



SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: July 14, 2026

Item Number: 24a

Item Description: Resolution Reinstating the Berkeley Police Department's Ability to Use Tear Gas for Critical Life-Threatening Incidents Only and Lifting the COVID-19 Moratorium on Smoke and Oleoresin Capsicum (OC) Spray

Submitted by: Katherine Lee, Interim Director of Police Accountability

The Police Accountability Board hereby submits its position on reinstating the BPD's authority to use chemical agents.



MEMORANDUM

Date: January 26, 2026
To: Honorable Members of the Public Safety Policy Committee (PSPC)
From: Police Accountability Board (PAB)
Subject: Proposed Resolution to Reinstate Berkeley Police Department's Use of Tear Gas and Related Chemical Agents

I. Purpose

This memorandum sets forth the Police Accountability Board's (PAB or Board) position regarding the proposed resolution to reinstate the Berkeley Police Department's (BPD) authority to use tear gas in limited circumstances and to lift the moratorium on smoke and oleoresin capsicum spray (collectively referred to as chemical agents).

II. Threshold Question: Necessity of Reinstatement

Based on the materials presented, the Board finds it unclear why reinstating chemical agent authority is necessary at this time. The sponsoring materials acknowledge that chemical agents have been used by BPD only three times over several decades, all in rare, high-risk scenarios, at least some of which created significant liability for the City of Berkeley¹. Given this limited historical use, the board questions whether reinstatement meaningfully enhances public safety, or whether it reintroduces a tool associated with significant community concern for marginal operational benefit.

¹ In 2014, for example, the BPD, assisted by multiple mutual aid agencies, responded to a large Black Lives Matter–related protest and ultimately ended up using significant amounts of CS tear gas to disperse crowds. Following an extensive independent investigation, the Berkeley Police Review Commission concluded that BPD's response was inadequately planned and overly focused on crowd control rather than crowd management, resulting in excessive and poorly coordinated uses of force that affected peaceful demonstrators, bystanders, media, and nearby residents; the Commission found that baton strikes and tear gas were at times indiscriminate, dispersal orders were confusing or impossible to comply with, and accountability was undermined by failures to track munitions use and preserve communications. The incident led to multiple federal civil rights lawsuits alleging violations of the First and Fourth Amendments, including claims by protesters and journalists injured by baton strikes and tear gas; in 2017, the City of Berkeley settled the principal consolidated case for **\$125,000 paid to seven plaintiffs**, while a related case against the City of Hayward arising from its mutual-aid role was resolved for an undisclosed amount. Police Review Commission Report "Report of Investigation Into the Response to Protest on December 6, 2015:" <https://berkeleyca.gov/sites/default/files/2026-01/2015-12-01-Item-32a-Report-of-Investigation.pdf>

[Government Code sections 7070 through 7073](#) (AB 481), enacted after the City Council's 2020 action barring the use of chemical agents, classify tear gas as "military equipment." These provisions require governing bodies, prior to approving a military equipment use policy, to determine that such equipment is necessary because no reasonable alternative exists to achieve the same objective. Given the historically limited deployment of chemical agents by BPD and the absence of any documented need since the 2020 ban, the Board questions whether this statutory necessity finding can be met.

III. If Advanced, Authorization Must Be Narrow and Explicitly Anchored in State Law

If the Public Safety Policy Committee, and ultimately the City Council (council) elects to advance the proposal notwithstanding the baseline question of necessity, the PAB recommends that any authorization be narrowly framed and explicitly bounded. It also must be grounded directly in [California Penal Code section 13652](#), which governs the use of chemical agents, and in the processes required by [BMC 2.100](#) and AB 481 which establish requirements for approval of use policies for chemical agents.

As amended and effective January 1, 2026, Penal Code section 13652:

- Prohibits the use of tear gas and other chemical agents to disperse assemblies, protests, or demonstrations, except under strictly limited circumstances.
- Permits use only when it is objectively reasonable to defend against a threat to life or serious bodily injury, or to bring an objectively dangerous and unlawful situation safely under control.
- Requires that de-escalation and alternatives to force be attempted first, when objectively reasonable.
- Mandates repeated audible warnings in appropriate languages, reasonable opportunities to disperse, and targeted use toward individuals engaged in violent acts.
- Requires proportionality, minimization of harm to bystanders and journalists, efforts to extract individuals in distress, and prompt medical assistance.
- Prohibits use targeted to the head, neck or vital organs; to enforce a curfew; or in response to a verbal threat or noncompliance with a law enforcement directive.
- Limits authorization of chemical agents to a commanding officer at the scene.
- Expressly allows local jurisdictions to adopt more stringent limitations than those imposed by state law.

Accordingly, any Berkeley policy reinstating chemical agents should, at a minimum:

- Mirror the statutory standards.

- In contrast to the broad scope of allowable use reflected in Councilmember Kesarwani's proposed resolution, be confined to clearly defined tactical incidents, such as barricaded or hostage situations, and exclude civil unrest or First Amendment-protected activity without exception.
- Affirm Berkeley's authority to impose stricter local limits consistent with community expectations and accountability norms.

In addition, BMC 2.100 and AB 481 establish procedural requirements governing the authorization and use of tear gas and related chemical agents classified as military equipment. Prior to authorizing use, a law enforcement agency must submit a publicly posted military equipment use policy for governing body approval addressing the equipment's authorized purposes and uses, fiscal impacts, applicable legal and procedural rules, training requirements, and oversight mechanisms. If approved, the policing agency must report annually to the City Council and the public on the use of such equipment.

IV. Accountability and Review

Given the sensitivity of chemical agent use and Berkeley's history in this area, the Board further recommends that any reinstatement include a requirement for after-action notice to the Police Accountability Board and City Council. In addition, the Board should be authorized to conduct periodic assessments of BPD's compliance with Penal Code section 13652, BMC 2.100, and AB 481.

V. Conclusion

The PAB questions the need to reinstate BPD's authority to use chemical agents given their historically low deployment rate. If the proposal to reinstate is advanced, the Board urges that authorization be narrow, explicitly tethered to Penal Code section 13652, BMC 2.100, and AB 481, and accompanied by strong accountability mechanisms consistent with Berkeley's commitment to civil liberties, proportionality, and public trust.