



CHRISTOPHER A. KEELE  
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November 4, 2010

***VIA HAND-DELIVERY***

Heather C. McLaughlin  
City Attorney  
City of Benicia  
250 East "L" Street  
Benicia, CA 94510

**Re: Qualifications and Proposal for Legal Services for the Benicia Arsenal Investigation and Cleanup Project**

Dear Ms. McLaughlin:

Thank you for the opportunity to submit our qualifications and this proposal for legal services for the Benicia Arsenal Investigation and Cleanup Project. We are very excited about working with the City of Benicia on this matter, especially having recently completed a successful and rewarding engagement by the City of Mountain View for negotiation of the city's responsibility (or absence thereof) in a vapor intrusion plan at the MEW Superfund site. For the City of Mountain View we took a lead role in analyzing remedial investigations and feasibility studies and negotiating a remedial action plan for vapor intrusion mitigation with U.S. EPA and private parties (land owners, lessees, and historic dischargers of solvent wastes and other contaminants), all at no out-of-pocket cost to the city.<sup>1</sup>

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<sup>1</sup> The City of Mountain View and U.S. EPA entered in to a Cooperative Agreement pursuant to 42 U.S.C. §104, whereby the federal government reimbursed the city for its expenses, including attorneys fees, for the city's assistance in the Superfund response initiative at the MEW site. To our knowledge, there is no State counterpart to this provision of CERCLA, but certainly one area of investigation and analysis is to determine if and how the City of Benicia can be reimbursed for its attorneys fees.

Heather C. McLaughlin

November 4, 2010

Page 2

### Understanding of scope of work and objectives

We understand that the City's objectives and the expected scope of work to attain those objectives include the following:

1. To represent the City in (a) negotiating a mechanism—preferably a voluntary consent agreement with and among the U.S. Army Corps of Engineers (“Army”), the California Department of Toxic Substances Control (“DTSC”), and former and current property owners—for immediate action to investigate, characterize and remediate MECs, MCs, HTRWs, CWMs and other contaminants and pollutants left behind by the Army as it abandoned its previous cleanup activities, and (b) navigating the process for this investigation, characterization, and remediation. The engagement includes providing legal services to help the City accomplish the following: (i) timely and comprehensive cleanup to assure protection of the health, safety and welfare of the public, including potential control over the investigation and remediation processes so there is no delay, (ii) minimal expense and financial exposure to the City (as former owner of certain parts of affected area), including negotiation of least burdensome and least costly institutional controls that DTSC may attempt to impose on the City, and (iii) public information and participation. In the event the parties do not reach a voluntary agreement, then the priority of the City, through counsel, will be to interface directly with DTSC to negotiate preparation of an Imminent and Substantial Endangerment Determination and Remedial Action Order (“IS&E order”) that will achieve these objectives.

2. Two ancillary but compelling objectives include (a) negotiate minimal exposure to the City from its maintenance of sewer and storm drain systems from which industrial wastes were allegedly discharged into the Carquinez Strait [*see Adobe Lumber, Inc. v. Hellman*, 658 F. Supp. 2d 1188 (E.D. Cal. 2009)], and (b) preserve the designations, physical integrity and maintenance of historical structures and areas.

### Approach

Our overriding approach will be to work closely, as a team, with the City Attorney (and her staff), City planning staff, and the environmental consultant that the City selects, to undertake and accomplish the following: (1) develop and implement a strategy to accomplish the City's objectives, complying with, and even pushing along, any schedule mandated by DTSC, including negotiation of a voluntary agreement; (2) aggressively seek/demand further investigation of areas left uncharacterized and not remediated by the Army in the Benicia Arsenal FUDS Restoration Project; this includes preparation of a “Feasibility Study” that would allow meaningful assessment and informed selection of appropriate remediation alternatives and public input; (3) aggressively seek/demand payment for same from the United States and other responsible parties; (4) restore the Restoration Advisory Board or some comparable means and process to ensure public information and community involvement; and (5) with the

Heather C. McLaughlin

November 4, 2010

Page 3

environmental consultant selected by the City, develop and negotiate a clean-up plan that will (i) remediate contaminants to levels protective of human health and the environment while allowing uses consistent with present zoning and future development plans, (ii) ensure preservation of historic structures and areas, and (iii) allow redevelopment consistent with the City's Lower Arsenal Mixed Use Specific Plan.

