

**FORT ORD REUSE AUTHORITY**

**COMPLETING ARMY MUNITIONS  
REMOVAL RESPONSIBILITIES:  
FORA CONTRACT OBLIGATIONS**

**KUTAK  
ROCK<sub>LLP</sub>**

# FORT ORD MUNITIONS BACKGROUND

- ▶ 1917: Established as a Field Artillery Training Range
  - ▶ 1920 – 1990: Light infantry training and field maneuvers
  - ▶ 1990: NPL/Superfund Designation by Environmental Protection Agency (EPA)
  - ▶ 1991: Base Realignment and Closure (BRAC) decision to close Fort Ord
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- ▶ Training Activities
  - ▶ Live fire, small arms, grenades, mortars, artillery, maneuver area
  - ▶ Contamination
  - ▶ Surface and soils mostly Munitions and Explosives of Concern (MEC)
  - ▶ Risk analysis of MEC is different: no  $10^{-6}$
  - ▶ Subsurface-groundwater and soil contamination are Army Retained Obligations

## 42 USC 9620(h)(3)

- ▶ Deed must include a covenant that warrants that all action necessary to protect human health and the environment has been taken.

# REGULATOR/ARMY DISAGREEMENT – Adequacy of Investigation and Removal (National Issue)

- ▶ Gridstats: 19 Jan 2001 EPA Headquarters letter: What are EPA's concerns?
- ▶ *“EPA Regional Project Managers have expressed concern relative these techniques and the site-level conclusions reached using them. These concerns, some of which are listed below, form the basis of the joint EPA and U.S. Army Corps of Engineers (USACE) review of these tools.”*
  - ▶ the ability of SS/GS and UXO Calculator to locate Unexploded Ordnance (UXO) clusters (e.g., target impact areas) and the boundaries of UXO contaminated areas;
  - ▶ whether the assumption of homogeneity of UXO used in these techniques is valid;
  - ▶ the extent to which an area is classified as "homogeneous;"
  - ▶ the statistical validity of assessing sector non-homogeneity;
  - ▶ the consistency/reproducibility of results;
  - ▶ a problem in the algorithm and confidence intervals for UXO Calculator; and
  - ▶ variability in UXO estimates and exposure scenarios.
- ▶ Fort Ord identified by EPA as one of the installations of Gridstats concern

# COMMUNITY CLEANUP CONCERNS

- ▶ Adequacy of clean up
- ▶ Funding stream - not assured
- ▶ Delay in obtaining beneficial use (access)

# INTERIM ACTION RANGES MRA

- ▶ Total acreage: 231
- ▶ 43 acres: special case/non-completed areas
- ▶ Location: adjacent to inland range; south of Parker Flats
- ▶ Army activities: 1997-2007
  - Burn activities and surface clearance
- ▶ FORA/ARCADIS:
  - Range 47 special case area – 14 acres
    - Brush removal and investigation – led to screening and removal of 44,000 cubic yards of soil
    - Digital geophysical mapping

# INTERIM ACTION RANGES MRA ~ cont'd.

## ▶ FORA/ARCADIS:

- Results within last 12 months:
  - ✓ 91 – 40mm HE MEC
    - Vietnam era
    - Sensitively-fused anti-personnel round
    - Maximum fragmentation distance – 339 feet
  - ✓ 8,200 lbs. – 40 mm Munitions Debris (MD)
  - ✓ 557 – other MEC
- Current activities:
  - ✓ Replacing 44,000 cubic yards of soil and erosion control measures
  - ✓ Implementing habitat restoration program (45,000 native species plants grown from local seeds)

# HOW TO ADDRESS REGULATORY AND COMMUNITY CONCERNS AT THE FORMER FORT ORD

- ▶ Environmental Services Cooperative Agreement (ESCA) Early Transfer to obtain beneficial use at the earliest opportunity
  - “...all action necessary to protect human health and the environment has been completed.” 42 USC 9620(h)(3). Establishes a condition precedent to transfer
  - Statutory provision that defers the condition precedent **IF** schedule, funding and adequate environmental protections are in place. 42 USC 9620(h)(3)(C)
- ▶ Grant funds made available to FORA “...to assist the Secretary to carry out any of **his** responsibilities to investigate, identify and cleanup contamination.” 10 USC 2701 (d)
- ▶ EPA/DTSC Administrative Order on Consent (AOC) imposed as condition of CA Governor’s concurrence and EPA approval of early transfer/deferred covenant
- ▶ Only makes sense for FORA if the two (Early Transfer and ESCA/Grant) are both approved
- ▶ FORA Board approved ESCA, AOC, LFR (now ARCADIS) Remedial Services contract, cost cap insurance policy—March 2007



# WORK APPROVAL AUTHORITY - ARMY/EPA pursuant to AOC, ESCA and Executive Order 12580

- ▶ Responsible party for contamination - Army per Federal Facilities Agreement with EPA and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- ▶ FORA status: Army contractor for MEC - Army retains groundwater and soils contamination
- ▶ ARCADIS status: FORA competitively selected subcontractor

## ESCA Section 4.2.1

...the Army shall review, comment, and/or approve all drafts of the Proposed Plans, Records of Decision, and documents required pursuant to the AOC.

# ADMINISTRATIVE ORDER ON CONSENT (AOC)

## Section 16

- ▶ Respondent [FORA] shall perform the work in accordance with...work plans or other plans, standards, specifications, and schedules...approved by EPA...pursuant to this AOC.

## Section 26

- ▶ ...the Army and/or EPA shall select a remedial action

# AOC

## Section 49

- ▶ After review of any plan, report, or other item which is required to be submitted for approval...EPA...shall:
  - ▶ (a) approve, in whole or in part, the submission;
  - ▶ (b) approve the submission upon specified conditions;
  - ▶ (c) modify the submission to cure the deficiencies;
  - ▶ (d) disapprove, in whole or in part, the submission, directing the respondent to modify the submission; or
  - ▶ (e) any combination of the above.

# Land Use Authority-FORA enabling statute does not replace or override local municipal authority

## ► Zoning, permitting and entitlement authority:

CAL. HSC § 33492.70

- (a)(1) This article shall govern the establishment and operation of all redevelopment project areas created within the area previously known as Fort Ord
- ...
- (c) In addition to the powers of an agency, the Redevelopment Agency of Fort Ord shall also act as the legislative body and the planning commission for all approvals and actions required and authorized by this part for the adoption and implementation of a redevelopment plan. However, subject to the consistency and appeal provision of Title 7.85 (commencing with Section 67650) of the Government Code and other applicable provisions of state law, all planning, zoning, and permitting decisions with regard to the land within the project area shall continue to be under the control and jurisdiction of each of the respective local legislative bodies, as applicable. **[emphasis added]**

# CONCLUSIONS:

- ▶ FORA's mission is to protect human health and the environment
- ▶ FORA is a federal government contractor, not a responsible party
- ▶ FORA does not have zoning/entitlement authority
- ▶ FORA's Board approved the AOC, ESCA, insurance and ARCADIS contract
- ▶ Cleanup to an appropriate level does not require use at that level
- ▶ Satisfaction of cleanup is an Army/EPA determination