RESOLUTION NO. 10-15

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, residential, commercial, light industrial and port related industrial assets in the area of the Lower Arsenal;

WHEREAS, the Former Benicia Arsenal, including the Lower Arsenal, has been recognized at the state and federal level for its historic significance. The Benicia Arsenal is both a California State Historic Landmark and a National Register District, with over 30 protected historic resources, including the Powder Magazine, Clocktower, and Commanding Officer's Quarters, among others;

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 (removal of contaminated soil at two different locations) 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, Form-Based Code zoning permits unrestricted residential as part of the mix of permitted uses and could be entertained by property owners and developers, 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 could 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 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 and Californians, 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 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, residential, 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, residential, commercial and industrial assets recognized by the City of Benicia, Solano County, the State of California and the nation.

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On motion of Council Member **Schwartzman**, seconded by Council Member **Ioakimedes**, 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: **Council Members Campbell, Hughes, Ioakimedes, Schwartzman and Mayor Patterson**

Noes: **None**

Absent: **None**

Elizabeth Patterson, Mayor

Attest:

Lisa Wolfe, City Clerk