



FORT ORD REUSE AUTHORITY

SPECIAL MEETING

FORT ORD REUSE AUTHORITY (FORA) BOARD OF DIRECTORS

Thursday, February 13, 2020 at 2:30 p.m. | 910 2nd Avenue, Marina, CA 93933 (Carpenters Union Hall)

AGENDA

1. CALL TO ORDER

2. PLEDGE OF ALLEGIANCE *(If able, please stand)*

3. ACKNOWLEDGEMENTS, ANNOUNCEMENTS, AND CORRESPONDENCE

4. ROLL CALL

FORA is governed by 13 voting members: (a) 1 member appointed by the City of Carmel; (b) 1 member appointed by the City of Del Rey Oaks; (c) 2 members appointed by the City of Marina; (d) 1 member appointed by Sand City; (e) 1 member appointed by the City of Monterey; (f) 1 member appointed by the City of Pacific Grove; (g) 1 member appointed by the City of Salinas; (h) 2 members appointed by the City of Seaside; and (i) 3 members appointed by Monterey County. The Board also includes 12 ex-officio non-voting members.

5. BUSINESS ITEMS

INFORMATION/ACTION

*BUSINESS ITEMS are for Board discussion, debate, direction to staff, and/or action. Comments from the public are **not to exceed 3 minutes** or as otherwise determined by the Chair.*

- a. Nomination of City of Seaside as FORA Successor to Environmental Services Cooperative Agreement ("ESCA") and Local Redevelopment Authority ("LRA")/Economic Development Conveyance ("EDC") Agreement with US Army.

Recommendation:

1. Receive report on refinements to the ESCA-LRA/EDC Successor Implementing Agreement.
2. Authorize Executive Officer to execute ESCA-LRA/EDC Successor Implementing Agreement.

- b. 2018 Transition Plan Implementation **2nd Vote**

- i. Assignment of; a) FORA-ESCA contract obligation to Successor-In-Interest City of Seaside, b) Economic Development Conveyance ("EDC") Memorandum of Agreement and c) Local Redevelopment Authority ("LRA") Obligations and Responsibilities.

Recommendation:

1. Receive a report regarding the FORA Federal government LRA obligations, including the implementation of the June 11, 2000 EDC agreement, and the March 2007 ESCA Agreement.
2. Approve the attached Memorandum of Agreement with the City of Seaside regarding its acceptance of FORA's obligations under the EDC and ESCA and designation as federal recognized LRA.

6. PUBLIC COMMENT PERIOD

INFORMATION

*Members of the public wishing to address the Board on matters within its jurisdiction, but **not on this agenda**, may do so for up to 3 minutes or as otherwise determined by the Chair and will not receive Board action. Whenever possible, written correspondence should be submitted to the Board in advance of the meeting, to provide adequate time for its consideration.*

7. ITEMS FROM MEMBERS

INFORMATION

Receive communication from Board members as it pertains to future agenda items.

8. ADJOURNMENT

NEXT MEETING: Thursday, March 12, 2020 AT 2:00 P.M.

FORT ORD REUSE AUTHORITY BOARD REPORT

BUSINESS ITEMS

Subject:	Economic Development Conveyance/ Local Redevelopment Authority Successor Designation	
Meeting Date:	February 13, 2020	INFORMATION/ACTION
Agenda Number:	5a	

RECOMMENDATION(S):

1. Receive report on refinements to the ESCA-LRA/EDC Successor Implementing Agreement.
2. Authorize Executive Officer to execute ESCA-LRA/EDC Successor Implementing Agreement.

BACKGROUND/DISCUSSION:

Staff and FORA's legal team were directed by the Board at its January 10, 2020 meeting to provide clarifying language for its review to the proposed FORA and City of Seaside Environmental Services Cooperative Agreement ("ESCA") and Local Redevelopment Authority ("LRA") / EDC Agreement - Successor Implementing Agreement (hereinafter "the Agreement"). The Executive Officer, FORA's legal team, and RGS consultant staff met with representatives from member agencies to identify key areas of concern and develop language to address them in conjunction with the Kutak-Rock legal team.

The Agreement was then vetted at the FORA Administrative Committee at its regular meeting on February 5, 2020 and a continuation of that meeting at 10:30am, February 6, 2020, at which time they recommended Board approval of the Agreement with following modifications:

- 1) Global change to the document title from "Economic Development Agreement" to "Economic Development Conveyance (EDC Agreement)";
- 2) Global change from "Memorandum of Agreement ("MOA") to "EDC Agreement";
- 3) Changes to paragraph 2.0 and throughout the document to "nominate" Seaside as the successor the EDC and LRA.
- 4) Section 3.0 Insurance Policies. FORA will request the transfer of its two pollution legal liability insurance policies and limits to Seaside. FORA shall also transfer any self-insured retention funds to Seaside to be used exclusively for ESCA and claims-related obligations. Seaside acknowledges that these insurance policies will expire in 2022 and 2024, respectively, and that Seaside's designation will be subject to approval by the insurers. Seaside's successful designation through December 31, 2024 is a condition precedent to becoming FORA's ESCA successor. Pollution legal liability insurance will be required by the ESCA from 1 January 2025 through no earlier than 30 June 2028, a requirement to be funded by the Army.

- 5) Section 8.4 No Obligation of Other Entities. Monterey Peninsula Community College District, the Board of Trustees of the California State University (on behalf of the Monterey Bay campus), the County of Monterey, the Cities of Del Rey Oaks, Marina and Monterey, the Marina Coast Water District (hereinafter collectively "Grantees"), will not be a party to the ESCA, and will not bear any financial liability as a result of the ESCA.
- 6) Section 9.0 establishes the following:
 - i. Water Rights Allocations. Until such time as such allocations may be amended by agreements, Seaside agrees to honor and abide by the water rights' allocations set forth in Exhibit A attached hereto, for Government Water Rights as defined in Subsection 5.02 of the EDC Agreement, that may be released by the Government in the future, subject to compliance with all applicable laws.
 - ii. Wastewater Discharge Rights. Until such time as such allocations may be amended by future agreements, Seaside agrees to establish and apply, in consultation with Grantees, pursuant to Section 5.04 of the EDC Agreement, a fair process to ensure that all Grantees will enjoy equitable utilization of Wastewater Discharge Rights that may be released by the Government in the future, subject to compliance with all applicable laws.
 - iii. Creates No Land-Use Authority. Nothing in this Agreement, nor Seaside's designation as the local redevelopment authority or as FORA's successor under the ESCA or EDC Agreement creates in Seaside any land-use decision-making authority with respect to any land not within Seaside's City limits. Further, Seaside shall not require that any land-use decisions of other entities be in compliance with the Fort Ord Base Reuse Plan.
 - iv. Seaside shall not require payment of any sale or lease proceeds or revenues (or the equivalent use of property such as licenses, permits, concession agreements etc.), from other entities for the transfer of property, water rights, or wastewater discharge rights received from the Army pursuant to the EDC Agreement.
- 7) Section 22. Third-Party Rights. The Grantees are intended to be third-party beneficiaries of this Agreement as it relates to future transfers of property, water rights, and wastewater discharge rights pursuant to the EDC Agreement, and shall have the right to enforce the provisions hereof as if they were direct parties hereto. Nothing in this Agreement is intended to confer upon any individual or entity, other than the Parties and the above-identified third-party beneficiaries, any rights or remedies whatsoever.

FISCAL IMPACT:

None.

COORDINATION:

Authority Counsel, Administrative Committee, Executive Committee, FORA Board, FORA Special Counsel

ATTACHMENTS:

- A. DRAFT Fort Ord Reuse Authority and City of Seaside Environmental Services Cooperative Agreement (ESCA) and Local Redevelopment Authority (LRA)/Economic Development Conveyance Agreement (EDC Agreement) Successor Implementing Agreement v.7 (*Updated as of February 7, 2020*).