We are prepared to assume the lead role in communications and negotiations with DTSC, Army, and the other responsible parties, taking point on all tasks in the scope of work. We defer, however, to the client on how much of a role the City wants us to take and how aggressively they want us to assert the client's positions. Having worked extensively with and for state and local agencies, we are sensitive to the fact that everything we do and how we do it reflects on the City of Benicia and its elected officials. Nonetheless, one of the reasons clients turn to us is because of our direct and, if necessary, aggressive style, which is always well supported by law and fact and, in the case of environmental cleanups, policy and regulation.

#### Organization, Management, Team Members and Qualifications

Thomas Whitelaw & Tyler LLP is a small litigation boutique and trial law firm. It represents business, industry, property owners, and municipalities in all types of matters and disputes, including environmental. We have offices in San Francisco and Irvine (Orange County). Christopher Keele will handle this engagement. Chris is resident in the San Francisco office, and will be lead outside counsel and day-to-day contact. It is likely he will be the only attorney working on this matter for the City. Chris's bio is enclosed.

We also contemplate utilizing a paralegal, to a limited extent, primarily for retrieval and compilation of pertinent documents, deliverables and historic records.

Chris has practiced environmental law for over twenty five years. In the mid 1980s, he helped start one of the first environmental law departments at a major law firm in Chicago (Wildman Harrold Allen & Dixon). In 1991, he moved to California to start the environmental and land use practice in Morrison & Foerster's Palo Alto office. He has focused much of his energy and effort on representing responsible parties in their efforts to avoid and mitigate liability under the federal "Superfund" statute, CERCLA, and its state counterparts (including the California Health and Safety Code). In addition, Chris has led teams of lawyers and consultants to develop and negotiate investigation, characterization and cleanup plans and agreements at all types of sites, including oil reclamation facilities, high tech facilities using (and disposing of) solvents and inorganics, coal gas facilities with coal tar contamination, and rail yards and other former industrial areas with heavy metal and hydrocarbon pollutants. Chris has extensive experience analyzing, assessing and negotiating every conceivable type of environmental instrument, including administrative orders and consent decrees, IS&E orders, health risk assessments, Remedial Investigations/Feasibility Studies, Engineering Evaluations/Cost

Analyses, Remedial Action Plans, Public Participation Plans, and land use covenants and Institutional Controls.

Chris was one of the early leaders in the area of Brownfields development and rehabilitation and reuse of contaminated properties, having successfully negotiated three of the first Prospective Purchaser Agreements with U.S. EPA Region 9 in San Francisco. He also served on an advisory committee to then California treasurer Phil Angelides for creation of the state Brownfields financing program.

Chris also has both professional and community experience in land use, zoning, and municipal planning and redevelopment. Chris has guided clients through environmental assessments and CEQA compliance, and he has instigated and defended challenges to projects under CEQA. As a member of the City of Burlingame Planning Commission for four years, Chris analyzed in-fill development projects and provided opinions and made decisions about the environmental impacts from same. This experience will be particularly helpful and valuable in representing the City of Benicia in the Arsenal Investigation and Cleanup Project, given the importance of the Lower Arsenal Mixed Use Specific Plan in the City's objectives.

#### Capacity for this Work

The present time is perfect for Chris to commit time, attention and energy to the City on this matter. He has recently completed several large litigation matters, and therefore has no conflicts or impediments to his devoting whatever time, attention and energy this matter requires. He is developing and marketing a new legal services model to the California business community, but this effort is flexible and would not take priority over the Arsenal project or representation of the City.

