

**AGENDA ITEM
CITY COUNCIL MEETING: FEBRUARY 2, 2010
ACTION ITEMS**

DATE : January 25, 2010

TO : City Council

FROM : City Attorney

SUBJECT : **REQUEST TO LEGISLATORS FOR ARSENAL
HAZARDS ANALYSIS WITH PRIORITY GIVEN TO THE
LOWER ARSENAL AREA**

RECOMMENDATION:

Adopt the resolution requesting that Federal and State legislators engage the Cal-EPA Department of Toxic Substances Control (DTSC) to complete a hazards investigation and, if necessary, cleanup of the former Benicia Arsenal, with priority given to the Draft Lower Arsenal Mixed Use Specific Plan area.

EXECUTIVE SUMMARY:

Marilyn Bardet has requested that the Council seek assistance in enlisting DTSC to lead a comprehensive hazards characterization for the Arsenal. Such an effort might preclude the need for individual property owners to undertake and fund parcel-specific cleanup, which is called for in the Draft Environmental Impact Report (DEIR) for the Draft Lower Arsenal Mixed Use Specific Plan in the event that an areawide characterization cannot be accomplished. The City Council, at the November 17th meeting, directed staff to prepare the resolution requesting the assistance of State and Federal legislators with potential cleanup and funding so long as the effort does not impede the processing of the Lower Arsenal Mixed Use Specific Plan.

GENERAL PLAN:

Relevant General Plan Goals and Policies include:

- Goal 2.5: Facilitate and encourage new uses and development which provide substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life.
- Goal 4.7: Ensure that existing and future neighborhoods are safe from risks to public health that could result from exposure to hazardous materials.
 - Policy 4.7.3: Protect existing and future development from contaminated sites, hazardous landfill waste and debris, chemical spills, and other hazards including unexploded ordnance and explosive waste.

- Policy 4.7.5: Require that all sites known or suspected to have unexploded ordnance and/or a toxic history be tested and remediated before any development can occur.

STRATEGIC PLAN:

Relevant Strategic Plan Goal:

- Strategic Issue #1: Protecting Community Health and Safety

BUDGET INFORMATION:

No new budget impact is anticipated. Staff resources will be required to monitor and coordinate the proposed effort.

ENVIRONMENTAL ANALYSIS:

The DEIR for the Lower Arsenal Plan was released for public review in July 2007. In response to public comment, the Hazards and Hazardous Materials section was recirculated in April 2008. It contained “significant new information” per the California Environmental Quality Act Guidelines, including impacts not previously identified in the DEIR.

In addition to original EIR mitigation that dealt with what must occur when hazardous materials are uncovered, language was added that acknowledges the potential presence of hazardous materials throughout the Lower Arsenal area and directs property owners to investigate and remediate contaminated areas, if discovered, in conjunction with any potentially responsible parties, such as prior owners and regulatory agencies. (A comprehensive hazard mitigation strategy involving the DTSC and the Army Corps of Engineers would be preferable but has not been attainable through discussions with these parties to date.)

BACKGROUND:

The Benicia General Plan establishes a Lower Arsenal Mixed Use designation for approximately 50 acres generally bounded by I-780, the Port of Benicia, and residences east of East 7th Street. “This category includes residential, live/work, office, retail, public and quasi-public, and limited industrial uses” (General Plan page 28). At the City Council’s direction, the draft Lower Arsenal Mixed Use Specific Plan was created. Work/live use, which was not contemplated at the time of the 1999 General Plan update, was included in the draft Lower Arsenal Mixed Use Specific Plan.

In the course of reviewing the proposed Environmental Impact Report (“EIR”) for the draft Specific Plan, the issue of the compatibility of residential uses and industrial uses was raised. Both the Planning Commission and the Historic Preservation Review Commission continued the discussion of the proposed EIR to allow more time to consider the issues. Key is the fact that a complete and comprehensive analysis and cleanup of the hazards left behind by the former military uses has not been done. While analysis and cleanup of individual parcels is possible, it may not make economical or practical sense. For example, cleanup of one parcel may require

the cleanup of adjacent parcels if contaminants have migrated. Also, the cost of cleanup may be economically prohibitive for a single property owner. Further, the lack of cleanup of other nearby parcels could pose a hazard to occupants of the clean parcel through inadvertent exposure or otherwise.

A comprehensive analysis and cleanup of the entire former Benicia Arsenal supervised by the Department of Toxic Substances Control ("DTSC") will help ensure that the work is done thoroughly and to standards. Priority should be given to the analysis and cleanup of the Lower Arsenal area if the entire work is not done at the same time. Conversations with the staff of DTSC indicate that this would be a good time to put forth this proposal. Although the relationship between the Army Corp of Engineers and DTSC has been strained at times in the past, the relationship has improved to the extent that we are more likely to make progress now than in the future. There may be funding available in July (assuming the budget woes do not impact this project). We have also had indications from Congressman Garamendi and Congressman Miller expressing interest in moving this project forward. It may be that this work could be done quicker than would be done by individual property owners. If it is not quicker, the resolution does not preclude individuals from proceeding on their own.

You will note that this resolution is longer than most City resolutions. This is so that the history of the issues is captured in one place.