Prepared by and Approved by:



Joshua Metz

1 **FORT ORD REUSE AUTHORITY AND CITY OF SEASIDE**
2 **ENVIRONMENTAL SERVICES COOPERATIVE AGREEMENT (ESCA) AND**
3 **LOCAL REDEVELOPMENT AUTHORITY (LRA)/ECONOMIC DEVELOPMENT**
4 **CONVEYANCE AGREEMENT (EDC AGREEMENT)**
5 **SUCCESSOR IMPLEMENTING AGREEMENT**
6

7 **RECITALS.**
8

9 **WHEREAS**, the Fort Ord Reuse Authority (“FORA”) is a regional agency and a
10 Corporation of the State of California established under California State Law Government
11 Code Sections 67650, et seq., to plan, facilitate and manage the transfer of former Fort Ord
12 property and is acknowledged as the federally recognized local reuse authority for property
13 transfers from the Army, to the governing local jurisdictions or their designees.
14

15 **WHEREAS**, the City of Seaside, California (“Seaside”), is a general law Municipal
16 Corporation of the State of California.
17

18 **WHEREAS**, FORA and Seaside are each a “Party”, and together the “Parties” to this
19 Agreement.
20

21 **WHEREAS**, Fort Ord, California was placed on the National Priorities List
22 (Superfund) in 1990 due to leaking underground storage tanks, contaminated groundwater
23 and a 150-acre landfill.
24

25 **WHEREAS**, in 1990, the Army executed a Federal Facility Agreement (“FFA”) under
26 CERCLA Section 120 outlining the Army’s Comprehensive Environmental Response,
27 Compensation, and Liability Act (“CERCLA”) clean up responsibilities with respect to the
28 former Fort Ord. The Army remains responsible for certain actions under that FFA. The
29 FFA was amended on or about July 26, 2007, the effect of which suspends the FFA for
30 FORA’s ESCA obligations so long as FORA or its successors are in compliance with the
31 AOC.
32

33 **WHEREAS**, the former Fort Ord was closed on September 30, 1994 pursuant to and
34 in accordance with the Defense Base Closure and Realignment Act of 1990, as amended
35 (Public Law 101-510; hereinafter referred to as the “Base Closure Act”).
36

37 **WHEREAS**, in accordance with Section 2905(b)(4) of the Base Closure Act, as
38 amended by Section 2821 of the Defense Authorization Act for Fiscal Year 2000, Pub. L.
39 No. 106-65 (1999), and the implementing regulations of the Department of Defense (32
40 CFR Parts 90 and 91), FORA executed an economic development conveyance agreement
41 and acquired portions of the former Fort Ord consisting of approximately five thousand two
42 hundred (5,200) acres of land, including all buildings, personal property, appurtenances,
43 rights-of-way, and drainage areas upon and subject to the terms and conditions of a June
44 23, 2000 Memorandum of Agreement with the United States of America (“EDC
45 Agreement”).
46

47 **WHEREAS**, the EDC Agreement provided for transfers of property in accordance

1 with the Army’s clean-up schedule. Subsequent to the EDC Agreement execution, FORA
 2 and the local communities decided to pursue an early transfer process pursuant to Title 42
 3 United States Code, section 9620(h)(3)(C) in order to expedite the property transfers and
 4 ultimate reuse and economic recovery for the communities affected by the Fort Ord closure.

5
 6 **WHEREAS**, in furtherance of the early transfer process, the Army, with the approval
 7 of the EPA Administrator and the concurrence of the Governor of California, transferred title
 8 of 3,337 acres of munitions impacted Fort Ord property by quitclaim deed to FORA before
 9 all action to protect human health and the environment had been completed. Concurrent
 10 with this transfer without the otherwise required CERCLA covenant mandated by Title 42
 11 United States Code, section 9620 (h)(3), FORA accepted title and agreed to perform the
 12 Army’s environmental remediation with funding from the Army. Excluded from FORA’s
 13 performance obligation are matters related to the groundwater at the former Fort Ord, as
 14 well as other Army responsibilities enumerated in the ESCA and elsewhere.

15
 16 **WHEREAS**, in 2007 an “Administrative Order on Consent (“AOC”) [Docket No. R9-
 17 2007-003] [was] entered into voluntarily by the United States Environmental Protection
 18 Agency (“EPA”), the California Department of Toxic Substances Control (“DTSC”), and the
 19 Fort Ord Reuse Authority. The AOC concerns the preparation and performance of potential
 20 removal actions, one or more remedial investigations and feasibility studies (“RI/FS”) and
 21 one or more remedial designs and remedial actions (“RD/RA”) for contaminants present on
 22 portions of the former Fort Ord located at Monterey, California (“Site”) and the
 23 reimbursement for future response costs incurred by EPA and DTSC in connection with
 24 such CERCLA response actions.”.

25
 26 **WHEREAS**, in 2007 the Army executed an amendment to the Federal Facilities
 27 Agreement.

28
 29 **WHEREAS**, in 2007 the Army and FORA executed an Environmental Services
 30 Cooperative Agreement W9128F 07 2-0162 (“ESCA”) under the authority of Title 10 United
 31 States Code, Section 2701(d) - Environmental Restoration Program (10 U.S.C. 2701)
 32 whereby FORA would perform the Army’s environmental responsibilities as the Army
 33 Response Action Contractor pursuant to Title 42 United States Code, section 9619, with
 34 the Army providing funding to perform these services.

35
 36 **WHEREAS**, the ESCA has been amended several times, the ESCA Mod 9
 37 amendment in 2017 which provided approximately \$6.8 million for Regulatory Oversight
 38 Through 31 December 2019, FORA ESCA Administrative costs during the EPA/DTSC
 39 remedial-completion documentation, property transfer process through 30 June 2020 and
 40 to perform the required long-term land management tasks, including Munitions and
 41 Explosives of Concern (“MEC”) Find Assessments, inspections, enforcement, monitoring
 42 and reporting through June 30, 2028.

43

ESCA Mod. Number	ESCA Contract Line Item Number (CLIN) and Description	Expiration Date	Amount
MOD 09	CLIN 02 – Department of Toxic Substance	31 Dec. 2019	\$745,913

	Control (DTSC) and United States EPA Technical Oversight Services		
	CLIN 03 – FORA ESCA Administrative Funds	30 June 2020	\$1,865,848
	CLIN 04 – Post-Closure MEC Find Assessments	30 June 2028	\$528,651
	CLIN 05 – Long Term/LUCs Management	30 June 2028	\$3,705,792
		Totals	\$6,846,204

1
2 **WHEREAS**, due to changes and delays in the transfer of properties, modifications
3 were made to the ESCA grant leaving post-June 30, 2020 funds available are ESCA CLIN
4 0004 Post Closure MEC Find Assessments \$528,651 and ESCA CLIN 0005 for Long-Term
5 Management and Land Use Control (LUC) management are \$3,705,792 (Totaling
6 \$4,234,443 available from June 30, 2020 through June 30, 2028):
7

ESCA Mod. Number	ESCA Contract Line Item Number (CLIN) and Description	Expiration Date	Amount
	CLIN 04 – Post-Closure MEC Find Assessments	30 June 2028	\$528,651
MOD 09	CLIN 05 – Long Term/LUCs Management	30 June 2028	\$3,705,792
		Totals	\$4,234,443

8
9 **WHEREAS**, in 2018 FORA adopted a Transition Plan as required by State Law that
10 specifies that FORA engage the Successor-in-Interest (“Successor”) provisions of the
11 ESCA contract.
12

13 **WHEREAS**, the Successor assumes responsibility and will be tasked with
14 performing the remaining LTOs under the ESCA, including the recent amendment. It is
15 assumed that all work under the previous \$98,000,000 contract will have been
16 accomplished prior to FORA’s dissolution as evidenced by the 2019 EPA Remedial Action
17 Completion letters, per AOC Section XVII, Certification of Completion, housed in the Army
18 Administrative Record located at: <http://fortordcleanup.com/documents/administrative-record/>.
19
20

21 **WHEREAS**, the City of Seaside is prepared, subject to funding, to assume ESCA
22 responsibility and attendant local reuse authority status, including the execution of the AOC
23 in order to complete the ESCA obligations and any property-related transfer actions
24 required after June 30, 2020.
25

26 *****

27 **NOW, THEREFORE**, the Parties agree as follows:
28

29 1. **Incorporation of Recitals**. The above recitals are hereby incorporated herein by
30 reference.
31

32 2. **Acknowledgement**. FORA agrees to acknowledge Seaside as the ESCA
33 Successor-In-Interest under the 2018 Transition Plan, and nominate Seaside to the

1 Department of Defense as the LRA Successor.

2
3 3. Insurance Policies. FORA will request the transfer of its two pollution legal liability
4 insurance policies and limits to Seaside. FORA shall also transfer any self-insured retention
5 funds to Seaside to be used exclusively for ESCA and claims-related obligations. Seaside
6 acknowledges that these insurance policies will expire in 2022 and 2024, respectively, and
7 that Seaside’s designation will be subject to approval by the insurers. Seaside’s successful
8 designation through December 31, 2024 is a condition precedent to becoming FORA’s
9 ESCA successor. Pollution legal liability insurance will be required by the ESCA from 1
10 January 2025 through no earlier than 30 June 2028, a requirement to be funded by the
11 Army.

12
13 4. ESCA LTO Program Evidence of Fiduciary and Technical Capability. FORA
14 agrees to provide technical and/or financial assistance to Seaside to meet the terms
15 required by the Army, EPA, and DTSC that the Successor be a single entity and
16 demonstrate technical and financial competence to complete the work.

17
18 5. ESCA records and contracts funds. FORA and Seaside shall establish a
19 mechanism for transfer of all ESCA records, back-up documents, computer files and
20 accounting records, and contract funds to Seaside for meeting FORA’s ESCA obligations.