#### Tasks within Scope of Work

We envision performing the following specific tasks within the scope of work described above:

#### **Compile and review pertinent documents, plans, reports, correspondence etc., including:**

- > Army's Archive Search Report (St. Louis District), 1994
- > Army's Archive Search Report Supplement, 1997
- > Records Research Report, 1998
- > DTSC letter to Army dated September 9, 2009, and the "Final Removal Action Work" Plan referenced therein.

- > DTSC and California Regional Water Quality Control Board (“RWQCB”) correspondence and comments on technical reports on the Army’s investigation and cleanup activities.
- > DTSC – Army correspondence and communications.
- > Lower Arsenal Mixed Use Specific Plan and Draft EIR (LSA, Aug. 2009) for same.

DELIVERABLE: index of same, with brief summary of material information contained in each.

This first task is critical. Our objective will be to investigate and ascertain historic uses and operations, including ownership of same, which resulted in the release of hazardous substances, including munitions and unexploded ordnance, so that we may develop the City’s case of who is responsible for the discharge of contaminants for which further investigation and cleanup activities are necessary. This will be crucial to our ability to convince DTSC which parties are responsible for what contamination.

**Communicate and collaborate with the City Attorney and her staff to discuss status, schedule and legal strategy.**

DELIVERABLE: Memorandum to client (mayor and council?) outlining same.

**Communicate and collaborate with the selected environmental consultant (and City representative[s]) to discuss status, schedule and scientific and technical strategy.**

DELIVERABLE: Memorandum to client (mayor and council?) outlining same.

**In collaboration with the client, develop the City’s positions (primary and secondary) on ‘pivotal’ issues:**

- > scope and timing of additional investigation, characterization and cleanup
- > other parties, not the City, should pay for same
- > who should perform same?
- > City’s role, if any, in this process, including in land use covenants and Institutional Controls
- > coordination of same with plan and objectives of the Lower Arsenal Mixed Use Specific Plan

- > develop and implement public information and participation plan to ensure public input at every stage of process

DELIVERABLE: Memorandum to client (mayor and council?) outlining same.

**Develop and implement strategy for communicating and negotiating the City's positions with Army, DTSC, property owners, and, perhaps most importantly, the public.**

- > written communications (correspondence and reports)
- > public meetings, notices and fact sheets
- > meetings with responsible parties and regulators; face-to-face negotiations
- > draft voluntary consent agreement and ancillary agreements (including access, testing and operations & maintenance ("O&M") agreements with owners of affected properties)
- > provide oversight on preparation of technical deliverables and review and comment on drafts of same (see DRAFT I&SE Determination and RA Order, ¶¶ 5.2, 5.5, 5.6, 5.7, 5.8, 5.10, 5.11).<sup>2</sup>

DELIVERABLES: see above.

Our focus here will be, with factual support and through advocacy, to convince DTSC and the other parties (especially the Army) that parties other than the City are responsible for these conditions and hence should pay all response costs (investigation and remediation).

Proposed Project Schedule

We understand that time is of the essence. We suggest engaging in a concentrated effort starting immediately, and proceeding as expeditiously as circumstances (and the other parties) allow. Using the "Calendar" in DRAFT I&SE Determination and RA Order (*see* ¶ 6.25) as guidance, and based on our experience in these types of projects (namely, about inherent delays, stops & starts, etc.), we anticipate this project will realistically take at least one full year to

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<sup>2</sup> Our work with the environmental consultant selected by the City to help prepare investigation and remediation deliverables would effectively be in an oversight role and as "point" between the City and other parties, including DTSC, to ensure compliance with regulatory requirements and terms of the voluntary agreement or an IS&E order.

complete. This means comprehensive investigation of contaminated areas, assessment and selection of remedial alternatives, and commencement of implementation of a final Remedial Action Plan will likely happen no earlier than December 2011.