Attachments:

- Proposed Resolution
- Proposed Transmittal Letter
- Staff Report from November 17, 2009 without the Attachments
- Marilyn Bardet Letter to Council - January 27, 2010

PROPOSED RESOLUTION

RESOLUTION NO. 10-_____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BENICIA REQUESTING THE ASSISTANCE AND SUPPORT OF CONGRESSIONAL AND LEGISLATIVE LEADERS FOR THE TIMELY INVESTIGATION AND CLEANUP OF LAND IN THE FORMER BENICIA ARSENAL, UNDER THE LEADERSHIP OF CAL-EPA'S DEPARTMENT OF TOXIC SUBSTANCES CONTROL, OFFICE OF MILITARY FACILITIES IN CONSORT WITH THE DEPARTMENT OF DEFENSE (AS PRIMARY RESPONSIBLE PARTY) AND ALL OTHER POTENTIAL RESPONSIBLE PARTIES, WITH PRIORITY GIVEN TO THE INVESTIGATION AND CLEANUP OF LAND IN THE LOWER ARSENAL AREA

WHEREAS, the City of Benicia on behalf of the community has invested to date a minimum of \$500,000 on the development of the Lower Arsenal Mixed Use Specific Plan (LAMUSP, Specific Plan) and its review of the Draft Environmental Impact Report (DEIR), to promote a community vision for infill development and for the enhancement and protection of the vital mix of unique historical, cultural, commercial, light industrial and port related industrial assets in the area of the Lower Arsenal;

WHEREAS, the primary obligation of City Council is to ensure protection of public health and safety, and also, protect the assets of the City and ensure its fiscal stability in accordance with goals and policies of the General Plan;

WHEREAS, lands formerly used by the military that are designated by the Department of Defense (DoD) as Formerly Used Defense Sites (FUDS) under the Defense Environmental Restoration Program initiated in 1986, were assessed for environmental cleanup under the DERP-FUDS Restoration Program (FUDS Program);

WHEREAS, FUDS were prioritized and subject to site investigation and cleanup activities according to a preliminary risk/hazards assessment such as was accomplished in 1993 for the former Benicia Arsenal by the Army Corps of Engineers (Army Corps);

WHEREAS, the former Benicia Arsenal earned a "Critical II" risk/hazards ranking by the Army Corps, such that under the FUDS Program, the Arsenal became a priority FUDS for cleanup, funding for which was stipulated and authorized by Congress;

WHEREAS, the Department of Defense (DoD) is the Primary Responsible Party with respect to cleanup of former lands of the Benicia Arsenal;

WHEREAS, under the FUDS Program, the Benicia Arsenal FUDS Restoration Project (Arsenal FUDS Project) became a cleanup project conducted by the Army Corps, for reasons of potential critical risks and dangers posed by former military uses of Arsenal lands from suspected and unknown hazards, including munitions and explosives of concern (MEC), and hazardous, toxic, and radioactive wastes (HTRW), including chemical warfare material (CWM), contaminants and pollutants, as documented by the Army Corps' Archive Search Report -1994 and Supplement-1997 and also the Records Research Report of 1998 (RRR);

WHEREAS, the FUDS Program operates under federal law called “CERCLA”, the Comprehensive Environmental Response, Compensation, Liability Act, which compels DoD to protect the public from potential hazards *exclusively attributable to former military activities*, including munitions and explosives of concern, and also, hazardous, toxic, and radioactive wastes (HTRW) including chemical warfare material (CWM), and other contaminants and pollutants, as described by the ASRs and RRR;

WHEREAS, under CERCLA, DoD provides for public stakeholder participation through voluntary petition and formation of a Restoration Advisory Board (RAB) to allow the public to be informed of the cleanup process and regulatory oversight;

WHEREAS, a RAB was formed in 2000 by community petition, but was discontinued and disbanded by the Army Corps in late 2005, such that the community, stakeholders and decision-makers remain mostly unaware and uninformed about the Army Corps’ reports produced and actions conducted since 2005, and are not informed of the comments of regulators, including about disagreements or controversies that remain unsettled between the Army Corps and DTSC;

WHEREAS, DoD never intended to investigate *all* the land of the former Benicia Arsenal under the FUDS Program;

WHEREAS, the Army Corps received stipulated federal funding to accomplish investigation of various priority sites identified within Areas I, W and M, (I - Industrial/ Manufacturing; W - Warehouse Expansion; and M -Motor Pool and Historical Ordnance Storage Area);

WHEREAS, the Records Research Report identified 383 specific sites for investigation and six new sites were identified as a result of a subsequent investigation, for a total of 389 sites evaluated for the Army Corps’ Preliminary Assessment Report of March 2004;

WHEREAS, with regard to identified ordnance activities on the former lands of Benicia Arsenal the Archive Search Report-1997 Supplement states in conclusion, *“Although the ASR and this supplement have identified specific areas where ordnance activities were known or suspected to have occurred, caution should be exercised during development of all former arsenal property.”*;

WHEREAS, Cal-EPA’s Department of Toxic Substances Control Office of Military Facilities, as California’s primary regulatory agency for FUDS, (DTSC) is mandated to protect human health and the environment, and therefore oversees, guides and also, by voluntary agreement or by issuing an order, may take the lead on cleanups, including on FUDS;

WHEREAS, DTSC regulates on FUDS cleanups in accordance with federal laws, including the Comprehensive Environmental Response, Compensation, Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA), as well as state law, including all Applicable or Relevant Appropriate Requirements (ARARs), and the California Environmental Quality Act (CEQA);

WHEREAS, DTSC encourages voluntary public and stakeholder participation and involvement to help achieve an environmental cleanup and provides support for formation of community advisory groups (CAGs), which meet under DTSC guidance to allow inquiry and dialogue with RP, PRPs and regulators, to review documents, and assure timely access to information to support community understanding and ultimate acceptance of agreed upon cleanup goals, investigation scope, workplans, risk assessment, remedial actions and residual risk management programs;