21
22 6. Technical Assistance. FORA agrees to request the Army extend the funding
23 expiration date on any remaining ESCA funds (not dedicated to Post-Closure MEC Find
24 Assessments and Long Term/LUCs Management) for Seaside to provide technical
25 assistance and funding to complete the ESCA transfer process through June 30, 2020,
26 including specialized legal, drafting and other staff or contract support. FORA agrees to
27 establish and fund a pool of monies to support Seaside’s assumption of responsibilities and
28 obligations of the EDC Agreement.

29
30 7. Obligations. FORA agrees to nominate and Seaside agrees to assume the
31 Federal local redevelopment authority “LRA” designation and the remaining reporting,
32 monitoring, and stewardship or other identified responsibilities associated with (i) the
33 FORA-Army 2007 ESCA, as FORA’s Successor through the end of the ESCA Contract
34 June 30, 2028 in order to complete property transfers and the ESCA to the extent that ESCA
35 performance does not obligate or put at risk Seaside’s municipal non-ESCA funds, and (ii)
36 the EDC Agreement, as FORA's successor. Exhaustion or unavailability of ESCA funds
37 with which to compensate Seaside for the performance of ESCA obligations will constitute
38 a force majeure under the ESCA and the AOC, thereby relieving Seaside of its responsibility
39 to perform FORA’s surviving ESCA obligations.

40
41 8. ESCA LTO Program Evidence of Fiduciary and Technical Capability. Seaside
42 agrees to provide evidence of its fiduciary and technical capability to comply with the terms
43 of the ESCA and manage the contract financial assets with associated invoicing and
44 reporting responsibilities, to assure the Army, EPA and DTSC of continued ESCA fiduciary
45 capability.

46
47 Seaside agrees to assume FORA’s ESCA Long Term Obligations Management

1 Program, as approved by the US Army, EPA and DTSC, and:
2

- 3 i. Personnel. Hire (2) full-time qualified staff to manage ESCA as required under
4 the contract provisions as currently amended through 2028, but with allowances
5 for indirect administrative overhead to assure the Army, EPA and DTSC of
6 continued ESCA technical capacity.
7
- 8 ii. ESCA Long-Term Obligation Support Services Contract. Enter into Support
9 Services Contracts through 2028 with specialists Arcadis, Weston Solutions, Inc.
10 and Westcliffe Engineers, Inc. (or other qualified vendors), including allowances
11 for indirect administrative overhead to assure the Army, EPA and DTSC of
12 continued ESCA technical capacity.
13
- 14 iii. Representation. Contract with Counsel reasonably qualified on environmental
15 issues with experience in working with state and federal entities (Army, EPA and
16 DTSC) for review and compliance as noted in the ESCA and the AOC.
17
- 18 iv. No Obligation of Other Entities. Monterey Peninsula Community College District,
19 the Board of Trustees of the California State University (on behalf of the Monterey
20 Bay campus), the County of Monterey, the Cities of Del Rey Oaks, Marina and
21 Monterey, the Marina Coast Water District (hereinafter collectively “Grantees”),
22 will not be a party to the ESCA, and will not bear any financial liability as a result
23 of the ESCA.
24

25 9. Coordination with other Entities. Seaside agrees to enter into agreements with
26 the Grantees for the property transfers and other necessary property-related rights to
27 effectuate the reuse and the oversight, reporting, response, and other long-term
28 stewardship obligations listed in and consistent with (a) the ESCA through 2028 on behalf
29 of the Army, and (b) the EDC Agreement.
30

- 31 i. Water Rights Allocations. Until such time as such allocations may be amended
32 by agreements, Seaside agrees to honor and abide by the water rights’
33 allocations set forth in Exhibit A attached hereto, for Government Water Rights
34 as defined in Subsection 5.02 of the EDC Agreement, that may be released by
35 the Government in the future, subject to compliance with all applicable laws.
36
- 37 ii. Wastewater Discharge Rights. Until such time as such allocations may be
38 amended by future agreements, Seaside agrees to establish and apply, in
39 consultation with Grantees, pursuant to Section 5.04 of the EDC Agreement, a
40 fair process to ensure that all Grantees will enjoy equitable utilization of
41 Wastewater Discharge Rights that may be released by the Government in the
42 future, subject to compliance with all applicable laws.
43
- 44 iii. Creates No Land-Use Authority. Nothing in this Agreement, nor Seaside’s
45 designation as the local redevelopment authority or as FORA’s successor under
46 the ESCA or EDC Agreement creates in Seaside any land-use decision-making
47 authority with respect to any land not within Seaside’s City limits. Further,

1 Seaside shall not require that any land-use decisions of other entities be in
2 compliance with the Fort Ord Base Reuse Plan.

- 3
4 iv. Seaside shall not require payment of any sale or lease proceeds or revenues (or
5 the equivalent use of property such as licenses, permits, concession agreements
6 etc.), from other entities for the transfer of property, water rights, or wastewater
7 discharge rights received from the Army pursuant to the EDC Agreement.

8
9 10. ESCA Amendment. The parties agree to work cooperatively to successfully
10 receive Army, EPA and DTSC concurrence that Seaside is the formal ESCA Successor and
11 execute the ESCA upon review and approval of terms and conditions. Seaside agrees to
12 execute an ESCA Agreement and to comply to comply with the U.S. Army Corps of
13 Engineers (“USACE”) oversight and grant management requirements for funding to
14 Seaside under the ESCA terms, provided however, that the Successor activities are fully
15 funded, including without limitation provision for PLL insurance coverage, funding shall be
16 provided from January 1, 2024 through June 30, 2028 or the completion of the ESCA
17 obligations. Seaside will not pay for Regulatory Oversight unless it is a reimbursement
18 funded by the Army through the end of the ESCA obligations.

19
20 11. Administrative Order on Consent. The parties agree to work cooperatively
21 to successfully receive EPA and DTSC approval that Seaside is the formal Successor to
22 execute an AOC upon review of terms and conditions.

23
24 12. Amendment. This Agreement or any provision hereof may be changed,
25 waived, or terminated only by a statement in writing signed by the Party against which such
26 change, waiver or termination is sought to be enforced.

27
28 13. No Waiver. No delay in enforcing or failing to enforce any right under this
29 Agreement will constitute a waiver of such right. No waiver of any default under this
30 Agreement will operate as a waiver of any other default or of the same default on a future
31 occasion.

32
33 14. Partial Invalidity. If any one or more of the terms, provisions, covenants or
34 conditions of this Agreement are to any extent declared invalid, unenforceable, void or
35 voidable for any reason whatsoever by a court of competent jurisdiction, the finding or order
36 or decree of which becomes final, the Parties agree to amend the terms in a reasonable
37 manner to achieve the intention of the Parties without invalidity. If the terms cannot be
38 amended, the invalidity of one or several terms will not affect the validity of the Agreement
39 as a whole, unless the invalid terms are of such essential importance to this Agreement that
40 it can be reasonably assumed that the Parties would not have contracted this Agreement
41 without the invalid terms. In such case, the Party affected may terminate this Agreement
42 by written notice to the other Party without prejudice to the affected Party’s rights in law or
43 equity.

44
45 15. Entire Agreement. This Agreement is intended by the Parties as a final
46 expression of their agreement and is intended as a complete and exclusive statement of
47 the terms and conditions thereof. Acceptance of or acquiescence in a course of

1 performance rendered under this Agreement shall not be relevant to determine the meaning
2 of this Agreement even though the accepting or acquiescing Party had knowledge of the
3 nature of the performance and opportunity for objection.
4

5 16. Choice of Law. This Agreement will be construed in accordance with the laws
6 of the State of California.
7

8 17. Further Assurances. Each Party agrees to execute and deliver all further
9 instruments and documents and take all further action that may be reasonably necessary
10 to complete performance of its obligations hereunder and otherwise to effectuate the
11 purposes and intent of this Agreement.
12

13 18. Headings. The headings of the sections hereof are inserted for convenience
14 only and shall not be deemed a part of this Agreement.
15

16 19. Notices. Any notice, demand, offer, or other written instrument required or
17 permitted to be given pursuant to this Agreement shall be acknowledged by the Party giving
18 such notice, and shall to the extent reasonably practicable be sent by hand delivery, and if
19 not reasonably practicable to send by hand delivery, then by telecopy, overnight courier,
20 electronic mail, or registered mail, in each case to the other Party at the address for such
21 Party set forth below (Note: A Party may change its place of notice by a notice sent to all
22 other Parties in compliance with this section):
23

24 City of Seaside
25 Attn: City Manager
26 440 Harcourt Avenue
27 Seaside, CA 93955
28

Fort Ord Reuse Authority
Attn: Executive Officer
920 2nd Avenue, Suite A
Marina, CA 93933

29 w/ an email copy to cityattorney@ci.seaside.ca.us
30

31 20. Term of Agreement: This Agreement shall be effective on the Effective Date
32 specified at the beginning of the Agreement and shall remain in effect unless and until
33 terminated by mutual agreement of the Parties or upon the legal dissolution of the Fort Ord
34 Reuse Authority.
35

36 21. Authorization. Each party affirms that it is fully authorized to enter into this
37 Agreement. The Seaside City Manager is designated on behalf of Seaside, subject to
38 review and approval of documents by the Seaside City Attorney, to enter into the terms and
39 conditions of this Agreement, the AOC and the ESCA and sign related ESCA and AOC
40 reporting and financial documents.
41

42 22. Third-Party Rights. The Grantees are intended to be third-party beneficiaries
43 of this Agreement as it relates to future transfers of property, water rights, and wastewater
44 discharge rights pursuant to the EDC Agreement, and shall have the right to enforce the
45 provisions hereof as if they were direct parties hereto. Nothing in this Agreement is intended
46 to confer upon any individual or entity, other than the Parties and the above-identified third-
47 party beneficiaries, any rights or remedies whatsoever.

