Except as provided in Section 5.3(b)(5), the Unfunded Remediation Costs described in Section 5.3(a)(3) shall be the sole responsibility of the Party incurring them, and said Party shall not claim any reimbursement from the Remediation Account for said Unfunded Remediation Costs. If the Party has initially been reimbursed for such Unfunded Remediation Cost from the ESCA Funds or the Remediation Account, such Party shall reimburse the ESCA Funds or the Remediation Account in the amount it received for the unsuccessfully disputed Unfunded Remediation Cost plus, in the case of reimbursement to the Remediation Account, interest thereon at the annual rate of six percent (6%). Moreover, in the event that the Remediation Account has been closed, any Party who later becomes obliged to reimburse the Remediation Account shall instead pay to the other Party directly the Allocation Proportion (i.e., 50%) of the amount that it is obliged to reimburse the Remediation Account.

(c) Allocation Procedure. Pursuant to Section 2 of Amendment 1, the Parties agree that at least Twelve Million Two Hundred Fifty Thousand Dollars (\$12,250,000) ~~The Remediation Account Manager shall notify the Parties in writing when Twelve Million Five Hundred Thousand Dollars (\$12,500,000) of the ESCA Funds have been "expended" (including any amounts subject to outstanding funding requests under Army Grants Officer review). Accordingly, within thirty (30) days after the Amendment 1 Effective Date. Within thirty (30) days after receipt of such notice from the Remediation Account Manager,~~ the Parties shall deposit in the aggregate One Million Dollars (\$1,000,000) in the Remediation Account in accordance with the Allocation Proportion (i.e., Five Hundred Thousand Dollars (\$500,000) from the Port and Five Hundred Thousand Dollars (\$500,000) from OBRA, ORA and the City Council collectively). -Each Party may draw from the Remediation Account to fulfill its remediation obligations as set forth in Section 5.1 of the Restated MOA, subject to, ~~(except that remediation costs associated with Marine Sediments shall be the responsibility of the Port in~~

~~accordance with Section 5.5), and consistent with, the draw procedures set forth in Section 5.3(d) of the Restated MOA. The Remediation Account Manager shall notify the Parties in writing each time the Remediation Account balance falls below Two Hundred Fifty Thousand Dollars (\$250,000). Within thirty (30) days after receipt of such notice from the Remediation Account Manager, the Remediation Account shall be funded by the Parties in aggregate One Million Dollar (\$1,000,000) increments in accordance with the Allocation Proportion. Such incremental payments shall continue until the aggregate amount paid for environmental remediation from ESCA Funds and from Remediation Account funds equals the Insurance Attachment Point, and thereafter if required under Section 5.3(a).~~

(d) Remediation Account Draws. Once any Unfunded Remediation Costs have been "deemed reasonable" under Paragraph 33 of the Insurance Policy because sixty (60) days have elapsed after Chubb's receipt of the City's and/or the Port's submissions of costs and/or any "additional information or back up documentation" requested by Chubb and Chubb has not rejected or denied the costs, Any Party seeking to withdraw funds from the Remediation Account shall make a request to the Remediation Account Manager specifying in sufficient detail the amount of funds requested, including a reasonable itemization of costs, and a description of how the funds will be used to comply with the obligations set forth in Section 5.1 of the Restated MOA, and the Remediation Account Manager shall pay the funds requested to the Party requesting them. The Parties may, if they mutually agree, arrange for claimed Unfunded Remediation Costs (including all or any portion of the Section F Remediation Costs) deemed to merit or require faster payment from the Remediation Account to be paid from the Remediation Account before they have been "deemed reasonable" under the Insurance Policy, subject to the reimbursement provisions herein. The Parties anticipate that draws generally will be based on invoices from third party service providers payable on a thirty (30) day cycle, and will comprise only costs that are Unfunded Remediation Costs as described in Section 5.3(a) in the Restated MOA, subject to the exceptions provided in Section 5.3(b) of the Restated MOA. Draws will not be made on the basis of estimates of future costs to be incurred. Therefore, the draw request will include an invoice in sufficient detail to determine the service provider and the services performed. A copy of the draw request shall be sent at the same time to each Party not seeking the funds. The Parties not seeking the funds shall have fifteen (15) days after receiving the request to notify the Party seeking the funds and the Remediation Account Manager that the information provided in the request is insufficient or the requested funds are otherwise not necessary to fulfill the obligations set forth in Section 5.1. The Party seeking the funds shall have ten (10) days after receiving such notification to confer with the other Parties and provide the necessary information to justify the requested use of the funds. If during or at the end of such ten (10) day period the Parties agree on the funds to be drawn from the Remediation Account, the Parties shall notify the Remediation Account Manager immediately after such agreement, and the Remediation Account Manager shall pay the disputed withdrawal request in accordance with the agreement reached by the Parties. If the Parties cannot agree, the dispute will be an MOA Dispute subject to Article 10. Notwithstanding such disagreement, the Party seeking the funds may request that the Remediation Account Manager disburse the funds requested. However, if after resolution of an MOA Dispute, it is determined that some or all of the funds requested are disallowed, then within fifteen (15) days after such determination, the