WHEREAS, DTSC in its regulatory capacity oversees, assesses and evaluates and, where feasible, requires action to eliminate or greatly reduce significant risks and dangers posed to human health and the environment that are potentially caused by contaminants, pollutants and hazardous wastes that affect soil, groundwater and air;

WHEREAS, on FUDS such as the former Benicia Arsenal, hazards include known or suspected munitions and explosives of concern (MEC) that may present immediate and/or future dangers to the public, construction workers, current and future occupants of an area currently designated for cleanup activities and subsequent development;

WHEREAS, when it is determined based on investigation that suspected or known hazards and contaminants still may remain in soils and groundwater after protective remedial actions deemed feasible and necessary have been taken, DTSC evaluates sites for residual risks associated to cleanups and designs risk management plans utilizing varied strategies to avoid or control those risks to protect construction workers, current and future occupants and the public;

WHEREAS, the City of Benicia experienced some controversies regarding the Tourtelot Restoration Project, located on formerly leased property of the Benicia Arsenal, which was initially a privatized cleanup project of former leased property of the Benicia Arsenal; and

WHEREAS, Tourtelot Restoration Project was successfully completed once DTSC issued an Order and became lead agency to successfully complete the investigation and to achieve a sufficiently conservative cleanup, which ensured the safety of contiguous properties in order to allow for proposed development of unrestricted residential use on the site;

WHEREAS, in its oversight capacity for the Arsenal FUDS Project, DTSC has repeatedly expressed in official letters addressed to the Corps, the Department's disagreement with the Corps' various assertions that site characterization and remedial actions accomplished to date in Areas I, W and M are complete and sufficient to be protective of human health and the environment, (see DTSC official response comments on FUDS Project documents, including the Final Preliminary Assessment Report-March 2004, Conceptual Work Plan, Site Investigation Plan, and comments on specific reports including on ordnance investigation and removal actions for Sections 2, 4 and 5, and the lands located within the Lower Arsenal identified by the Corps under the Arsenal FUDS Project as Area I and Area W);

WHEREAS, in fact, according to DTSC, the work thus far accomplished by the Army Corps in Areas I, W and M is *neither complete nor sufficient* and *does not accurately characterize the extent of DoD's exclusive liability as primary Responsible Party* with regard to

the nature, level and extent of contamination from hazardous, toxic wastes, chemical warfare material and also, munitions and explosives of concern;

WHEREAS, in two letters addressed to the City of Benicia regarding the Hazards Section of the Arsenal Specific Plan's DEIR, (Chris Parent letters dated March 27 and September 27, 2007), DTSC stated that site characterization in the Lower Arsenal area is incomplete, and that, therefore, DTSC's overriding concerns continue to exist owing to inadequate evaluation of risk associated to toxic contaminants, pollutants, chemical weapons material, and ordnance and munitions of concern that still are either known or suspected in the area;

WHEREAS, the Arsenal Specific Plan DEIR's Recirculated Hazards Section reflects the perspectives and concerns of DTSC as stated in the Chris Parent letters, (cited above) such that Mitigation Measure HAZ-1 requires that a preliminary endangerment assessment and health risk assessment be accomplished, as well as, if deemed necessary, possible further site characterization and remedial action before a permit can be issued by the City for excavation and construction activities;

WHEREAS, it appears from a recent letter dated Sept. 9, 2009 written by DTSC addressed to the Army Corps and copied to the City of Benicia and others, that two remedial actions that the Corps had recommended be taken were indicated as *the only two actions that the Corps considered to be still needed to cover DoD's exclusive liability in Areas I, W and M as primary Responsible Party under the FUDS Program*;

WHEREAS, DTSC in its letter to the Army Corps, dated Sept. 9, 2009, discusses a "Final Removal Action Work Plan" for completion of several remedial actions in the vicinity of Building 51 and Former UST 161, and states the following: "*DTSC will work with USACE (Army Corps) on the final cleanup plan to set appropriate cleanup levels for the soil and groundwater and to determine what actions must be taken to complete site characterization*", and continues, "*Additionally, in the final cleanup plan DTSC will work with USACE on land use restrictions (as described in state law and regulation) to assure that inappropriate uses do not occur*", and continues, "*Alternately, to avoid land use restrictions the USACE could submit a final cleanup plan wherein the final cleanup allows for residential use (i.e. unrestricted use.) . . . And, finally, the enclosed ordnance map(s) show the sites are located just outside a potential ordnance area. To ensure site safety, DTSC recommends USACE provide onsite active ordnance construction support*";

WHEREAS, DTSC considers the sites' characterization to be insufficient *considering prospective uses in the Lower Arsenal* which currently may include residential according to the Specific Plan, and considering the proximity of a "*potential ordnance area*";

WHEREAS, under Form-Based Code zoning that permits unrestricted residential as part of the mix of permitted uses, unrestricted residential could be entertained by property owners and developers, *now or any time in the future*, for new construction or by conversion of an existing building in the Lower Arsenal Plan Area;

WHEREAS, for *any* development to proceed in the Lower Arsenal the possibility of encountering MEC on a property slated for development but also, *on its contiguous properties and others in the surroundings*, must be addressed;

WHEREAS, Mitigation Measure HAZ-2 of the Recirculated Hazards Section of the LAMUSP DEIR states potential hazards that could potentially be encountered during construction, such as “*underground storage tanks, abandoned drums, or other hazardous materials and wastes*” and also states that discovery and reporting of *observed* contamination or hazards encountered during construction would halt those activities, but does not specifically mention the potential scenario wherein toxic contaminants, hazardous wastes including munitions and explosives of concern could be encountered while remaining *unseen*, thus posing a circumstance of possible immediate danger;