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IN WITNESS WHEREOF, each Party has executed the Agreement with the approval of its governing body as of the date first written above.

CITY OF SEASIDE:

Date: _____
Craig Malin
City Manager

APPROVED AS TO FORM:

CITY ATTORNEY

FORT ORD REUSE AUTHORITY:

Date: _____
Joshua Metz Executive Officer

APPROVED AS TO FORM:

AUTHORITY COUNSEL

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EXHIBIT A

Current Water Allocations & Percentage-based Allocations of Future Army Water*

	Current Water Allocations in Acre Feet	Allocation of Future Army Water Based on Percentage of Current Water Allocation
City of Marina	1340	29%
City of Monterey	65	1%
City of Seaside	1012.5	22%
County of Monterey	720	15%
CSUMB	1035	22%
City of Del Rey Oaks	242.5	5%
CA State Parks	44.5	1%
UCMBEST	230	5%

9 *In the unlikely event of availability of additional water from the US Army it would be
 10 distributed following the percentage-based allocation provided above. These allocations
 11 reflect previously agreed upon water distribution as per FORA Board Resolution No. 07-1
 12 (potable water), and are consistent with the Marina Coast Water District Urban Water
 13 Management Plan (2105). They also incorporate the Memorandum of Understanding
 14 between the County of Monterey, the City of Seaside, and the FORA allocating 10 acre-feet
 15 (af) to the Central Coast Veterans Cemetery (2009), and includes the transference of 15 af
 16 to the City of Marina for Veterans Transition Center housing (effective Nov 20, 2017).

1 **FORT ORD REUSE AUTHORITY AND CITY OF SEASIDE-**
2 **ENVIRONMENTAL SERVICES COOPERATIVE AGREEMENT (ESCA) AND-**
3 **LOCAL REDEVELOPMENT AUTHORITY (LRA)-ECONOMIC DEVELOPMENT**
4 **CONVEYANCE AGREEMENT (EDC AGREEMENT)**
5 **SUCCESSOR**
6 **IMPLEMENTING AGREEMENT**
7

8 **RECITALS.**

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29 former Fort Ord. The Army remains responsible for certain actions under that FFA. The
30 FFA was amended on or about July 26, 2007, the effect of which suspends the FFA for
31 FORA’s ESCA obligations so long as FORA or its successors are in compliance with the
32 AOC.

33
34 WHEREAS, the former Fort Ord was closed on September 30, 1994 pursuant to and
35 in accordance with the Defense Base Closure and Realignment Act of 1990, as amended
36 (Public Law 101-510; hereinafter referred to as the “Base Closure Act”).

37
38 WHEREAS, in accordance with Section 2905(b)(4) of the Base Closure Act, as
39 amended by Section 2821 of the Defense Authorization Act for Fiscal Year 2000, Pub. L.
40 No. 106-65 (1999), and the implementing regulations of the Department of Defense (32
41 CFR Parts 90 and 91), FORA executed an economic development conveyance agreement
42 and acquired portions of the former Fort Ord consisting of approximately five thousand two
43 hundred (5,200) acres of land, including all buildings, personal property, appurtenances,
44 rights-of-way, and drainage areas upon and subject to the terms and conditions of a June
45 23, 2000 Memorandum of Agreement (~~MOA~~) with the United States of America (“EDC

1 Agreement”).

2
3 WHEREAS, the MOAEDC Agreement provided for transfers of property in
4 accordance with the Army's clean-up schedule. Subsequent to the MOAEDC Agreement
5 execution, FORA and the local communities decided to pursue an early transfer process
6 pursuant to Title 42 United States Code, section 9620(h)(3)(C) in order to expedite the
7 property transfers and ultimate reuse and economic recovery for the communities affected
8 by the Fort Ord closure.—

9
10 WHEREAS, in furtherance of the early transfer process, the Army, with the approval
11 of the EPA Administrator and the concurrence of the Governor of California, transferred title
12 of 3,337 acres of munitions impacted Fort Ord property by quitclaim deed to FORA before
13 all action to protect human health and the environment had been completed. Concurrent
14 with this transfer without the otherwise required CERCLA covenant mandated by Title 42
15 United States Code, section 9620 (h)(3)—, FORA accepted title and agreed to perform the
16 Army's environmental remediation with funding from the Army. Excluded from FORA's
17 performance obligation are matters related to the groundwater at the former Fort Ord, as
18 well as other Army responsibilities enumerated in the ESCA and elsewhere.—

19
20 WHEREAS, in 2007 an “Administrative Order on Consent (“AOC”) [Docket No. R9-
21 2007-003] [was] entered into voluntarily by the United States Environmental Protection
22 Agency (“EPA”), the California Department of Toxic Substances Control (“DTSC”), and the
23 Fort Ord Reuse Authority. The AOC concerns the preparation and performance of potential
24 removal actions, one or more remedial investigations and feasibility studies (“RI/FS”) and
25 one or more remedial designs and remedial actions (“RD/RA”) for contaminants present on
26 portions of the former Fort Ord located at Monterey, California (“Site”) and the
27 reimbursement for future response costs incurred by EPA and DTSC in connection with
28 such CERCLA response actions.”.

29
30 WHEREAS, in 2007 the Army executed an amendment to the Federal Facilities
31 Agreement.

32
33 -WHEREAS, in 2007 the Army and FORA executed an Environmental Services
34 Cooperative Agreement W9128F 07 2-0162 (“ESCA”) under the authority of Title 10 United
35 States Code, Section 2701(d)— Environmental Restoration Program (10 U.S.C. 2701)
36 whereby FORA would perform the Army's environmental responsibilities as the Army
37 Response Action Contractor pursuant to Title 42 United States Code, section 9619, with
38 the Army providing funding to perform these services.—

39
40 WHEREAS, the ESCA has been amended several times, the ESCA Mod 9
41 amendment in 2017 which provided approximately \$6.8 million for Regulatory Oversight
42 Through 31 December 2019, FORA ESCA Administrative costs during the EPA/DTSC
43 remedial-completion documentation, property transfer process through 30 June 2020 and
44 to perform the required long-term land management tasks, including Munitions and
45 Explosives of Concern (“MEC”) Find Assessments, inspections, enforcement, monitoring

and reporting through June 30, 2028.-

ESCA-Mod.-Number	ESCA Contract Line Item Number (CLIN) and-Description	Expiration Date	Amount
MOD 09	CLIN 02 – Department of Toxic Substance Control (DTSC) and United States EPA Technical Oversight Services	31 Dec. 2019	\$745,913
	CLIN 03 – FORA ESCA Administrative Funds	30 June 2020	\$1,865,848
	CLIN 04 – Post-Closure MEC Find Assessments	30 June 2028	\$528,651
	CLIN 05 – Long Term/LUCs Management	30 June 2028	\$3,705,792
	Totals		\$6,846,204

WHEREAS, due to changes and delays in the transfer of properties, modifications were made to the ESCA grant leaving post-June 30, 2020 funds available are ESCA CLIN 0004 Post Closure MEC Find Assessments \$528,651 and ESCA CLIN 0005 for Long-Term Management and Land Use Control (LUC) management are ~~\$3,705,792~~, \$3,705,792 (Totaling \$4,234,443 available from June 30, 2020 through June 30, 2028)-;

ESCA Mod. Number	ESCA Contract Line Item Number (CLIN) and-Description	Expiration Date	Amount
MOD 09	CLIN 04 – Post-Closure MEC Find Assessments	30 June 2028	\$528,651
	CLIN 05 – Long Term/LUCs Management	30 June 2028	\$3,705,792
	Totals		\$4,234,443

WHEREAS, in 2018 FORA adopted a Transition Plan as required by State Law that specifies that FORA engage the Successor-in-Interest (“Successor”) provisions of the ESCA contract.

