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Memorandum

Date: February 20, 2020

To: Josh Metz, Fort Ord Reuse Authority

From: Chelsea Maclean, Holland & Knight
Bradley Brownlow, Holland & Knight

Re: Fort Ord Multi-Species Habitat Conservation Plan Environmental Impact Statement/ Environmental Impact Report – Legal Principles

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I. Introduction

We have been asked to summarize legal principles surrounding certification of the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Fort Ord Multi-Species Habitat Conservation Plan given the unique circumstance that the Fort Ord Reuse Authority's (FORA) statutory authority ends on June 30, 2020. We understand that it is anticipated that a joint powers authority (JPA) will be created to assume some of FORA's obligations.

II. Factual Background

We understand that the Fort Ord Reuse Authority (FORA) published a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Fort Ord Multi-Species Habitat Conservation Plan on November 1, 2019. The EIS/EIR is further described as follows:

> [The EIS/EIR] analyzes the effects of the Proposed Action, which is the issuance of Federal and State incidental take permits (ITPs) by the U.S. Fish and Wildlife Service (USFWS) under Section 10(a)(1)(B) of the Federal Endangered Species Act, and by the California Department of Fish and Wildlife (CDFW) under Section 2081 of the California Fish and Game Code in compliance with the California Endangered Species Act. The issuance of the ITPs would authorize take of the eight State and Federally listed species identified in the Draft Fort Ord Multi-Species Habitat Conservation Plan (Draft HCP) during the course of the redevelopment of the former Fort Ord military base. The USFWS is acting as lead agency under National Environmental Policy Act (NEPA) and FORA is acting as lead agency under California Environmental Quality Act (CEQA). (FORA Habitat Conservation and Management webpage, available at: https://fora.org/habitat.html (accessed February 17, 2020)).

The public comment period closed on December 16, 2019. We understand that FORA's member jurisdictions have expressed a reluctance to conduct as much take as is contemplated in the Draft

HCP because of the associated mitigation costs. The FORA Working Group is discussing possible modifications to the HCP, including reducing the amount of take (Reduced Take Approach) and/or phasing take such that more development would only move forward when certain conversation targets are achieved (Phased Take Approach).

As noted above, we are also aware that FORA's statutory authority ends on June 30, 2020. (Government Code §67700(a)). A Transition Plan was approved by the FORA Board on December 19, 2018. We understand that a joint powers authority (JPA) will be created to assume some of FORA's obligations, including obligations related to HCP approval.

III. Options

We understand that there are several options that are being considered, including the following:

Option 1: FORA certifies EIR and approves HCP

Option 2: FORA certifies EIR with currently analyzed project and alternatives, but does not approve HCP

Option 3: FORA certifies EIR with a Reduced Take, Phased Take Approach and/or other alternative(s), but does not approve HCP

Option 4: JPA relies on FORA certified EIR and approves HCP

Option 5: FORA takes no action and JPA certifies EIR and approves HCP

IV. Legal Principles

The following section summarizes the legal principles associated with various steps in the environmental review and project approval process given the potential options described above.

A. EIR Recirculation

Recirculation is required when significant new information is added to an EIR prior to certification. (Pub. Res. Code §21092.1). Further, "significant new information" requiring recirculation includes, for example, a disclosure showing that:

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
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> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
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> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (CEQA Guidelines §15088.5).

Case law has specifically found that recirculation is not required when an alternative is added to a Final EIR that does not include significant new information. (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 CA4th 316, 330 (rejecting a challenge to the approval of a project EIR for failure to recirculate a revised EIR including a staff recommended alternative that built upon an existing, "Redesign/Reduced Density," alternative to subdivision and development of a 20-acre site)). Further, in *South of Market Community Action Network v. City and County of San Francisco*, the court upheld the EIR for the 5M project in San Francisco that resulted in a variant of alternatives considered in the EIR. ((2019) 33 Cal.App.5th 321). The court stated: "the whole point of requiring evaluation of alternatives in the DEIR is to allow thoughtful consideration and public participation regarding other options that may be less harmful to the environment. . . . . We do not conclude the project description is inadequate because the ultimate approval adopted characteristics of one of the proposed alternatives; that in fact, is one of the key purposes of the CEQA process." (*Id*. at 336). In contrast, recirculation was required for a complete redesign of a stormwater management plan adopted as an environmentally superior means of addressing hydrology and water quality impacts. (*Spring Valley Lake Ass'n v. City of Victorville* (2016) 248 CA4th 91, 108).