WHEREAS, the Records Research Report documents that the Clocktower Fortress, in 1912, was ravaged by fire that collapsed two upper floors onto the ground floor where were stored 75,000 rounds of highly explosive .30 caliber munitions, which then ignited causing explosions that were felt all over town and that further caused the collapse of the building’s north wall and tower;

WHEREAS, in the immediate vicinity of the Clocktower, below the building on Amports property, is located a military landfill that, according to DTSC, has been insufficiently investigated by the Corps and is known to contain metal and also “hot spots” with elevated levels of lead;

WHEREAS, discovery of any munition or explosive of concern in the Lower Arsenal would potentially affect activity within a designated distance of the discovery during a proposed removal action, thus potentially requiring evacuation of nearby businesses and curtailment of other routine human activity in the Lower Arsenal while such removal actions are carried out;

WHEREAS, Mitigation Measure HAZ-1 of the LAMUSP DEIR, states that further risk assessment and any further investigation and remedial action that may be required on a Lower Arsenal property before a permit is issued for excavation or construction activities would have to be pursued before a permit is issued, by *individual property owners*, who are considered Potential Responsible Parties (PRPs) by DoD;

WHEREAS, in effect, therefore, the LAMUSP DEIR suggests that any further investigation and cleanup of the Lower Arsenal area will depend on individual property owners and developers, acting on a case-by-case basis;

WHEREAS, such a piecemeal Arsenal cleanup could not be considered “comprehensive” or “complete” as would be if conducted as a whole project under DTSC regulations and guidelines and with an enforceable cleanup timeline;

WHEREAS, with respect to the Lower Arsenal area, a piecemeal cleanup could not be considered sufficiently protective of the City, considering its liability, nor protective of construction workers and the public, including current and future occupants of the Lower

Arsenal, given the incompleteness of the Arsenal FUDS Project as determined by DTSC, and the fact that munitions and explosives of concern are said by DTSC to be known or suspected to be present in the vicinity, and given that “unknowns” remain a serious concern throughout the Arsenal, according to the Archive Search Report 1997 Supplement;

WHEREAS, currently, a property owner or developer intending to develop private land within the boundaries of the former Benicia Arsenal is required to *pay upfront* the costs associated to pursuing such protocols as are required by DTSC, such that, a property owner and/or developer, as a Potentially Responsible Party, would have to seek recovery of those costs from DoD *after* the required work is completed, and thus, would presumably incur additionally significant legal fees as a PRP to petition DoD for compensation;

WHEREAS, with regard to WHO PAYS for cleanup: according to the DoD’s Defense Environmental Programs Report to Congress - Fiscal Year 2008 - Complete Installation Data for Benicia Arsenal/Formerly Used Defense Sites CA99799F569900/C-EST, (DoD Report to Congress FY-08) the Arsenal FUDS Project for the entire area of the former Arsenal remains unfinished, and also indicates that DoD considers that the *extent* of their total liability as primary Responsible Party under the FUDS Program amounts to approximately \$4 million *already spent*;

WHEREAS, it is fair to infer from DoD’s Report to Congress FY-08, that the Arsenal FUDS Project’s schedule remains virtually *indefinite*, potentially extending beyond 2015, whereby a minimal number of activities are planned from 2011 - 2015 that are as yet unfunded, which therefore suggests that final completion of the FUDS Project is uncertain and will remain without dedicated funding into the future;

WHEREAS, the Army Corps, representing DoD as primary Responsible Party, has determined that whatever hazards remain in the Lower Arsenal are not considered DoD’s *exclusive* liability, and therefore, that *No Further Action* is required in the areas investigated by the Army Corps to date, such that any remaining hazards are considered by DoD to be the responsibility of PRPs, and that, effectively therefore, the Lower Arsenal area is to be considered “a PRP site”;

WHEREAS, it is reported by the Army Corps that landfill or infill sites and quarries have been sampled and investigated for metals, and that metals, possibly MEC, have been detected and mapped, (see DTSC comments from David Price, dated April 7 and April 20, 2000, and comments from the Regional Water Quality Control Board on the Technical Report for Area I landfills 1 and 2 and Quarry 3, and Area M Quarry 1);

WHEREAS, the Army Corps has not conducted a metal scan in the Lower Arsenal, except for the two identified landfill sites on Amports’ properties, (extensive area under asphalt along Tyler Street and in scruffy undeveloped terrain below the Clocktower building) and over quarry site on nearby Valero property (west of Park Rd.);

WHEREAS, the Army Corps fully acknowledges in a letter to DTSC, signed by Jerry Vincent, dated March 27, 2003, that funding for the Arsenal FUDS Project was cut and that the (then) current efforts planned for the Lower Arsenal area “*will consume all dollars programmed*”

for the Arsenal this fiscal year and potentially for the next five fiscal years”, such that DTSC’s concerns to implement further ordnance investigation and removal activities in Area M’s Sectors 2 and 4, and Sector 5 (in the vicinity of the historic Camel Barns) could not be accomplished under those funds previously stipulated for remedial investigation in the Lower Arsenal in Areas I and W, and, that therefore, “higher authorization” (from Congress) would be required to gain sufficient funding for further such actions deemed necessary by DTSC;

WHEREAS, it is stated in notes taken by Benicia’s City Attorney during an Army Corps presentation to the citizens’ Restoration Advisory Board meeting Oct. 23, 2003, that the funding cut to the Benicia Arsenal FUDS Project was stated to be a “50% cut” (see Notes-RAB 10/23/03, from City Attorney, City Attorney Arsenal file);