#### Proposed Budget and Fee/cost Arrangement

We propose that our work for the City be performed on a capped fee basis, with additional performance-based enhancers in this arrangement.

#### *Monthly Capped Fee*

We propose that the City engage us for a capped fee of \$16,000/month. This fee amount does not include out-of-pocket expenses and costs (e.g., copies, fax, overnight express, first class mail), which we will charge without mark-up or premium. We will not charge for mileage to-from Benicia, Sacramento, or other locations in Northern California where this engagement may require us to go.

Chris Keele's hourly billing rate is \$400. If the \$16,000 monthly flat fee is viewed in light of Chris's hourly rate, then this amount contemplates that Chris will spend 40 hours per month on this matter. Our experience tells us that during certain months, Chris will be required to spend well over 40 hours per month. For these months, we will not charge the City any fees over \$16,000. In other months, Chris will spend less than 40 hours. In these months, the City will pay only for those hours actually spent and billed. (Note, in recording his time for these calculations, Chris will not include [and hence not "bill"] travel time, that is, time spent driving to-from Benicia, Sacramento, etc.).

#### *Fee enhancers based on success at certain milestones*

Successful negotiation of a voluntary consent agreement with DTSC, Army and other responsible parties (e.g., former and current property owners) to investigate and characterize, and implement remedial action plan, at sole expense of other parties, including U.S./Dept. of Defense/Army (not the City): \$10,000.

- ➔ If a favorable voluntary consent agreement is executed by all parties within 60 days of engagement: an additional \$5,000.
- ➔ Negotiation of a favorable I&SE order where DTSC imposes sole responsibility and liability on Army (and others) not including the City, i.e., City is not named as a "Respondent" of any degree: \$5,000.

*Exclusions*

This budget and cost proposal does not contemplate or include litigation that the City may initiate to recover response costs from responsible parties. We are certainly qualified and prepared to handle such litigation, and would look forward to doing so for the City, but such action is outside the scope of this submittal and is the subject of a separate proposal.

References, Related Experience, Etc.

*References*

Michael Martello (former City Attorney) [408.354.6818 or 650.450.7267], Jannie Quinn (current City Attorney) [650.903.6303], Kevin Woodhouse (assistant to the City Manager) [650.903.6215], City of Mountain View.

Bruce Scarbrough, Stantec (formerly SECOR International) [925.299.9300].

David Anderson, California Department of Water Resources [916.653.5791].

Stan Meyers, SEMI [408.943.6900].

Paul Meyer, Legacy Partners [650.571.2200].

*Related Experience*

Chris has extensive front line experience with negotiation of voluntary cleanup and cost allocation agreements involving federal and state regulatory agencies and private parties, investigation and cleanup decrees and orders, public participation plans, and operations & maintenance programs and institutional controls.

State investigation and cleanup orders and consent decrees (both DTSC and RWQCB):

- > Former municipal landfill at Sierra Point (Brisbane and South San Francisco)
- > Former PG&E power station and Southern Pacific rail yard (metal recycling facility) on Sacramento River (Sacramento)
- > Former PG&E coal gas facility (Grass Valley, California)
- > Former Hercules Powder Works plant (Hercules, California)
- > Hillview Porter/Watkins Johnson solvent site (Palo Alto)

> Former AmeriPride industrial laundry facility site (Sacramento)

Federal remedial investigation/feasibility studies, remedial action plans, and cleanup orders and decrees (U.S. EPA):

> MEW Superfund site (Mountain View)

> Former municipal landfill at Monterey Park (Monterey Park, California)

> South Bay Asbestos Area site (San Jose)

> MEW site vapor intrusion plan (Mountain View)

#### Willingness to Comply with Proposed Agreement Terms

We are willing and able to comply with the City's "Policy Guide for Law Firms Providing Legal Services to the City of Benicia" as well as its form "Attorney Services Agreement," with the following single exception: ¶ 3.1 Compensation. Our proposal contemplates total compensation in excess of \$5,000.00 for this engagement.