WHEREAS, the Successor assumes responsibility and will be tasked with performing the remaining LTOs under the ESCA, including the recent amendment. It is assumed that all work under the previous \$98,000,000 contract will have been accomplished prior to FORA’s dissolution as evidenced by the 2019 EPA Remedial Action Completion letters, per AOC Section XVII, Certification of Completion, housed in the Army Administrative Record located at: <http://fortordcleanup.com/documents/administrative-record/>.-

WHEREAS, the City of Seaside is prepared, subject to funding, to assume ESCA responsibility and attendant local reuse authority status, including the execution of the AOC in order to complete the ESCA obligations and any property-related transfer actions required after June 30, 2020.

1 **NOW, THEREFORE, the Parties agree as follows:**

2
3 1. Incorporation of Recitals. The above recitals are hereby incorporated herein by
4 reference.

5
6 2. Acknowledgement. FORA agrees to acknowledge Seaside as the ESCA
7 Successor-In-Interest under the 2018 Transition Plan, and nominate Seaside to the
8 Department of Defense as the LRA Successor.

9
10 3. Insurance Policies. FORA ~~agrees to designate and will~~ request the transfer of its
11 two pollution legal liability insurance ~~coverages policies and limits~~ to Seaside. FORA shall
12 also transfer any self-insured retention funds to Seaside to be used exclusively for ESCA
13 and ~~claim~~claims-related obligations. Seaside acknowledges that these
14 ~~coverages insurance policies~~ will expire in 2022 and 2024, respectively, and that ~~successor~~
15 ~~designations~~Seaside's designation will be subject to approval by the insurers. Seaside's
16 successful ~~receipt of insurance coverage designation~~ through ~~June 30, 2028~~December 31,
17 2024 is a condition precedent to becoming FORA's ESCA ~~and local reuse authority~~
18 successor. Pollution legal liability insurance will be required by the ESCA from 1 January
19 2025 through no earlier than 30 June 2028, a requirement to be funded by the Army.

20
21 4. ESCA LTO Program Evidence of Fiduciary and Technical Capability. FORA
22 agrees to provide technical and/or financial assistance to Seaside to meet the terms
23 required by the Army, EPA, and DTSC that the Successor be a single entity and
24 demonstrate technical and financial competence to complete the work.

25
26 5. ESCA records and contracts funds. FORA and Seaside shall establish a
27 mechanism for transfer of all ESCA records, back-up documents, computer files and
28 accounting records, and contract funds to Seaside for meeting FORA's ESCA obligations.

29
30 6. Technical Assistance. FORA agrees to request the Army extend the funding
31 expiration date on any remaining ESCA funds (not dedicated to Post-Closure MEC Find
32 Assessments and Long Term/LUCs Management) for Seaside to ~~utilize providing~~provide
33 technical assistance and funding to complete the ESCA transfer process through June 30,
34 2020, including specialized legal, drafting and other staff or contract support. FORA agrees
35 to establish and fund a pool of monies to support Seaside's assumption of responsibilities
36 and obligations of the ~~MOA~~EDC Agreement.

37
38 7. Obligations. FORA agrees to nominate and Seaside agrees to assume the
39 Federal local redevelopment authority "LRA" designation and the remaining reporting,
40 monitoring, and stewardship or other identified responsibilities associated with (i) the
41 FORA-Army 2007 ESCA, as FORA's Successor through the end of the ESCA Contract
42 June 30, 2028 in order to complete property transfers and the ESCA to the extent that ESCA
43 performance does not obligate or put at risk Seaside's municipal non-ESCA funds, and (ii)
44 the ~~MOA~~EDC Agreement, as FORA's successor. Exhaustion or unavailability of ESCA
45 funds with which to compensate Seaside for the performance of ESCA obligations will

1 constitute a force majeure under the ESCA and the AOC, thereby relieving Seaside of its
2 ~~obligations~~responsibility to perform ~~the~~FORA's surviving ~~FORA~~ESCA obligations.-

3
4 8. ESCA LTO Program Evidence of Fiduciary and Technical Capability. Seaside
5 agrees to provide evidence of its fiduciary and technical capability to comply with the terms
6 of the ESCA and manage the contract financial assets with associated invoicing and
7 reporting responsibilities, to assure the Army, EPA and DTSC of continued ESCA fiduciary
8 capability.

9
10 a. ~~To~~Seaside agrees to assume FORA's ESCA Long Term Obligations
11 Management Program, as approved by the US Army, EPA and DTSC, and:

12
13 i. Personnel. Hire (2) full-time qualified staff to manage ESCA as required
14 under the contract provisions as currently amended through 2028, but with
15 allowances for indirect administrative overhead to assure the Army, EPA
16 and DTSC of continued ESCA technical capacity.-

17
18 ii. ESCA Long-Term Obligation Support Services Contract. Enter into
19 Support Services Contracts through 2028 with specialists Arcadis, Weston
20 Solutions, Inc. and Westcliffe Engineers, Inc. (or other qualified vendors),
21 including allowances for indirect administrative overhead to assure the
22 Army, EPA and DTSC of continued ESCA technical capacity.

23
24 iii. Representation. Contract with Counsel reasonably qualified on
25 environmental issues with experience in working with state and federal
26 entities (Army, EPA and DTSC) for review and compliance as noted in the
27 ESCA and the AOC.

28
29 iv. No Obligation of Other Entities. Monterey Peninsula Community College District,
30 the Board of Trustees of the California State University (on behalf of the Monterey
31 Bay campus), the County of Monterey, the Cities of Del Rey Oaks, Marina and
32 Monterey, the Marina Coast Water District (hereinafter collectively "Grantees"),
33 will not be a party to the ESCA, and will not bear any financial liability as a result
34 of the ESCA.

35
36 9. Coordination with other Entities. Seaside agrees to enter into agreements with
37 the ~~Monterey Peninsula Community College District, the Board of Trustees of the California State University~~
38 ~~(on behalf of the Monterey Bay campus), the County of Monterey, the Cities of Del Rey Oaks, Marina and~~
39 ~~Monterey, and the Marina Coast Water District or others~~Grantees for the property transfers and
40 other necessary property-related rights to effectuate the reuse and the oversight, reporting,
41 response, and other long-term stewardship obligations listed in and consistent with (a) the
42 ESCA through 2028 on behalf of the Army ~~or, and~~ (b) the MOAEDC Agreement.

43
44 i. Water Rights Allocations. Until such time as such allocations may be
45 amended by agreements, Seaside agrees to honor and abide by the

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water rights' allocations of potable and recycled water set forth in Exhibit A attached hereto, for Government Water Rights as defined in Subsection 5.02 of the EDC Agreement, that may be released by the Government in the future, subject to compliance with all applicable laws.

ii. Wastewater Discharge Rights. Until such time as such allocations may be amended by future agreements, Seaside agrees to establish and apply, in consultation with Grantees, pursuant to Section 5.04 of the EDC Agreement, a fair process to ensure that all Grantees will enjoy equitable utilization of Wastewater Discharge Rights that may be released by the Government in the future, subject to compliance with all applicable laws.

iii. Creates No Land-Use Authority. Nothing in this Agreement, nor Seaside's designation as the local redevelopment authority or as FORA's successor under the ESCA or MOAEDC Agreement creates in Seaside any land-use decision-making authority with respect to any land not within Seaside's cityCity limits. Further, Seaside shall not require that any land-use decisions of other entities be in compliance with the Fort Ord Base Reuse Plan.

iv. Seaside shall not require payment of any sale or lease proceeds or revenues (or the equivalent use of property such as licenses, permits, concession agreements etc.), from other entities for the transfer of property, water rights, or wastewater discharge rights received from the Army pursuant to the EDC Agreement.

10. ESCA Amendment. The parties agree to work cooperatively to successfully receive Army, EPA and DTSC concurrence that Seaside is the formal ESCA Successor and execute the ESCA upon review and approval of terms and conditions. Seaside agrees to execute an ESCA Agreement and to comply to comply with the U.S. Army Corps of Engineers ("USACE") oversight and grant management requirements for funding to Seaside under the ESCA terms, provided however, that the Successor activities are fully funded, including without limitation provision for PLL insurance coverage, funding shall be provided from January 1, 2024 through June 30, 2028 or the completion of the ESCA obligations. Seaside will not pay for Regulatory Oversight unless it is a reimbursement funded by the Army through the end of the ESCA obligations.

11. Administrative Order on Consent. The parties agree to work cooperatively to successfully receive EPA and DTSC approval that Seaside is the formal Successor to execute an AOC upon review of terms and conditions.

12. Amendment. This Agreement or any provision hereof may be changed, waived, or terminated only by a statement in writing signed by the Party against which such change, waiver or termination is sought to be enforced.