B. EIR Certification

It is noted that certifying an EIR is a distinct step from approving a project analyzed in the EIR. A lead agency first decides whether to certify an EIR and is required to make limited findings that the EIR: complies with CEQA; reflects the lead agency's independent judgment and analysis; and was presented to the decision-making body, which reviewed and considered the information in the final EIR before approving the project. (14 Cal Code Regs §15090(a)(2)).

C. Project Approval

After certifying an EIR, the lead agency decides whether and how to approve or carry out a project. (CEQA Guidelines §15091). In doing so, the agency must fulfill its duty to mitigate or avoid significant environmental impacts when it is feasible to do so. (Pub Res C §§21002, 21002.1(b)). Further, a public agency may not approve or carry out a project for which an EIR was prepared unless either: the project as approved will not have a significant effect on the environment; or the agency has eliminated or substantially lessened all significant effects on the environment when feasible and has determined that any remaining significant effects are acceptable when balanced against the project's benefits (Pub. Res. Code §21081; CEQA Guidelines §15092(b)).

D. CEQA Statute of Limitations for Litigation

Once an EIR is certified and an agency elects to approve a project, it is subject to litigation. (Pub. Res. Code §21167). The statute of limitations is 30 days from the date that a notice of determination is filed, or if no notice of determination is filed, 180 days from the date of the public agency's decision to approve the project. (Pub. Res. Code §21167).

Considering the options described in Section III, the statute of limitations to challenge the EIR would not begin to run under Options 2 or 3 since they do not include HCP approval. There is limited value of a certified EIR for responsible agencies if the HCP is not approved or until the HCP is approved.

The statute of limitations would only begin to run under Option 1 if and when FORA approved the HCP or Options 4 or 5 if and when the JPA approves the HCP. Once a project is approved and the statute of limitations runs, the overall adequacy of the environmental document becomes irrelevant as a result of the conclusive presumption of validity. The age of the original environmental document is irrelevant, if subsequent events do not trigger the need for further environmental review.[1] (*Snarled Traffic Obstructs Progress v. City & County of San Francisco* (1999) 74 CA4th 793). Multiple courts have upheld reliance on decade-old EIRs. (See, e.g., *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal. App. 4th 192 (upholding reliance on a 1998 EIR in preparation of a 2009 housing element); *Concerned Dublin Citizens v. City of Dublin* (2011) 214 Cal. App. 4th 1301 (upholding reliance on a 9-year old EIR)).

E. Shift in Lead Agency Designation

The identity of a lead agency can change during the CEQA process. Such a change in the lead agency's identity does not, in itself, require the successor lead agency to restart the CEQA review process. (Practice Under the California Environmental Quality Act, §3.8: Shift in Lead Agency Designation (citing *Gentry v. City of Murrieta* (1995) 36 CA4th 1359, 1383)("*Gentry*"))

In *Gentry*,[2] a project application for a single family home community was first submitted and reviewed by a county. The area containing the project was later annexed to a city.[3] The court explained:

> Thereafter, when the City was incorporated, it took over as lead agency. We have not been referred to any statutory or case authority on the effect of such a change in the identity of the lead agency, nor has our own research revealed any. We note, however, that where two public agencies simultaneously have a substantial claim to be lead agency for a project, they may enter into an agreement designating one of them the lead agency; such an agreement may also "provide for cooperative efforts . . . by contract, joint

[1] Following approval of an EIR, subsequent or supplement environmental review is not required unless: changes to the project require "major revisions" to the EIR; circumstances affecting the project require "major revisions" to the EIR; and/or new information, not knowable at the time of certification, comes to light. (Pub. Res. Code §21166; CEQA Guidelines § 15162).

