Section 1

Approach

Project Understanding and Approach

The Benicia Arsenal was established by the U.S. Army (Army) in 1849. The Army operated the arsenal until its closure in the 1960s. The Army used the arsenal for the following:

- Principal depot for ordinance storage
- Issuance of ammunition, small arms parts, and military supplies
- Manufacturing and testing of small arms and mobile and seacoast targets

Over time, the Army grew the arsenal to 2,728 acres in size. Throughout the arsenal's history, the functions of many buildings and operation areas changed, in response to changing Army needs.

The City of Benicia (City) obtained title to most of the former Benicia Arsenal property upon its closure. Portions of the former arsenal property are currently under private ownership and have been developed for use under a variety of land uses (e.g., Benicia Industries, Valero Energy, commercial business, residential housing, and historic preservation).

As a result of over 150 years of use by the Army, it is recognized that significant portions of the former Benicia Arsenal are impacted with ordnance and chemical contamination: munitions and explosives of concern (MEC); hazardous, toxic, and radioactive wastes (HTRW); and, chemical warfare material (CWM).

Major investigation and cleanup activities have been performed to date, primarily by the Army through its Formerly Used Defense Sites (FUDS) program. Additional private cleanup activities were conducted under the Tourtelot Cleanup Project. At the conclusion of its most recent cleanup activities in late 2009, the Army stated that ordnance and chemical contamination that the Army was responsible for had been adequately remediated. The Army believed that any remaining contamination was the responsibility of the property owners, including the City, and/or past and current lessees. The recent Army cleanup activities have been conducted under the oversight of the California Department of Toxic Substances Control (DTSC), the lead regulatory agency for the former Benicia Arsenal. Until recently, the California Regional Water Quality Control Board, San Francisco Bay Region (Water Board) served as the lead regulatory agency.

In its June 16, 2010 letter to Senator Patricia Wiggins and Assembly Member Mariko Yamada, DTSC agreed with concerns raised by the City and others on behalf of the current property owners/lessees, that "both ordnance and chemical contamination likely remain on the former Benicia Arsenal and that investigation to make such a determination has not been completed". If contamination remained, DTSC indicated that additional cleanup by the Army would be needed. In the same letter, DTSC stated that the preferable course of action would be for the Army and property owners to enter into a Voluntary Cleanup Agreement (VCA) with DTSC to address this concern.

In September 2010, DTSC attempted to facilitate a path forward with the Army and property owners. In its September 15, 2010 letter to the Army, DTSC stated that the best path forward may be to issue an Imminent and Substantial Endangerment Determination and Remedial Action Order (Order) to the Army "given the current circumstances." A draft of this Order was provided to the Army for their review.

In Section 2.3.7 of its draft Order, DTSC stated the following:

> [DTSC] and the San Francisco Bay Regional Water Quality Control Board (RWQCB) have not been satisfied with the adequacy and completeness of most of the Investigations and Removal Actions. The [Army] did not follow the United States Environmental Protection Agency Guidance documents and was not consistent with the Comprehensive Environmental Response Compensation and Liability Act. The [Army] did not obtain access to several large areas of the Site to conduct necessary and adequate Investigations in order to determine if Removal/Remedial Actions were necessary. The [Army] also did not conduct Removal/Remedial Actions in areas where current property owners "beneficially reused" the properties subsequent to [Army] vacating the Site. The [Army] also did not conduct Removal/Remedial Actions at portions of the Site where current property owners "may" have caused additional contamination.

The above passage is a critical summation on the past failing of the Army to make its investigations and cleanup activities transparent to the public, especially the property owners. The Army failed to live up to its own guidelines presented in its FUDS Fact Sheet regarding working with interested parties:

> Active communication, coordination, consultation and collaboration with property owners, state and federal regulators, tribal and local governments, and local communities are critical in planning and carrying out cleanups. The [Army] works hard to keep all interested parties informed and offers opportunities for dialogue throughout all cleanup phases.

As stated in the City's Request for Qualifications, it appears that DTSC, as of its September 30 meeting with the parties, is continuing to "request" that the Army and/or property owners enter into a VCA with DTSC. If not, DTSC intends to issue an Order. Based on the draft Order and its September letters to the parties, it appears that DTSC would initially issue the Order only to the Army. In Section 2.8 of the draft Order, DTSC includes a provision indicating that it may issue additional orders to other parties currently owning portions of the former Benicia Arsenal. In any such orders, the Army would likely continue to be jointly named.

Given the uncertainties regarding potential liabilities for the City associated with a DTSC order, the City has issued their Request for Qualifications seeking environmental and legal consultants to evaluate DTSC's request to negotiate a VCA among the Army, the City, and property owners with DTSC.

Entering into a VCA with the Army has its benefits, including providing an opportunity to the City to have direct communication, coordination, and collaboration with the Army during the process of further characterization and remediation of the former Benicia Arsenal. Ideally, the City would have the opportunity to review all formal project documents prior to submittal to DTSC, forcing consideration of property owner and/or lessee concerns. Also, the City could have direct input into the schedule of the work so as to minimize delays in the Army's implementation of the work.

However, in order to establish a VCA, the City would first need to negotiate several critical items with the Army, including establishing remedial action objectives (standards for cleanup) for the affected properties and financial agreement for recovery of City and other property owner-incurred costs for completing DTSC's initial task to the Army: "...both ordnance and chemical contamination likely remain on the former Benicia Arsenal and that investigation to make such a determination has not been completed."

Negotiating these points, which is common at multi-party cleanup sites, is sometimes a difficult and time-consuming process. An alternative to establishing a VCA is the issuance of orders to the parties from the regulatory agency and subsequent negotiation among the parties for cost allocation.

As with any negotiation, the City needs to be very clear on the following points prior to entering into discussion regarding the VCA with the Army: objectives to be achieved, positions that may be sacrificed through compromise, elements requiring collaboration to complete, and principles that will not be conceded (i.e., points of negotiation failure).