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1
2 13. No Waiver. No delay in enforcing or failing to enforce any right under this
3 Agreement will constitute a waiver of such right. No waiver of any default under this
4 Agreement will operate as a waiver of any other default or of the same default on a future
5 occasion.

6
7 14. Partial Invalidity. If any one or more of the terms, provisions, covenants or
8 conditions of this Agreement are to any extent declared invalid, unenforceable, void or
9 voidable for any reason whatsoever by a court of competent jurisdiction, the finding or order
10 or decree of which becomes final, the Parties agree to amend the terms in a reasonable
11 manner to achieve the intention of the Parties without invalidity. If the terms cannot be
12 amended, the invalidity of one or several terms will not affect the validity of the Agreement
13 as a whole, unless the invalid terms are of such essential importance to this Agreement that
14 it can be reasonably assumed that the Parties would not have contracted this Agreement
15 without the invalid terms. In such case, the Party affected may terminate this Agreement
16 by written notice to the other Party without prejudice to the affected Party's rights in law or
17 equity.

18
19 15. Entire Agreement. This Agreement is intended by the Parties as a final
20 expression of their agreement and is intended as a complete and exclusive statement of
21 the terms and conditions thereof. Acceptance of or acquiescence in a course of
22 performance rendered under this Agreement shall not be relevant to determine the meaning
23 of this Agreement even though the accepting or acquiescing Party had knowledge of the
24 nature of the performance and opportunity for objection.

25
26 16. Choice of Law. This Agreement will be construed in accordance with the laws
27 of the State of California.

28
29 17. Further Assurances. Each Party agrees to execute and deliver all further
30 instruments and documents and take all further action that may be reasonably necessary
31 to complete performance of its obligations hereunder and otherwise to effectuate the
32 purposes and intent of this Agreement.

33
34 18. Headings. The headings of the sections hereof are inserted for convenience
35 only and shall not be deemed a part of this Agreement.

36
37 19. Notices. Any notice, demand, offer, or other written instrument required or
38 permitted to be given pursuant to this Agreement shall be acknowledged by the Party giving
39 such notice, and shall to the extent reasonably practicable be sent by hand delivery, and if
40 not reasonably practicable to send by hand delivery, then by telecopy, overnight courier,
41 electronic mail, or registered mail, in each case to the other Party at the address for such
42 Party set forth below (Note: A Party may change its place of notice by a notice sent to all
43 other Parties in compliance with this section):

44
45 City of Seaside

Fort Ord Reuse Authority

Attn: City Manager
440 Harcourt Avenue
Seaside, CA 93955

Attn: Executive Officer
920 2nd Avenue, Suite A
Marina, CA 93933

w/ an email copy to cityattorney@ci.seaside.ca.us

20. Term of Agreement: This Agreement shall be effective on the Effective Date specified at the beginning of the Agreement and shall remain in effect unless and until terminated by mutual agreement of the Parties or upon the legal dissolution of the Fort Ord Reuse Authority.

21. Authorization. Each party affirms that it is fully authorized to enter into this Agreement. The Seaside City Manager is designated on behalf of Seaside, subject to review and approval of documents by the Seaside City Attorney, to enter into the terms and conditions of this ~~Memorandum of~~ Agreement, the AOC and the ESCA and sign related ESCA and AOC reporting and financial documents.

22. Third-Party Rights. ~~Each of the Monterey Peninsula Community College District, the Board of Trustees of the California State University (on behalf of the Monterey Bay campus), the County of Monterey, the Cities of Del Rey Oaks, Marina and Monterey, and the Marina Coast Water District~~The Grantees are intended to be third-party beneficiaries of this Agreement as it relates to future transfers of property, water rights, and wastewater discharge rights pursuant to the EDC Agreement. and shall have the right to enforce the provisions hereof as if they were direct parties hereto. Nothing in this Agreement is intended to confer upon any individual or entity, other than the ~~parties~~Parties and the above-identified third-party beneficiaries, any rights or remedies whatsoever.

IN WITNESS WHEREOF, each Party has executed the Agreement with the approval of its governing body as of the date first written above.

CITY OF SEASIDE:

Craig Malin
City Manager

Date: _____

APPROVED AS TO FORM:

CITY ATTORNEY

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13

FORT ORD REUSE AUTHORITY:

Joshua Metz Executive Officer

Date: _____

APPROVED AS TO FORM:

AUTHORITY COUNSEL

DRAFT

EXHIBIT A

Current Water Allocations & ~~Potential*~~ Future Percentage-based Allocations of Future Army Water*

	Current Potable-Water Allocation/Allocations in Acre Feet	<u>Allocation of Future Army Water- Allocation Based on Percentage of Current Water Allocation</u>	Current- Recycled- Water in- Acre Feet	Future- Recycled- Water- Allocation- Based on- Percentage of- Current- Recycled- Water- Allocation
City of Marina	1340	29%	345	25%
City of Monterey	65	1%	0	0%
City of Seaside	1012.5	22%	453	33%
County of Monterey	720	15%	134	10%
CSUMB	1035	22%	87	6%
City of Del Rey Oaks	242.5	5%	280	21%
CA State Parks	44.5	1%	0	0%
UCMBEST	230	5%	60	4%

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8 *In the unlikely event of availability of additional water from the US Army it would be
 9 distributed following the percentage-based allocation ~~provide~~provided above. These
 10 allocations reflect previously agreed upon water distribution as per FORA Board Resolution
 11 No. 07-1 (potable water) ~~and No. 07-10 (recycled water) (2007)~~, and are consistent with the
 12 Marina Coast Water District Urban Water Management Plan (2105). They also incorporate
 13 the Memorandum of Understanding between the County of Monterey, the City of Seaside,
 14 and the FORA allocating 10 acre-feet (af) to the Central Coast Veterans Cemetery (2009),
 15 and includes the transference of 15 af to the City of Marina for Veterans Transition Center
 16 housing (effective Nov 20, 2017).-

FORT ORD REUSE AUTHORITY BOARD REPORT

BUSINESS ITEMS

Subject: 2018 Transition Plan Implementation – 2nd Vote

Meeting Date: February 13, 2020

Agenda Number: 5b

INFORMATION/ACTION

- i. Assignment of a) Fort Ord Reuse Authority (“FORA”) – Environmental Services Cooperative Agreement (“ESCA”) contract obligation to Successor-In-Interest City of Seaside, b) 2000 Economic Development Conveyance (“EDC”) Memorandum of Agreement between The United States of America, acting by and through the secretary of the Army, United States Department of the Army and FORA, and c) Local Redevelopment Authority (“LRA”) Obligations and Responsibilities.
- ii. Transition Planning Update

RECOMMENDATION:

- 1) Receive a report regarding the FORA federal government LRA obligations, including the implementation of the June 11, 2000 EDC Agreement and the March 2007 ESCA Agreement.
- 2) Approve the attached Implementing Agreement with the City of Seaside regarding its acceptance of FORA’s obligations under the EDC and ESCA and designation as federally recognized LRA.

BACKGROUND:

FORA was created under state law to be the LRA as required in federal law. Under the terms of that federal law, FORA was eligible to receive funding from the Department of Defense (“DoD”) in the 1990s as well as in the last decade. Further, as the, FORA was the designated agency for receiving federal property under federal law that created EDCs of former military properties closed under the Base Realignment and Closure Act (BRAC”). As well, in 2005, special federal provisions allowed the U.S. Army (“Army”) to negotiate contracts with federally recognized LRAs for cooperative services including environmental cleanup.

Given the federal provisions noted above, FORA implemented its three county obligations in compliance with these federal provisions. In particular, FORA negotiated the EDC for significant portions of the former Fort Ord for the purpose of creating jobs, housing, services, enterprises and other purposes under an adopted base reuse plan. FORA also negotiated an ESCA contract with the Army to complete munitions and explosives removal for 3,340 acres of former Fort Ord property. Each of these agreements require a FORA Successor-In-Interest (“Successor”) be appointed and contain provisions outlining the terms and conditions for assigning FORA’s responsibilities.

Discussion/Report:

As reported last month, Army BRAC Headquarters (“HQ”) Chief Thomas Lederle requested FORA and City of Seaside (“Seaside”) meet with BRAC and U.S. Secretary of DoD Office of Economic Adjustment (“OEA”) to discuss ESCA status and FORA Successor requirements. Seaside has expressed interest in becoming FORA's Successor and sent Mayor Ian Oglesby, Councilmember Jon Wizard, City Manager Craig Malin, Assistant City Manager Leslie Milton-Rerig and Assistant City Attorney Sheri Damon to attend those meetings with the FORA Executive Officer and Senior Program Manager.