WHEREAS, the potential existence of munitions and explosives of concern in the Lower Arsenal has *not been ruled out* by DTSC and should therefore be considered a *significant and potentially immediate risk to public safety requiring further investigation and assessment*;

WHEREAS, DTSC, as oversight agent for the Arsenal FUDS Project, has final jurisdiction and “sign off” authority on investigative work accomplished and for any development to proceed on lands within the former Benicia Arsenal including therefore in the Lower Arsenal area;

WHEREAS, DTSC has the means and authority, by Voluntary Agreement or by issuance of a special Order, to compel a comprehensive cleanup conducted on a legally enforceable timetable that brings property owners and all Potential Responsible Parties (PRPs) and stakeholders together, *including the Department of Defense as primary Responsible Party*, in order to gain better understanding of the extent of contamination from former military uses, therefore, with DoD as the primary RP *paying its fair share, to thereby achieve a complete cleanup*, thus to meet the desire of the City of Benicia, Arsenal property owners, stakeholders and the community to enable development in accordance with the Lower Arsenal Specific Plan for appropriate uses;

WHEREAS, the City of Benicia has experience of DTSC’s success in coordinating a complicated final cleanup of the Tourtelot site, for which DTSC gained cooperation from the City, the Army Corps, contractors, developers and stakeholders and gained acceptance by the community-at-large, and wherein the land, under DTSC order to be cleaned up, was a formerly leased property of the Benicia Arsenal where discoveries of live ordnance, metal fragments and toxic contaminants, including explosive soils, required significant removal actions to avoid immediate and future potential danger to field workers, construction workers, the public and future occupants of the site;

WHEREAS, the City of Benicia on behalf of the community desires that its investment in the Arsenal Specific Plan proves worthy toward the realization of the community vision expressed in the General Plan;

WHEREAS, initiating a federally funded, final Arsenal cleanup project with priority given to the Lower Arsenal under DTSC’s leadership would bring jobs to Benicia in 2010, such

that future infill development projects could occur that would bring union construction jobs to the Lower Arsenal area;

WHEREAS, it is neither protective of human health and the environment, nor cost effective, to further indefinitely forestall, delay, or defer cleanup of former Benicia Arsenal lands;

WHEREAS, it is economically wise and morally responsible to leave as a legacy to future generations of Benicians, the benefits, both environmental and economic, of a thorough Arsenal cleanup accomplished appropriately under DTSC leadership and funded by DoD as primary RP, as herein recommended by this Resolution and its findings; and

WHEREAS, without a cooperative strategy led by DTSC to compel the cleanup of the Lower Arsenal in the area of the Specific Plan, future necessary economic development that would benefit the entire community in an area designated for mixed use will be impeded, if not indefinitely prevented, such that property values in the Lower Arsenal would remain depressed, as some now contend, and would likely continue to be affected into the future by complicated disclosures, related encumbrances and restrictions relevant to an incomplete cleanup of former Arsenal properties.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Benicia that the City of Benicia — for the sake of public health and safety, for the community's economic future, for achieving goals of the Lower Arsenal Specific Plan and preservation and enhancement of unique historic, cultural, commercial and industrial assets valued as intrinsic to the vitality of the Lower Arsenal area, the City and community— shall request the support of our state legislators and Congressional delegation to seek completion of the investigation and cleanup of former lands of the Benicia Arsenal, ideally to be accomplished (1) by an enforceable Voluntary Cleanup Agreement between Cal-EPA/DTSC and the Department of Defense, including all Potential Responsible Parties, *or*, by Order of Cal-EPA/DTSC, with cooperation and support of the City of Benicia, DoD and all PRPs; and (2) with a workplan and enforceable schedule that would reflect the prioritization of the investigation and cleanup of the Lower Arsenal to allow development in compliance with the Lower Arsenal Mixed Use Specific Plan.

BE IT FURTHER RESOLVED, to insure this effort succeeds, the City shall petition California's Congressional Delegation including Senator Diane Feinstein, Senator Barbara Boxer, Honorable Speaker of the House Nancy Pelosi, Congressman George Miller and Representative John Garamendi to request that the Department of Defense cooperate with Cal-EPA in this necessary endeavor and seek Congressional funding for completion of the Benicia Arsenal cleanup project.

BE IT FURTHER RESOLVED, that the City shall enlist the support of Congressman George Miller, together with State legislators including Senator Pat Wiggins and Senator Mariko Yamada, and also Solano County Supervisor Linda Seifert, to make formal request to Cal-EPA's DTSC-Office of Military Facilities to lead the comprehensive project on a legally enforceable timetable to complete the investigation and cleanup of the former Benicia Arsenal, with specific

priority given to the Lower Arsenal lands within the area designated as included in the Lower Arsenal Mixed Use Specific Plan, to allow for appropriate development and uses.

BE IT FURTHER RESOLVED, that the City of Benicia will encourage all manner of cooperation with the Department of Toxic Substances Control, among stakeholders and from USACE, and make every effort to gain, if useful and feasible, other agencies' or organizations' involvement, both private and public, to carry out what shall be considered a green military Brownsfield restoration project for former lands of the Benicia Arsenal, with priority given to the Lower Arsenal, to be carried out in accordance with the City's Climate Action Plan for promise of economic development, and for enhancement of vital historic, cultural, commercial and industrial assets recognized by the City of Benicia, Solano County, the State of California and the nation.