~~receiving Party shall reimburse the Remediation Account for such disallowed amounts plus interest thereon at an annual rate of six percent (6%).~~

(e) Allocation Accounting. The Port and ORA shall establish the Remediation Account and will require the Remediation Account Manager to provide a statement on a monthly basis that reflects the account balance, the cumulative contributions to the Remediation Account by each Party and specific draws on the Remediation Account. ~~At the time the Insurance Attachment Point is reached, and subsequently as of the date the Remediation Account terminates,~~ The Parties, with the assistance of the Remediation Account Manager, shall, on a monthly basis, reconcile the Remediation Account to ensure that each Party's contribution to the Remediation Account was consistent with the Allocation Proportion. If a Party underfunded its Allocation Proportion of the Remediation Account, it shall reimburse the Party that overfunded the Remediation Account in an amount that reconciles the cumulative Remediation Account contributions with the Allocation Proportion.

(f) Demonstration of Financial Assurance for Conveyance. The City and the Port cooperated in submitting to DTSC a financial assurance demonstration in accordance with the Allocation Proportion, under which the City demonstrated financial capabilities of funding fifty percent (50%) of the anticipated remediation funding gap, and the Port demonstrated financial capabilities of funding the remaining fifty percent (50%) of the remediation funding gap.

#### 5.4 Insurance Policy.

(a) Insurance Attachment Point. ~~Prior to the the Amendment 1 Effective Date, date and before the Insurance Attachment Point under the Insurance Policy is reached, the Parties were obligated by the by the Restated MOA to shall jointly submit the reports executed by the Port and by OBRA or ORA to the Insurance Policy provider, as required under by the Insurance Policy to Chubb, executed by the Port and by OBRA or ORA, and -specifying allowable costs incurred during the reporting period. In addition to the agreed separate submission of Section F Remediation Costs described in Section F above, on and after the Amendment 1 Effective Date, each Party shall separately transmit the submissions to Chubb required by the Insurance Policy, specifying allowable remediation costs incurred by that Party. Each Party promptly will notify each other Party in writing of any responses it receives from Chubb the Insurance Policy provider. -The notification will include a copy of any written responses from Chubb the Insurance Policy provider. -The Parties shall confer when any Party believes that eighty-five percent (85%) of the Insurance Attachment Point has been reached. The Parties shall reasonably cooperate and confer with Chubb the Insurance Policy provider to reconcile the status of the self-insured retention and allowable costs under the Insurance Policy.~~

(b) Cost Cap Insurance Policy Claims. After the date the Insurance Attachment Point is reached, each Party shall be entitled to make claims under the cost cap portion of the Insurance Policy to fulfill its obligations under Section 5.1 of the Restated MOA. The Party making a claim shall provide a copy of the claim notice to the other Parties at the same time it submits the claim to Chubb ~~is submitted to the Insurance Policy provider~~. The Parties shall

reasonably cooperate with respect to claims submitted to ~~Chubb~~the Insurance Policy provider. The Party making the claim shall be responsible for its costs, legal or otherwise, in pursuing any claim. After Chubb agrees that the Insurance Attachment Point has been reached, ~~e~~Each Party shall advance ~~its own~~the cost of remediation in accordance with its obligations under Section 5.1 of the Restated MOA, and be entitled to the sole benefit from any reimbursement from Chubb for that Party's claim~~claims~~ paid. Each Party will promptly notify each other Party in writing of the response received from ~~Chubb~~the Insurance Policy provider in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by ~~Chubb~~the Insurance Policy provider. In the event any remediation costs that are properly incurred and reported by a Party to fulfill its obligations under Section 5.1 are not reimbursed by the Insurance Policy provider, the Party making the claim may submit the claim to the other Parties and to the Remediation Account Manager and it shall be paid from the Remediation Account or, if the funds in the Remediation Account have been depleted, will be shared by the Parties in accordance with the Allocation Proportion using the procedures set forth in Section 5.3(e).

~~(e) Excess Remediation Costs.~~ If environmental remediation costs exceed the limit of the cost cap portion of the Insurance Policy, and/or if there are environmental remediation costs properly incurred and reported by any Party to fulfill its obligations under Section 5.1 that are not covered by the cost cap portion of the Insurance Policy, such excess environmental remediation costs shall be allocated and shared in accordance with the Allocation Proportion using the Remediation Account procedures set forth in Section 5.3(e).