#### Other Observations

The City enjoys the unique position of having its interests aligned to a certain extent with those of the lead regulatory agency, DTSC. Both the City and DTSC want this investigation and remediation process, including meaningful public participation, to start and finish as quickly as possible. This alignment of interests could be used to the City's advantage by allowing it to forge a beneficial and productive relationship with DTSC. The City can and perhaps should sit on the same side of the table with DTSC vis-à-vis other responsible parties, especially the Army.

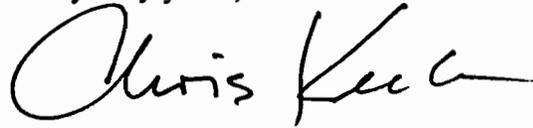
To the extent it has not done so, the City should consider approaching U.S. EPA for federal involvement, including funding, for this investigation and cleanup. The Army is obligated to comply with the National Contingency Plan and other federal regulatory requirements under the FUDS program. To the extent it has not done so and refuses to do so, EPA can and should step in to perform or control response activities, particularly given the fact there are privately-owned sites that require action.

The City should carefully assess, as reported in certain press accounts of observations by City officials, whether it can and should take a lead role in performing the investigation and cleanup, and then seek reimbursement for its costs. Our experience tells us these activities are extensive, time consuming, labor intensive, and usually beyond the resources and outside of the role of city government.

Heather C. McLaughlin  
November 4, 2010  
Page 10

Again, thank you for considering this proposal. I am very excited at the opportunity to work with you and the City of Benicia on the Arsenal Investigation and Cleanup Project. I look forward to hearing from you.

Very truly yours,

A handwritten signature in black ink that reads "Chris Keele". The signature is written in a cursive style with a long horizontal stroke at the end.

Christopher A. Keele

97549



# THOMAS WHITELAW

CHRISTOPHER A. KEELE  
PARTNER

Chris Keele is a veteran trial lawyer with over 25 years experience in the courtroom. He has represented business, industry, state agencies, not-for-profits and individuals in all types of civil litigation. His practice covers a broad spectrum of areas, including environmental, product liability, toxic tort, securities and accounting fraud, unfair business practices, breach of contract, and real estate, partnership and other complex business disputes.

Mr. Keele joined Thomas Whitelaw as the managing partner of the San Francisco office in 2007. Prior to joining the firm, he was the managing partner of Stoel Rives LLP's California offices. He practiced at Stoel Rives and its California predecessor, Washburn Briscoe & McCarthy, beginning in 1993. Prior to that, he was an associate at Morrison & Foerster in its Palo Alto office.

Mr. Keele began his career as an intern in the felony and capital crimes division of the Marion County prosecutors office in Indianapolis. He has practiced in small and large firms, in both Chicago and the Bay Area.

## Representative Cases

- *Karis v. Entelos, Inc.* (Cal. Sup. Ct., San Mateo County): Represent Entelos against claims of wrongful termination and labor code violations.
- *Menlo Business Park, et al. v. PharmChem, et al.* (Cal. Sup. Ct., San Mateo County): Represented owners of a business park in an action arising out of tenant's alleged waste and misuse of real property and breach of lease from operation of a chemical analysis laboratory on client property. On the eve of trial, the case resolved on terms favorable to the client, with client receiving a substantial settlement.
- *State of California v. Anna Ayala, et al.* (Cal. Sup. Ct., Santa Clara County): Represented fast food purveyor Wendy's in food contamination case where customer planted severed finger in a bowl of chili as part of a scheme to blackmail Wendy's. Worked with law enforcement authorities and district attorney to gather facts to establish conspiracy on part of customer and husband, resulting in criminal action, guilty pleas and significant jail

sentences for both. Helped client mitigate financial losses from adverse publicity through design and implementation of sophisticated public relations plan.