On motion of Council Member _____, seconded by Council Member _____ the above Resolution was introduced and passed by the City Council of the City of Benicia at a regular meeting of said Council held on the 2nd day of February, 2010 and adopted by the following vote:

Ayes:

Noes:

Absent:

Elizabeth Patterson, Mayor

Attest:

Lisa Wolfe, City Clerk

PROPOSED TRANSMITTAL LETTER

January ___, 2010

Speaker of the House, Nancy Pelosi at
americanvoices@mail.house.gov
Senator Barbara Boxer at
donna_strain@boxer.senate.gov
Senator Dianne Feinstein at
gina_banks@feinstein.senate.gov
Congressman George Miller at
barb.johnson@mail.house.gov
Congressman John Garamendi
jennifer.barton@mail.house.gov

Senator Patricia Wiggins at
senator.wiggins@senate.ca.gov
Senator Lois Wolk at
senator.wolk@senate.ca.gov
Assembly Member Mariko Yamada
mariko.yamada@asm.ca.gov
Assembly Member Noreen Evans at
assemblymember.evans@assembly.ca.gov

Dear Congresspersons and State Legislators:

The City Council of the City of Benicia adopted the attached resolution seeking Congressional and state legislative support for a request to have the California Department of Toxic Substances Control (“DTSC”) exercise its authority to cause the cleanup of the Lower Arsenal area in the former Benicia Arsenal. Although some investigation and remediation of the Lower Arsenal area has occurred, the investigation and remediation has not been completed in a timely manner.

Benicia Arsenal is a former Army site that was closed in the 1960’s. The Lower Arsenal area of the Benicia Arsenal is designated by the City’s draft Specific Plan for possible infill development, including unrestricted residential use. It is important to the development and reuse of the Lower Arsenal area that the land be properly remediated. DTSC has the authority as a Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) lead agency, under state laws, and Applicable or Relevant and Appropriate Requirements (“ARARs”) to ensure remediation activities are undertaken under a Voluntary Agreement, involving all Responsible Parties (“RP”) including the Department of Defense (“DoD”) as primary Responsible Party.

The Formerly Used Defense Sites (“FUDS”) program for the Benicia Arsenal was said to be complete at the close of an "Expanded Site Investigation" in 2005, for which two activities have been concluded in 2009. The Army Corps has said that it can't do any more work in the area because they have determined that they have taken care of the cleanup they are solely responsible for and that whatever else remains in the ground is the responsibility of subsequent property owners and/or lessees, e.g. Potential Responsible Parties (“PRP”). Everyone seems to

January ____, 2010

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agree that there is additional work to be done but there is no one stepping up to the plate to do the work. This has left the Lower Arsenal cleanup in limbo.

DTSC, as regulatory oversight agency for the FUDS project under the Army Corps' lead, has voiced its concern that the site investigation and remedial activities are insufficient and that further site characterization and risk analysis is necessary, given the level of uncertainty with regard to "munitions and explosives of concern" that may still remain in the Arsenal; and given the fact that residential is a prospective, allowed end use in the Lower Arsenal area. Currently there is no mechanism to reliably assure cleanup in a timely comprehensive manner, e.g., to compel DoD and PRP to accomplish further investigative work and cleanup. With a Voluntary Agreement, DTSC would be able to make sure the investigation and remediation of the site was appropriately completed.

With a Voluntary Agreement, DTSC could also make sure that certain processes were followed and completed. For example, there was no "Feasibility Study" accomplished under the FUDS program for Benicia Arsenal. This study would help determine appropriate remediation activities and provide a vehicle for public input. The Army Corps, as lead and also as representing DoD as primary RP under the FUDS program, virtually shut down the Restoration Advisory Board ("RAB") in 2005. The RAB was composed of residents, property owners and business owners. The RAB, which had been initiated by citizen petition to DoD in 2000, had been the primary mechanism for public involvement in the cleanup process. Since the RAB was shut down, there have been actions by the Army Corps and reports such as the "Draft Final Human Health Risk Assessment." Yet there has been no public vehicle for community involvement, no public review of final draft reports or documents that address the Army Corps' view of "completion" of its activities in the Lower Arsenal area, etc. Without the public input, the public trust that the appropriate remediation has been, or will be, done is broken.

The Arsenal cleanup is a legacy project after 150+ years of DoD use of lands within the City of Benicia. Cleanup will enable future development for economic benefit of the City and community as a whole. If DTSC were to shepherd the remediation of the Lower Arsenal, the City is confident that the project would be as successful as the Tourtelot Remediation project previously completed in the City. The City requests that you urge DTSC to pursue a Voluntary Agreement to remediate the Lower Arsenal and that you support funding the remediation at both the Federal and State levels. Thank you for your support.

Sincerely,

Elizabeth Patterson
Mayor

Attachment: City Council Resolution

cc: City Council
City Manager
City Attorney

IX-B-16

**STAFF REPORT
FROM NOVEMBER 17, 2009**

AGENDA ITEM
CITY COUNCIL MEETING: NOVEMBER 17, 2009
INFORMATIONAL ITEMS

DATE : October 27, 2009
TO : City Council
FROM : City Manager
SUBJECT : **REQUEST TO LEGISLATORS FOR LOWER ARSENAL
HAZARDS ANALYSIS**

RECOMMENDATION:

Direct staff to prepare a resolution recommendation requesting that federal and State legislators engage the Cal-EPA Department of Toxic Substances Control (DTSC) to complete a hazards investigation and, if necessary, cleanup of the former Benicia Arsenal, with priority given to the Draft Lower Arsenal Mixed Use Specific Plan area.