[2] In another case, *Merced Irrig. Dist. v. Green*, a court upheld a shift in lead agency designation from city to irrigation district in approving a project to build new headquarters for irrigation district. (2002 WL 1004093 (2002)) The case is unpublished so it may not be cited in court, but still evidences useful precedent.

[3] To provide more factual background, an applicant applied for a vesting tentative map for a project consisting of approximately 555 single-family homes from a county. (*Id*. at 1367). The county prepared and certified an EIR for the project itself, as well as an EIR for a community plan within which the project was located. (*Id*. at 1368). Another applicant applied to the county for a vesting tentative map for a smaller project. (*Id*.). The county then prepared a negative declaration. (*Id*. at 1369). Before taking action on the negative declaration, the applicant requested transmittal of the record to a city that had just been incorporated. (*Id*.). The city incorporated the county's materials and ultimately adopted a negative declaration. (*Id*. at 1370).

> exercise of powers, or similar devices." (Guidelines, § 15051, subd. (d).) *This strongly suggests that where two public agencies successively are lead agency for a project, they could likewise engage in "cooperative efforts," provided each agency exercises an independent judgment on the matters which actually come before it for decision*. (*Gentry*, *Id*. at 1397-1398 (*emphasis* added)).

Gentry further illustrates the steps the city took:

> It is undisputed that the County exercised its independent judgment in releasing a proposed negative declaration, in proposing mitigation conditions, and in holding public hearings. The City then rereleased the County's proposed negative declaration on March 17, 1992. It explained its decision to do so in its first staff report. The staff report discussed the history of the Project, including the history of its consideration by the County. The staff report discussed the issues that had been raised in the County's public hearings, but concluded that "[e]ach of these issues has been resolved through the Conditions of Approval, as written by County staff and amended by City staff. . . . " This staff report shows that the City did review, analyze, and exercise independent judgment with respect to the proposed negative declaration. The proposed negative declaration adequately reflected the City's independent judgment. (*Gentry*, *Id*. at 1398).

Similar to the way in which the *Gentry* case involved a shift in lead agency from a county to a city after annexation pursuant to the Cortese Knox Hertzberg Act, the Legislature contemplated succession of FORA to a successor agency identified by FORA. Government Code Section 67700(b) provides as follows:

> (1) The Monterey County Local Agency Formation Commission shall provide for the orderly dissolution of the authority including ensuring that all contracts, agreements, and pledges to pay or repay money entered into by the authority are honored and properly administered, and that all assets of the authority are appropriately transferred. (Emphasis added).
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> (2) The board shall approve and submit a transition plan to the Monterey County Local Agency Formation Commission on or before December 30, 2018, or 18 months before the anticipated inoperability of this title pursuant to subdivision (a), whichever occurs first. The transition plan shall assign assets and liabilities, designate responsible successor agencies, and provide a schedule of remaining obligations.

The Transition Plan approved by the FORA Board on December 19, 2018 provides that FORA's duties and obligations with respect to the preparation and implementation of the HCP will pass to a joint power authority as successor agency formed for that purpose. *Gentry* suggests that a reviewing court has a reasoned basis to find that the JPA continues as the lawful lead agency in this matter.

F. NEPA Relationship

We understand that the USFWS is the NEPA lead agency and that the EIR has been structured as a joint EIS/EIR, a practice authorized by CEQA Guidelines Sections 15170, 15222. The

certification of the EIR under CEQA should have no bearing on the federal agency's action under NEPA. Following the completion of the EIS/EIR, the USFWS will prepare, publicly notice, and sign a Record of Decision (ROD), which is a concise public record of the decision.