

# Former Fort Ord Real Property Obligations & Opportunities After June 30, 2020

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# Introduction:

- Identify for greater Monterey Peninsula Community Issues and Decision Points to be faced following the “Sunset” of the Fort Ord Reuse Authority (FORA) after 30 June 2020. Issues and Decision Points relate to community interaction with the Department of Defense, the Department of the Army, and Federal and State Environmental Regulators.

# Threshold Decisions:

- A. ESCA:** Will Seaside assume responsibility as Successor to the Environmental Services Cooperative Agreement (“ESCA”) with the Army, and the EPA Administrative Order on Consent?
  
- B. EDC Agreement:** Will Seaside assume the limited federally imposed responsibilities for the Economic Development Conveyance Agreement (“EDC Agreement”) between the United States and FORA?

# A. Background and Environmental Complexities:

The Fort Ord property is listed on the National Priorities (“Superfund”) List due to groundwater contamination. As a result of that listing, the Army, DTSC and EPA entered into an enforceable agreement for investigation and remediation. (FFA).

Timeline:

NPL Listing-1990.

Army, DTSC, EPA enter into enforceable agreement—FFA 1990.

BRAC Closure-1994.

# Insurance Issues:

- AIG Cost Cap policy includes \$15M of traditional PLL coverage – expires 20 MAR 2022 – obtain approval to change insured.
- Current PLL coverage – reassign FORA's \$11M of coverage – expires 31 DEC 2024.
- ESCA requires PLL coverage – current policy expires 31 DEC 2024
- ESCA obligation continues to 30 JUN 2028.
- Army needs to fund PLL coverage to 30 JUN 2028.

# Environmental Legal Overlay:

- MEC, groundwater concerns.
- CERCLA Warranty-condition precedent to transfer:  
*“ ... all action necessary to protect human health and the environment has been taken”*
- Army funding stream-uncertain, unpredictable.
- Regulatory satisfaction of “condition precedent” for residential use not ascertainable.

## CERCLA Warranty exception-deferred warranty/early transfer if:

- EPA approves, Governor concurs.
- Deed contains environmental protection assurances.

# Deferral of no benefit to community unless:

- Funding assured.
- Regulatory concerns addressed.
- Beneficial use for region is obtained.



# Statutory and regulatory path forward (2005):

- Funding assured.
- FORA control of sequencing, priorities.
- Regulatory approval process.
- Accelerate beneficial use.

# How to achieve:

- 10 USC 2701(d)- Army grant funds to LRA

Environmental Service Cooperative Agreement (ESCA) with Army

- Scope of work, \$97,000,000, almost completely focused on MEC; Groundwater excluded.

Enter into Administrative Order on Consent (AOC) with EPA and DTSC

- Scope of work, oversight, standards.

Enter into Remediation Services Contract with LFR/Arcadis

- Perform ESCA scope.

Enter into PLL Cost Cap Insurance policy with AIG.

# Negotiations

- 3 Years to negotiate, integrate these 4 documents.
- LRA, Army, AIG each performed statistical modeling to predict likelihood of success at various funding levels.
- LRA required 98% certainty. Achieved at \$143,000,000.
- AIG policy used to leverage Army grant.
- Army agreed to pay up to \$128,000,000 for coverage and fund next \$15,000,000.

# Delay

- Dispute with Army
  - Is MEC a CERCLA hazardous substance, such that the Army is legally obligated under CERCLA 120(h)(3) to return to address if later discovered?
  - Resolved favorably for LRA and subsequent property owners.

# ESCA Current Status

- FORA legal status terminates on 30 June 2020.
- ESCA obligations continue to 30 June 2028.
- ESCA obligations survive FORA.
- AOC and ESCA provide for Successor:
  - ESCA lists eligible entities, including Seaside.
  - AOC identifies criteria for successor approval.
    - Consequence of no approval-FFA suspension lifted, Army deals with EPA and DTSC.
  - ESCA and AOC revisions being drafted.

## ESCA Current Status (continued):

Seaside has agreed, subject to conditions, to be the Successor.

- Funding adequacy.
- Liability protections.
- Regional acceptance.

## To be done prior to 30 June 2020:

- Successor agreement, obtain EPA approval;
- ESCA and AOC amendments;
- PLL Insurance changes-AIG Coverage A and Chubb policy;
- Complete all real estate transactions with Army;
- Records and funding transfer; and
- Personnel decisions for continuity.

# Background:

## B. EDC Agreement:

1. Pursuant to the Base Closure Act, the DoD Office of Economic Adjustment (“OEA”) recognizes a single entity representative of the greater community to guide the closure, reuse, redevelopment, and disposal of the surplus property resulting from the closure or realignment of a military installation.
2. To guide the response to the Fort Ord realignment, California created the Fort Ord Reuse Authority (FORA) pursuant to California Government Code. Subsequently, OEA recognized FORA as that sole entity.
3. FORA’s plan for the future of the surplus Fort Ord property was presented to the Army and analyzed in the Army’s Final Environmental Impact Statement (FEIS) and approved by the FORA Board on December 12, 1994.



# Background (continued):

4. FORA and the Army executed a Memorandum of Agreement for the Sale of Portions of the former Fort Ord to FORA for Economic Development Purposes dated June 20, 2000 (“EDC Agreement”).
  - The EDC Agreement required that all surplus Fort Ord property subject to the EDC Agreement be conveyed by the Army to FORA, and that FORA subsequently convey that surplus property to the land use jurisdictions pursuant to individual “Implementation Agreement.”
  - The EDC Agreement provided for the transfer of certain water and wastewater collection systems and Government Water Rights to the community, and FORA has the first right of refusal for future Unutilized Government Water and Wastewater Rights.
5. The initial conveyance of surplus Fort Ord property was conveyed to FORA on August 8, 2000, and there have been numerous Army conveyances to FORA in the ensuing years. Portions of the former Fort Ord property remain to be conveyed by the Army pursuant to the EDC Agreement.

# EDC Agreement Issues:

1. An EDC Agreement is authorized exclusively by the Base Closure Act and then only with an entity recognized by the OEA. There is no certainty that OEA will recognize a successor to FORA, although such recognition is likely if:
  - The FORA Board endorses such a successor prior to FORA's sunset;
  - FORA's successor is a land use jurisdiction with a significant interest in the remaining Fort Ord surplus property;
  - The parties agree on a limited role of the Successor entity;
  - There is general community consensus and acceptance of such a new single point of contact; and
  - The new single entity agrees to comply with the federal requirements of the EDC Agreement.

# EDC Agreement Issues (continued):

2. Absent a single entity recognized by the OEA, the Army will unilaterally determine how to dispose of the remaining portions of surplus Fort Ord property subject to the EDC Agreement; although this is likely to be to the underlying land use jurisdictions, there is no guarantee as to the uniformity or urgency of the Army disposal process.
3. Unique community rights and privileges obtained by FORA (e.g. first right of refusal for future Unutilized Government Water and Wastewater Rights), will most likely be lost without EDC successor.

## To be done prior to 30 June 2020:

1. FORA Board to nominate Successor;
2. FORA designated Successor petitions OEA for Federal recognition;
3. OEA recognizes FORA Successor;
4. Army and Successor amend EDC Agreement;
5. FORA Successor and land use jurisdictions agree on an implementing framework; and
6. Successor assumes rights and obligations of EDC Agreement.