- *Wall Street Network, Ltd. v. Clickbank* (C.D. Cal.): Represented Internet retailer of digital products that developed web-based system for online advertising. Defended client in breach of contract and fraud action, under which plaintiff claimed to have marketed products via client's online advertising network. Case settled on terms favorable to client on eve of trial.
- *Tera Power Company, et al. v. State of California (Department of Water Resources)* (Cal. Sup. Ct., San Francisco County): Lead trial counsel for defendant State of California Department of Water Resources. Case arose out of DWR's termination of a thirty-year contract for wind energy from a facility in Altamont Pass. After a nine-week trial, jury returned defense verdicts on all claims.
- *Perry Wells v. Rockwell Automation, Inc.* (Cal. Sup. Ct., San Francisco County): Lead trial counsel for defendant in product liability litigation. After a four-week trial and one day of deliberation, the jury returned a defense verdict.
- *John Wells v. Rockwell Automation, Inc.* (Cal. Sup. Ct., San Francisco County): Lead trial counsel for defendant in product liability litigation. After a four-week trial and one day of deliberation, the jury returned a defense verdict.
- *United States v. Clark Equipment Company* (M.D. N. Car.): Represented forklift truck manufacturer in CERCLA enforcement action. Defended claims brought by U.S. Department of Justice and EPA that client generated oils with heavy metals that were disposed of at North Carolina oil reclamation facility. Case settled on terms favorable to client on eve of trial.
- *Siltec Corporation v. General Instrument Corporation* (N.D. Cal.): Represented silicon wafer manufacturer in environmental cost recovery action against previous owner-operator of facility in Silicon Valley. Solvent contamination of groundwater was primary injury. After discovery, parties reached settlement favorable to client.
- *Fairchild, et al. v. Siltec Corporation, et al.* (N.D. Cal.): Defended silicon wafer manufacturer in environmental cost recovery action by downgradient property owners for alleged groundwater contamination. After discovery and mediation, parties settled on terms favorable to client.
- *West County Landfill v. Mitsubishi Silicon America* (N.D. Cal.): Defended silicon wafer manufacturer in private cost recovery action. Owner-operator of sanitary landfill brought contribution claims against generators of hazardous waste disposed of at the landfill. Established that client was *de minimis* generator and, on that basis, negotiated favorable settlement for client.
- *State of California (Department of Toxic Substances Control) v. Hyampom Lumber Company, et al.* (E.D. Cal.): Represented major bank, which held security interest in

property contaminated with lumber operations waste. Obtained summary judgment for client based on statute of limitations defense.

- *State of California (Department of Water Resources) v. Pacific Gas & Electric, et al.* (E.D. Cal.): Represented California Department of Water Resources in environmental action against entities that previously owned and operated a power plant (and later a metal recycling facility) on the Sacramento River. Action included claims against railroad, which operated rail yard adjacent to power plant. After discovery and mediation, matter settled on terms very favorable to the State.
- *Calcot, Ltd. v. Insurance Companies* (Cal. Sup. Ct., Fresno County): Represented cotton cooperative in coverage litigation seeking recovery of defense costs for lawsuit claiming client owned property that was source of groundwater contamination and degradation of drinking water source. After discovery and mediation, matter settled on terms very favorable to client.

### **Practice Areas**

Trials, Product Liability, Environmental Litigation, Complex Business Litigation

### **Honors**

Mr. Keele is a Fellow of the Litigation Counsel of America, a Trial Lawyer Honorary Society

He has been selected for inclusion in both the Northern California and Corporate Counsel editions of *Super Lawyers* the past several years.

### **Speaking Engagements**

Mr. Keele is a frequent lecturer on trial strategies and courtroom advocacy.

### **Admissions**

State Bar of California  
All United States District Courts in California.

### **Education**

Mr. Keele graduated with honors from Wabash College in Crawfordsville, Indiana. In 1984 he received his JD from Indiana University School of Law in Bloomington, where he was Executive Editor of the *Indiana Law Journal*.