- On November 18, 2019, FORA and Seaside met with the Army BRAC HQ staff to discuss the following ESCA Successor Issues:
 - FORA Transition/FORA Successor process/progress
 - Seaside – as the proposed ESCA Successor
 - ESCA Long-Term Obligation Management Program
 - ESCA Pollution Legal Liability Insurance
 - ESCA Successor and EDC authorities, obligations and interdependence

At the meeting, FORA staff and Special Counsel provided an ESCA status and FORA Board Members, Executive Officer and Seaside Counsel Members/staff provided Mr. Lederle with an update on the ESCA Successor efforts. Mr. Lederle and Army attorneys provided FORA and Seaside with guidance on the Army's ESCA Successor requirements.

On November 19, 2019, FORA and Seaside met with Mr. Patrick Obrien, Director, OEA to discuss FORA's June 30, 2020 closure and FORA ESCA Successor plans. Since many of the ESCA obligations include multiple real property conveyance documentation and transfers that directly grow from the EDC, the attendees discussed the coordination required between these FORA responsibilities. An outgrowth of that conversation was the suggestion that FORA explore and conclude on the assignment of the EDC agreement obligations, the OEA LRA designation as well as the ESCA Successor issue.

Attached is an agreement between the FORA and Seaside outlining the basic terms for Seaside to become FORA's ESCA, EDC and LRA Successor. If Seaside were to become FORA's Successor, this has implications for future potential funding.

FISCAL IMPACT:

Reviewed by FORA Controller _____

Funding for the ESCA contract is provided by the Army and funding for the 2018 transition plan are included in the 2019/2020) budget.

COORDINATION:

Administrative Committee; Executive Committee; Authority Counsel; Special Authority Counsel, Arcadis; Westcliffe Engineering, Inc., Weston Solutions, Inc., Army; EPA; and DTSC.

ATTACHMENTS:

Attachment A: Draft Implementing Agreement

Prepared by 
Stan Cook

Approved by 
Joshua Metz

1 **FORT ORD REUSE AUTHORITY AND CITY OF SEASIDE**
2 **ENVIRONMENTAL SERVICES COOPERATIVE AGREEMENT SUCCESSOR**
3 **TRANSITION PLAN IMPLEMENTING AGREEMENT**
4
5

6 **RECITALS**
7

8 WHEREAS, the Fort Ord Reuse Authority ("FORA") is a regional agency and a
9 Corporation of the State of California established under California State Law Government
10 Code Sections 67650, et seq., to plan, facilitate and manage the transfer of former Fort
11 Ord property and is acknowledged as the federally recognized local reuse authority for
12 property transfers from the Army, to the governing local jurisdictions or their designees;
13 and
14

15 WHEREAS Fort Ord, California was placed on the National Priorities List
16 (Superfund) in 1990 due to leaking underground storage tanks, contaminated
17 groundwater and a 150-acre landfill; and
18

19 WHEREAS, in 1990, the Army executed a Federal Facility Agreement (FFA) under
20 CERCLA Section 120 outlining the Army's Comprehensive Environmental Response,
21 Compensation, and Liability Act ("CERCLA") clean up responsibilities with respect to the
22 former Fort Ord. The Army remains responsible for certain actions under that FFA. The
23 FFA was amended on or about July 26, 2007, the effect of which suspends the FFA for
24 FORA's ESCA obligations so long as FORA or its successors are in compliance with the
25 AOC; and
26

27 WHEREAS, the former Fort Ord was closed on September 30, 1994 pursuant to
28 and in accordance with the Defense Base Closure and Realignment Act of 1990, as
29 amended (Public Law 101-510; hereinafter referred to as the "Base Closure Act").
30

31 WHEREAS, in accordance with Section 2905(b)(4) of the Base Closure Act, as
32 amended by Section 2821 of the Defense Authorization Act for Fiscal Year 2000, Pub. L.
33 No. 106-65 (1999), and the implementing regulations of the Department of Defense (32
34 CFR Parts 90 and 91), FORA acquired portions of the former Fort Ord consisting of
35 approximately five thousand two hundred (5,200) acres of land, including all buildings,
36 personal property, appurtenances, rights-of-way, and drainage areas upon and subject to
37 the terms and conditions of a June 23, 2000 Memorandum of Agreement (MOA) with the
38 United States of America.
39

40 WHEREAS, the MOA provided for transfers of property in accordance with the
41 Army's clean-up schedule. Subsequent to the MOA execution, FORA and the local
42 communities decided to pursue an early transfer process pursuant to Title 42 United
43 States Code, section 9620(h)(3)(C) in order to expedite the property transfers and ultimate
44 reuse and economic recovery for the communities affected by the Fort Ord closure.
45

46 WHEREAS, in furtherance of the early transfer process, the Army, with the approval of the

1 EPA Administrator and the concurrence of the Governor of California, transferred title of
2 3,337 acres of munitions impacted Fort Ord property by quitclaim deed to FORA before all
3 action to protect human health and the environment had been completed. Concurrent with
4 this transfer without the otherwise required CERCLA covenant mandated by Title 42
5 United States Code, section 9620 (h)(3) , FORA accepted title and agreed to perform the
6 Army's environmental remediation with funding from the Army. Excluded from FORA's
7 performance obligation are matters related to the groundwater at the former Fort Ord, as
8 well as other Army responsibilities enumerated in the ESCA and elsewhere.

9
10 WHEREAS, in 2007 an "Administrative Order on Consent ("AOC") [Docket No. R9-
11 2007-003] [was] entered into voluntarily by the United States Environmental Protection
12 Agency ("EPA"), the California Department of Toxic Substances Control ("DTSC"), and
13 the Fort Ord Reuse Authority. The AOC concerns the preparation and performance of
14 potential removal actions, one or more remedial investigations and feasibility studies
15 ("RI/FS") and one or more remedial designs and remedial actions ("RD/RA") for
16 contaminants present on portions of the former Fort Ord located at Monterey, California
17 ("Site") and the reimbursement for future response costs incurred by EPA and DTSC in
18 connection with such CERCLA response actions.", and

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21 Agreement; and

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25 WHEREAS, in 2007 the Army and FORA executed an Environmental Services
26 Cooperative Agreement W9128F 07 2-0162 ("ESCA") under the authority of Title 10 United
27 States Code, Section 2701(d)- Environmental Restoration Program (10 U.S.C. 2701)
28 whereby FORA would perform the Army's environmental responsibilities as the Army
29 Response Action Contractor pursuant to Title 42 United States Code, section 9619, with
30 the Army providing funding to perform these services; and

31
32 WHEREAS, the ESCA has been amended several times, the amendment in 2017
33 which provides approximately \$6.8 million to complete the property transfer process and
34 to perform the required long-term land management tasks, including Munitions and
35 Explosives of Concern ("MEC") Find Assessments, inspections, enforcement, monitoring
36 and reporting through June 30, 2028; and

37
38 WHEREAS, due to changes and delays in the transfer of properties, modifications
39 were made to the ESCA grant leaving post-June 30, 2020 funds available are ESCA Line
40 Item Number 0004 Post Closure MEC Find Assessments \$528,651 and ESCA Line Item
41 Number 0005 for Long-Term Management and Land Use Control (LUC) management are
42 \$3,705,792, (Totaling \$4,234,443 available from June 30, 2020 through June 30, 2028),
43 [need Stan and Helen to confirm these numbers. Stan/FORA/ARMY to confirm that Mods
44 10,11 and 12 do not affect the ability to fully implement the original task list of LTO which
45 were estimated to require \$6.8 to complete (i.e. that Mods 10-12 do not re-allocate a
46 portion of the 6.8 to current tasks]; and

1
2 WHEREAS, in 2018 FORA adopted a Transition Plan as required by State Law that
3 specifies that FORA engage the Successor-in-Interest (“Successor”) provisions of the
4 ESCA contract, and

5
6 WHEREAS, the Successor assumes responsibility and will be tasked with
7 performing the remaining LTOs under the ESCA, including the recent amendment. It is
8 assumed that all work under the previous \$98,000,000 contract will have been
9 accomplished prior to FORA’s dissolution as evidenced by the 2019 EPA Remedial Action
10 Completion letters, per AOC Section XVII, Certification of Completion, housed in the Army
11 Administrative Record located at: [http://fortordcleanup.com/documents/administrative-
13 record/](http://fortordcleanup.com/documents/administrative-
12 record/), and

14 WHEREAS, the City of Seaside is prepared, subject to Army funding, to assume
15 ESCA responsibility and attendant local reuse authority status, including the execution of
16 the AOC in order to complete the ESCA obligations and any property-related transfer
17 actions required after June 30, 2020;

18
19
20 *****

21 **NOW, THEREFORE,**

22
23 1. Incorporation of Recitals. The above recitals are hereby incorporated herein by
24 reference.

25
26 2. Acknowledgement. FORA agrees to acknowledge Seaside as the ESCA
27 Successor-In-Interest under the 2018 Transition Plan.