EXECUTIVE SUMMARY:

Marilyn Bardet has requested that the Council seek assistance in enlisting DTSC to lead a comprehensive hazards characterization for the Arsenal. Such an effort might preclude the need for individual property owners to undertake and fund parcel-specific cleanup, which is called for in the Draft Environmental Impact Report (EIR) for the Draft Lower Arsenal Mixed Use Specific Plan in the event that an areawide characterization can not be accomplished.

GENERAL PLAN:

Relevant General Plan Goals and Policies include:

- Goal 2.5: Facilitate and encourage new uses and development which provide substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life
- Goal 4.7: Ensure that existing and future neighborhoods are safe from risks to public health that could result from exposure to hazardous materials.
 - Policy 4.7.3: Protect existing and future development from contaminated sites, hazardous landfill waste and debris, chemical spills, and other hazards including unexploded ordnance and explosive waste.
 - Policy 4.7.5: Require that all sites known or suspected to have unexploded ordnance and/or a toxic history be tested and remediated before any development can occur.

STRATEGIC PLAN:

Relevant Strategic Plan Goal:

- Strategic Issue #1: Protecting Community Health and Safety

BUDGET INFORMATION:

No budget impact is anticipated. Staff resources will be required to monitor and coordinate the proposed effort.

ENVIRONMENTAL ANALYSIS:

The Draft EIR for the Lower Arsenal Plan was released for public review in July 2007. In response to public comment, the Hazards and Hazardous Materials section was recirculated in April 2008. It contained "significant new information" per the California Environmental Quality Act Guidelines, including impacts not previously identified in the Draft EIR.

In addition to original EIR mitigation that dealt with what must occur when hazardous materials are uncovered, language was added that acknowledges the potential presence of hazardous materials throughout the Lower Arsenal area and directs property owners to investigate and remediate contaminated areas if discovered, in conjunction with any potentially responsible parties such as prior owners and regulatory agencies. (A comprehensive hazard mitigation strategy involving the DTSC and the Army Corps of Engineers would be preferable but has not been attainable through discussions with these parties to date.)

SUMMARY:

At a joint meeting on October 22, 2009, the Planning and Historic Preservation Review Commissions each continued review of the Lower Arsenal Plan and EIR, to allow more time to consider the issue of residential/industrial use compatibility, especially given the possibility of development occurring without a comprehensive hazards characterization for the area. (The Planning Commission in August 2008 had already recommended that the Council certify the EIR and approve the Plan, but is conducting additional review due to the addition of climate change analysis in the EIR. HPRC recommended approval of the Draft Plan for Environmental Review in January 2007, but has not yet commented on the Draft EIR.)

The only single-family component of the Specific Plan is a 22-home proposal at 1025 Grant Street, but the overall appropriateness of residential use, even live/work and work/live, has been a topic of concern throughout the Plan and EIR review process. Ms. Bardet has consistently emphasized the need for a comprehensive hazards analysis. Her proposed resolution provides a viable draft that staff could adapt for Council review and approval.

BACKGROUND:

The Benicia General Plan establishes a Lower Arsenal Mixed Use designation for approximately 50 acres generally bounded by I-780, the Port of Benicia, and residences east of East 7th Street. "This category includes residential, live/work, office, retail, public and quasi-public, and limited industrial uses" (General Plan page 28). (Work/live use, which was not contemplated at the time of the 1999 General Plan update, is also included in the Draft Specific Plan.)

The Draft Plan includes standards for building form, architecture, open space, and circulation that would replace current zoning provisions for allowable uses, permit requirements and site development; however, the Arsenal Historic Conservation Plan would continue to provide additional design guidelines that will supersede the Specific Plan provisions in the event of any conflict.

The Specific Plan would allow approximately 215,000 square feet of new mixed-use development, which is roughly one-third the additional amount of office, commercial and live-work that could be allowed under current zoning. The majority of new development would occur at the Jefferson Ridge, which is the only area for which the Plan considers more than one development pattern. Some type of residential use would be allowed throughout the Lower Arsenal, with the exception of the area south of Grant Street and West of Polk Street.

Plan and EIR History

In August 2006, the City began a process to involve citizens in planning for preservation and change in the lower Arsenal with a community workshop and stakeholder interviews, followed by a multi-day charrette in September 2006. In January 2007, the Planning and Historic Preservation Review Commissions recommended the Draft Specific Plan to the City Council, and Council approved a Draft Plan for Environmental Review in February 2007 (published March 30, 2007).

The Planning Commission held an EIR scoping hearing in April 2007, and the Draft EIR was published in July 2007. The first Draft EIR recirculation was published in April 2008, and the Planning Commission held a public hearing on the recirculated Hazards and Hazardous Materials and Cultural and Paleontological Resources sections in June 2008, and another to recommend Council approval of the Draft Plan and Draft EIR in August 2008.

After considering the Draft Plan and Draft EIR at its October 21, 2008 regular meeting, the City Council directed that an additional public workshop be held, primarily to provide additional information regarding historic preservation and residential/industrial compatibility issues. The attached summary indicates the workshop did not yield consensus but did identify "conditions" that might lead to resolution of the residential/industrial compatibility issues, such as restricting sensitive populations from inhabiting work-live units close to industrial uses and adding buffers to separate residential and industrial uses. (The other conditions listed on page 3 of the summary are covered by Plan actions and/or EIR mitigation measures.)

Following the April 2009 workshop, staff requested Council direction to revise the Sustainability and Energy section of the EIR to become the Global Climate Change, Energy Use, and Sustainability section in compliance with AB 32. In addition, staff agreed to the Port's request to

revise the Noise Section to include analysis of a noise report submitted on the Port's behalf (rather than merely respond to it as a comment on the Draft EIR).