~~(d)~~(c) Liability Claims Under Insurance Policy. Each Party shall be entitled to make claims under the liability portion of the Insurance Policy in the event such Party incurs a loss resulting from a pollution incident associated with the EDC Property. The Party making a claim shall provide a copy of the claim notice to the other Parties at the same time the claim is submitted to ~~the Insurance Policy provider~~Chubb. The Parties shall reasonably cooperate with respect to claims submitted to ~~the Insurance Policy provider~~Chubb. The Party making the claim shall (1) be responsible for payment of any deductible associated with the claim and its costs, legal or otherwise, in pursuing any claim, and (2) benefit from any reimbursement from claims paid, and bear the risk that ~~the Insurance Policy provider~~Chubb will not fully reimburse such Party for all or any portion of the claim. Each Party will promptly notify each other Party in writing of the response received from ~~the Insurance Policy provider~~Chubb in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by ~~the Insurance Policy provider~~Chubb.

~~(e) Disputes Regarding Insurance Claims.~~ In the event any Party disputes a claim under the Insurance Policy made by another Party, the disputing Party shall notify the other Parties in writing of the basis for the dispute. If the Parties cannot resolve the dispute within thirty (30) days of the notice (or such shorter period as is expressly provided in this Restated MOA), it shall be an MOA Dispute subject to Article 10.

~~(f)~~(d) Insurance Policy Term and Limits. The Parties shall meet and confer at the earlier of either the time when Twenty Million Dollars (\$20,000,000) of the cost cap limits

~~under the Insurance Policy have been paid by Chubb, or by August 7, 2012 which is one year before the expiration of the Insurance Policy term, to assess whether at such time there is have been paid by the Insurance Policy provider. If at such time there is a reasonable possibility that required activities necessary to comply with the Regulatory Requirements will, in the aggregate, exceed the cost cap limits, or extend beyond August 7, 2013, the expiration of the Insurance Policy term. If the Parties agree that the Parties shall determine in good faith whether an increase in cost cap limits and/or an extension or replacement of the Insurance Policy is appropriate or necessary, all costs of securing that increase or extension (excluding the Port's and City's in-house costs and outside legal costs), including, but not limited to, any insurance premium for any increase in limits or extension or replacement of the Insurance Policy, shall be allocated to the City and the Port in accordance with the Allocation Proportion. The Parties shall further confer one year before the end of the Insurance Policy term to determine in good faith whether an extension of the term is appropriate. If the Parties do not reach agreement with regard to securing an increase in the cost cap limits and/or an extension of the term of the Insurance Policy within a reasonable time before the cost cap limits or term of the Insurance Policy are likely to be exceeded, then the matter shall be resolved as an MOA Dispute subject to Article 10 of the Restated MOA, cannot agree on whether an increase in limits and/or extension of the term is appropriate, regardless of how much of the policy proceeds have been paid out by that date, the dispute will be an MOA Dispute subject to Article 10. Any costs (excluding the Port's and City's in-house costs and outside legal costs) incurred for securing increased limits under, or replacement insurance for, or an extended term of, the Insurance Policy as a result of, or pursuant to, the resolution of the MOA Dispute be allocated to the City and the Port. To the extent the Parties agree that an increase in limits and/or extension of the term is appropriate or it is otherwise so determined as a result of an MOA Dispute resolution, the cost of any increased premium shall be allocated in accordance with the Allocation Proportion.~~

### 5.5 Marine Sediments.

As among the Parties, the Port shall have full and complete responsibility for any and all remediation activities required to address the impacts to Marine Sediments to the extent the Marine Sediments are required to be addressed to achieve regulatory closure in accordance with the Regulatory Requirements. Notwithstanding anything in this Restated MOA to the contrary, the Allocation Proportion shall not apply to funding for activities associated with the Port Fill Project, including but not limited to remediation of the Marine Sediments, and all such funding shall be provided by the Port or third parties. The City shall not be required to provide any funding for the Port Fill Project or the remediation of the Marine Sediments, and no ESCA Funds, funds from the Remediation Account, or proceeds from claims under the Insurance Policy shall be used for the Port Fill Project or the remediation of the Marine Sediments. The Parties acknowledge and agree that it is anticipated completion of the Port Fill Project will satisfy the Regulatory Requirements applicable to the Marine Sediments, but the Port's obligations will not be satisfied by the Port Fill Project in the event the Port Fill Project does not fully achieve regulatory closure in accordance with the Regulatory Requirements. The City will reasonably cooperate at the expense of the Port with any efforts the Port undertakes to recover remediation costs relating to the Marine Sediments from third parties.