

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

**STAFF SUMMARY REPORT
STAFF: Stephen Morse
MEETING DATE: March 17, 2004**

ITEM: 5. I.

SUBJECT: Authorizing the Executive Officer to Sign a Mutual Release and Covenant Not to Sue With Arrowhead Marsh LLC, a Delaware Limited Liability Company, for the Former Port of Oakland Overflow Parking Lot, Pardee Drive & Swan Way, Oakland, Alameda County – Adoption of Resolution

CHRONOLOGY: Not previously considered by the Board

DISCUSSION: The Port of Oakland has found that the former Oakland Airport Overflow Parking Lot at Pardee Drive and Swan Way (Property) is no longer needed for their airport plans. The 35-acre Property will be sold by the Port to Arrowhead Marsh LLC for commercial / industrial use. Due to site conditions identified during due diligence investigations, Arrowhead has requested that the Board enter into a Mutual Release and Covenant Not to Sue (“Mutual Release”, interchangeably called a Prospective Purchaser Agreement or “PPA”).

During due diligence investigations, low-level soil and possible groundwater contamination was identified beneath the Property. The low-level contamination is the result of uncharacterized fill from many sources utilized for filling the Property’s previous marsh areas during the 1970s. This situation is typical of fill from urban sources and is often found around the edges of the Bay where marshland has been historically filled for development. No specific sources of the Property’s fill are known. No other use other than as a marsh or as a parking lot has been made of the Property. The due diligence investigations demonstrated that soil is contaminated with some low concentrations of various constituents that can be left in place and, with proper management, will not affect public health or the environment.

Arrowhead Marsh LLC intends to purchase the Property on or about March 29, 2004, and, with further permitting, develop commercial buildings for small to medium-sized business as opportunities develop.

Arrowhead Marsh LLC seeks a commitment from the Board that Arrowhead, and its members, officers, partners, successors, etc. will not be named as dischargers (or responsible parties) in a Board enforcement order with regard to existing known conditions of contamination solely by virtue of being involved in the purchase and redevelopment of the Property. Specifically, Arrowhead requests that the Board issue a Mutual Release to the Buyer for the Property. Without this assurance from the Board, Arrowhead states that it will not be able or willing to complete the purchase and redevelopment of the Property.

The Port, who has land-use control, has approved the Property’s project and sale. Redevelopment of the Property would have economic and social benefits to the local community and to the public at large. The proposed redevelopment will provide increased jobs and payroll, real estate and income taxes accruing to the State and locality. The project would also exemplify productive reuse of a Bay Area Brownfields property.

Mutual Releases or PPAs are one tool the Board has to prevent or eliminate “Brownfields” (i.e., sites not being developed or redeveloped from the fear or perceived fear of pollution liability), where it is in the public interest. This proposed use of a PPA fits within the State Board’s guidelines for the use of PPAs. Over the past seven years, this Board has authorized

PPAs for thirteen redevelopment sites. This draft PPA is consistent with prior PPAs approved by the Board.

The Tentative Resolution and attachments (Appendix A) would authorize the Executive Officer to enter into an agreement with Arrowhead Marsh LLC for a mutual release and a covenant not to sue (i.e., "PPA"). A PPA essentially releases Arrowhead and *future* owners from liability from Board-ordered cleanup of the site for the known existing pollution. The Port remains liable for the known existing pollution, even after the PPA is executed, although Board staff does not expect to require any remediation at this time.

Staff recommends that the Board authorize the Executive Officer to finalize negotiations and enter into a PPA with Arrowhead Marsh LLC. Staff finds that the benefits are significant; the risk of default by the Port is minimal; the site has been investigated enough to determine that, with minimal management, human health, the environment, and water quality are protected, and that with the implementation of the required deed restrictions and soil management plan, residual risks are insignificant. We have received some minor comments and recommendations on the Tentative Resolution, Attachment, and Exhibits from the State Department of Toxic Substances Control, the Port, and Arrowhead, and have made changes to reflect all their concerns. At this time, there is no known opposition to this PPA and no testimony is expected.

**RECOMM-
ENDATION:**

Adoption of the Tentative Resolution

FILE NO.:

01S0599 (SIM)

APPENDIX:

A: Tentative Resolution

Attachment: Mutual Release and Covenant Not to Sue

Exhibit A. Property Legal Description

Exhibit B. Soil Management Plan (*contact Derek Whitworth for review*)

Exhibit C. Covenant and Environmental Restriction on Property

Exhibit D. Written Instrument of Release and Transfer Document

Project Location Map

APPENDIX A