Conclusion

The question of whether residential use, even work/live, is appropriate in the Arsenal is a matter of Council policy. Although individual parcel analysis (and cleanup as necessary) involves uncertainty regarding the level of investment needed to obtain State or County approval for housing, Draft EIR Mitigation Measure HAZ-1 (see attachment) includes the necessary required mitigation from each property owner desiring to develop in the Lower Arsenal. A detailed, comprehensive characterization of potential hazards would be preferable, but representatives of the Army Corps and DTSC have heretofore told City staff that neither agency will perform a comprehensive hazards investigation nor prescribe corrective measures for the area. Requesting that DTSC supervise a comprehensive hazards characterization for the Lower Arsenal would not preclude Council from approving the Specific Plan with the option of cleanup by individual property owners.

Attachments:

- ❑ Proposed Resolution and Exhibits from Marilyn Bardet Submitted October 6, 2009 to the City Council
- ❑ April 2009 Workshop Report
- ❑ Hazards Section of Draft EIR Mitigation Monitoring and Reporting Program
- ❑ October 22, 2009 Planning Commission/HPRC Meeting Minutes (Draft)
- ❑ Additional Submittal from Marilyn Bardet of November 9, 2009

**MARILYN BARDET LETTER TO COUNCIL
DATED JANUARY 27, 2010**

MARILYN J. BARDET
333 East K Street, Benicia CA 94510
707-745-9094 mjbardet@comcast.net

January 27, 2010

Mayor Patterson
Vice Mayor Schwartzman and Councilmembers Campbell, Hughs and Ioakimedes
City of Benicia,
250 East L Street
Benicia CA 94510

SUBJECT: Proposed Resolution seeking Congressional support to achieve cleanup of the former Benicia Arsenal under the leadership of Cal-EPA's Department of Toxic Substances Control, with first priority given to the Lower Arsenal Mixed Use Specific Plan area.

Mayor Patterson, Vice Mayor Schwartzman and Councilmembers Campbell, Hughs and Ioakimedes,

First, I want to thank you all for your prompt consideration of this proposed Resolution, for the very willing cooperation and assistance I've received from our City Attorney and her staff, and for the encouragement and reciprocity in conversation I've had with our City Manager, and for our Mayor's and Council's continuing interest in following up on such an important matter that affects our economic future. I also want to give credit to Cal-EPA's Department of Toxic Substances Control for their timely help in compiling files and providing me with materials that aided my research.

The final draft Resolution before you represents considerable research on my part, which I compressed into Findings (Whereases) that I believe give ample reason for you to approve the Resolution. In approving the Resolution—with understanding of the economic advantage and necessity of seeking now what our city and community and Arsenal property owners and stakeholders deserve—you would put into motion a means to achieve a long-held vision for a comprehensive final, defensible cleanup of the lands of the former Benicia Arsenal.

In adopting the Resolution, as our civic leaders in your primary duty to protect the public health and safety, you will be assuring that such a cleanup will be in accordance with all state and federal laws and standards, for the Resolution seeks to cause Cal-EPA's Department of Toxic Substances Control to exert its expertise as lead agent, to conduct a thorough, legally defensible investigation and cleanup on an enforceable timetable, bringing all parties together, and with public involvement. And as specified by the Resolution, first priority will be given to the area and vicinity described in our Lower Arsenal Mixed Use Specific Plan.

The Resolution provides that the City will seek support from our Congressional delegation to engage the Department of Defense as primary Responsible Party. This is to ensure federal funding for the cleanup under leadership of Cal-EPA.

The advantage of seeking Congressional support now is that it can be understood that cleanup of the Arsenal represents promise of future economic benefit to the City, such as the Lower Arsenal

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Specific Plan envisions through infill development over the next 25+ years. The City has demonstrated its commitment to further economic development of regional tourism by funding the restoration of the historic Commanding Officer's Residence in our National Register District which symbolizes our respect for the area's history and future economic potential.

On that score, the economic future of Benicia will depend on our resourcefulness, resilience, creativity and ingenuity to meet all kinds of unprecedented challenges that will affect us all—businesses, property owners, and residents of every stripe. We should do what we can now to provide for environmental restoration of the Arsenal lands with EPA expertise, thus to provide certainty that land proposed for future uses, especially for unrestricted family residential, will be safe from hazards that are currently suspected or known to exist on lands once occupied by the former Benicia Arsenal. This goal fulfills policies of our General Plan, as cited in the staff report.

The Benicia Arsenal served the nation's vital interest during major wars and peace for over 100+ years, from Lincoln's presidency and the Civil War through the Korean War, until its final closing in 1964. Since its closing, the Arsenal has become home to our industrial park, to the refinery, to Amports' port operations, to small business, to professional services, to churches, schools, cultural arts organizations and an artists' thriving community. It also still contains historic treasures that distinguish Benicia from its earliest days.

It's time to take care, with Congressional support now, to finish a job that had been envisioned in 1986, under the Defense Environmental Restoration Program, established by the Defense Department, which foresaw the need to cleanup the hazards and contamination left by former military bases and other defense installations so that the land could be re-used safely and productively for the benefit of communities and cities where they had been located.

I have previously submitted into the record enough material for you to fully understand the reasons why I believe that this Resolution deserves Council's full support. The Resolution is written to document those reasons.

I am ready to answer, or find answers, for any questions you might have that deserve to be addressed so that you can feel comfortable and right in approving the Resolution for an Arsenal cleanup.

Thank you once again for your considerable attention.

Respectfully,

Marilyn Bardet