28
29 3. Insurance Policies. FORA agrees to designate or transfer its insurance
30 coverages to Seaside under the **Coverage A under the AIG PLL and the CHUBB policy.**
31 FORA shall also transfer any self-insured retention funds to Seaside to be used
32 exclusively for ESCA and claim-related obligations. Seaside acknowledges that these
33 coverages will expire in 2022 and 2024, respectively, and that successor designations will
34 be subject to approval by the insurers. Seaside’s successful receipt of insurance
35 coverage is a condition precedent to becoming FORA’s ESCA and local reuse authority
36 successor.

37
38 4. ESCA LTO Program Evidence of Fiduciary and Technical Capability. FORA
39 agrees to provide technical and/or financial assistance to Seaside to meet the terms
40 required by the Army, EPA, and DTSC that the Successor be a single entity and
41 demonstrate technical and financial competence to complete the work.

42
43 5. ESCA records and contracts funds. FORA and Seaside shall establish a
44 mechanism for transfer of all ESCA records, back-up documents, computer files and
45 accounting records, and contract funds to Seaside for meeting FORA’s ESCA obligations.
46

1 6. Technical Assistance. FORA agrees to continue to provide technical assistance
2 and funding to complete the ESCA transfer process through June 30, 2020, including
3 specialized legal, drafting and other staff or contract support.
4

5 7. Obligations. Seaside agrees to assume the local reuse authority designation
6 and the remaining reporting, monitoring, and stewardship or other identified
7 responsibilities associated with the FORA-Army 2007 ESCA as FORA's Successor
8 through the end of the ESCA Contract June 30, 2028 in order to complete property
9 transfers and the ESCA to the extent that ESCA performance does not obligate or put at
10 risk Seaside's municipal non-ESCA funds. Exhaustion or unavailability of ESCA funds
11 with which to compensate Seaside for the performance of ESCA obligations will constitute
12 a force majeure under the ESCA and the AOC, thereby relieving Seaside of its obligations
13 to perform the surviving FORA obligations.
14

15 8. ESCA LTO Program Evidence of Fiduciary and Technical Capability. Seaside
16 agrees to provide evidence of its fiduciary and technical capability to comply with the
17 terms of the ESCA and manage the contract financial assets with associated invoicing
18 and reporting responsibilities, to assure the Army, EPA and DTSC of continued ESCA
19 fiduciary capability.
20

21 a. To assume FORA's ESCA Long Term Obligations Management Program,
22 as approved by the US Army, EPA and DTSC
23

24 i. Personnel. Hire (2) full-time qualified staff to manage ESCA as required
25 under the contract provisions as currently amended through 2028, but
26 with allowances for indirect administrative overhead to assure the Army,
27 EPA and DTSC of continued ESCA technical capacity.
28

29 ii. ESCA Long-Term Obligation Support Services Contract. Enter into
30 Support Services Contracts through 2028 with specialists Arcadis,
31 Weston Solutions, Inc. and Westcliffe Engineers, Inc. (or other qualified
32 vendors), including allowances for indirect administrative overhead to
33 assure the Army, EPA and DTSC of continued ESCA technical capacity.
34

35 iii. Representation. Contract with Counsel reasonably qualified on
36 environmental issues with experience in working with state and federal
37 entities (Army, EPA and DTSC) for review and compliance as noted in
38 the ESCA and the AOC.
39

40 9. Coordination. Enter into agreements with the ESCA underlying jurisdictions
41 (Monterey Peninsula College, California State University Monterey Bay, Monterey County,
42 the cities of Del Rey Oaks and Monterey and Marina Coast Water District) for the property
43 transfers and other necessary property-related rights to effectuate the reuse and the
44 oversight, reporting, response, and other long-term stewardship obligations listed in the
45 ESCA through 2028 on behalf of the Army.
46

1 10. ESCA Amendment. The parties agree to work cooperatively to successfully
2 receive Army, EPA and DTSC concurrence that Seaside is the formal ESCA Successor
3 and execute the ESCA upon review and approval of terms and conditions. Seaside
4 agrees to execute an ESCA Agreement and to comply to comply with the U.S. Army
5 Corps of Engineers (“USACE”) oversight and grant management requirements for funding
6 to Seaside under the ESCA terms, provided however, that the Successor activities are
7 fully funded, including without limitation provision for PLL insurance coverage, funding
8 shall be provided from January 1, 2024 through June 30, 2028 or the completion of the
9 ESCA obligations. Seaside will not pay for Regulatory Oversight unless it is a
10 reimbursement funded by the Army through the end of the ESCA obligations.

11
12 11. Administrative Order on Consent. The parties agree to work cooperatively to
13 successfully receive EPA and DTSC approval that Seaside is the formal Successor to
14 execute an AOC upon review of terms and conditions.

15
16 12. Amendment. This Agreement or any provision hereof may be changed,
17 waived, or terminated only by a statement in writing signed by the Party against which
18 such change, waiver or termination is sought to be enforced.

19
20 13. No Waiver. No delay in enforcing or failing to enforce any right under this
21 Agreement will constitute a waiver of such right. No waiver of any default under this
22 Agreement will operate as a waiver of any other default or of the same default on a future
23 occasion.

24
25 14. Partial Invalidity. If any one or more of the terms, provisions, covenants or
26 conditions of this Agreement are to any extent declared invalid, unenforceable, void or
27 voidable for any reason whatsoever by a court of competent jurisdiction, the finding or
28 order or decree of which becomes final, the Parties agree to amend the terms in a
29 reasonable manner to achieve the intention of the Parties without invalidity. If the terms
30 cannot be amended, the invalidity of one or several terms will not affect the validity of the
31 Agreement as a whole, unless the invalid terms are of such essential importance to this
32 Agreement that it can be reasonably assumed that the Parties would not have contracted
33 this Agreement without the invalid terms. In such case, the Party affected may terminate
34 this Agreement by written notice to the other Party without prejudice to the affected Party’s
35 rights in law or equity.

36
37 15. Entire Agreement. This Agreement is intended by the Parties as a final
38 expression of their agreement and is intended as a complete and exclusive statement of
39 the terms and conditions thereof. Acceptance of or acquiescence in a course of
40 performance rendered under this Agreement shall not be relevant to determine the
41 meaning of this Agreement even though the accepting or acquiescing Party had
42 knowledge of the nature of the performance and opportunity for objection.

43
44 16. Choice of Law. This Agreement will be construed in accordance with the
45 laws of the State of California.

1 17. Further Assurances. Each Party agrees to execute and deliver all further
2 instruments and documents and take all further action that may be reasonably necessary
3 to complete performance of its obligations hereunder and otherwise to effectuate the
4 purposes and intent of this Agreement.

5
6 18. Headings. The headings of the sections hereof are inserted for convenience
7 only and shall not be deemed a part of this Agreement.

8
9 19. Notices. Any notice, demand, offer, or other written instrument required or
10 permitted to be given pursuant to this Agreement shall be acknowledged by the Party
11 giving such notice, and shall to the extent reasonably practicable be sent by hand
12 delivery, and if not reasonably practicable to send by hand delivery, then by telecopy,
13 overnight courier, electronic mail, or registered mail, in each case to the other Party at the
14 address for such Party set forth below (Note: A Party may change its place of notice by a
15 notice sent to all other Parties in compliance with this section):

16
17 City of Seaside
18 Attn. City Manager
19 440 Harcourt Avenue
20 Seaside, CA 93955

Fort Ord Reuse Authority
Attn: Executive Officer
920 2nd Avenue, Suite A
Marina CA

21
22 w/ an email copy to cityattorney@ci.seaside.ca.us

23
24 20. Term of Agreement: This Agreement shall be effective on the Effective Date
25 specified at the beginning of the Agreement and shall remain in effect unless and until
26 terminated by mutual agreement of the Parties or upon the legal dissolution of the Fort
27 Ord Reuse Authority. [Do we need to provide for survival beyond 30 June 2020? And
28 expiration in 2028?] [Not sure what/who would take the survivorship beyond FORA?
29 LAFCO?]

30
31 21. Authorization. Each party affirms that it is fully authorized to enter into this
32 Agreement. The Seaside City Manager is designated on behalf of Seaside, subject to
33 review and approval of documents by the City Attorney, to enter into the terms and
34 conditions of this Memorandum of Agreement, the AOC and the ESCA and sign related
35 ESCA and AOC reporting and financial documents.

36
37
38
39 *****

40 IN WITNESS WHEREOF, each Party has executed the Agreement with the
41 approval of its governing body as of the date first written above.

42
43 CITY OF SEASIDE:

44
45
46 _____

Date: _____

1 Craig Malin
2 City Manager

3
4 APPROVED AS TO FORM:

5
6
7 _____

8 CITY ATTORNEY

9
10
11 FORT ORD REUSE AUTHORITY:

12
13
14 _____ Date: _____

15 Josh Metz
16 Executive Officer

17
18 APPROVED AS TO FORM:

19
20
21 _____

22 AUTHORITY COUNSEL

23
24

