

FORT ORD REUSE AUTHORITY BOARD REPORT

BUSINESS ITEMS

Subject: Transition Planning Update

Meeting Date: February 9, 2018

Agenda Number: 8b

INFORMATION/ACTION

RECOMMENDATION

- i. Receive Update on January transition planning issues
- ii. Receive Transition Plan Summary Charts for Administration and Environmental Services Cooperative Agreement;


BACKGROUND/DISCUSSION

At the January 12, 2018, staff presented the Transition Plan workplan. The first two summary charts of the plan were presented at that time. The workplan requires a strict schedule of summary charts in order to meet the plan submission date prior to December 30, 2018. Accordingly, we are including the draft Transition Plan summary charts for known administrative and Environmental Services Cooperative Agreement ("ESCA") components. The charts will be modified based upon the new side by side comparison approach requested by Senator Monning and approved by the Board at the January meeting. We expect further discussion and refinements during the Transition Ad Hoc Committee discussions. At the January Board meeting, direction was given to secure consultant services and to work with a new transition ad hoc committee on the side by side comparison of Fort Ord Reuse Authority ("FORA") extension as contrasted with allocation/assignment to multiple entities. The FORA Board chair has convened a Transition Ad Hoc Committee ("TAC"). The new charge and the TAC appointees are attached as Exhibit A. Staff is looking to convene the first TAC in mid-February.

Local Agency Formation Commission ("LAFCO") staff submitted a report to its Board on expectations for the FORA Transition Plan. A copy of the LAFCO staff report can be found at (<http://www.monterey.lafco.ca.gov/meetings/current/1-22-18%20Commission%20Meeting/1-22-18%20PDF%20FullMtgPkt-Searchable%20Agn.pdf>, at Agenda Item 15). Of significant note, LAFCO is requesting an application processing fee and an executed Indemnification Agreement upon submission of the Transition Plan. The processing fee is estimated by LAFCO staff to be an amount of between \$10,000-\$20,000. FORA Board Vice Chair Supervisor Parker, in her capacity as LAFCO commissioner, inquired of LAFCO staff as to the value of an Indemnification Agreement executed by FORA if the obligation extends beyond FORA's sunset date. She was advised that this would most likely be handled in the transition plan as a liability for successor entities. We have noted this Indemnification Agreement with a place holder in the Transition Plan which contract will be inserted once it becomes available. Additionally and significantly, LAFCO is requiring an environmental document related to the Transition Plan, the nature and extent of which has not yet been determined by either LAFCO or FORA (as the lead agency). The Board can expect significant budget revisions in the next fiscal year as the Transition Plan ramps up to address indemnification, processing and additional consultant costs. Currently, the Board has approved \$50,000 in consultant fees related to Transition planning. Accordingly, staff has retained an on-call financial consultant to assist with some discrete financial calculations and expects to retain the services of an environmental consultant as well in order to meet the timelines set forth for the Transition Plan.

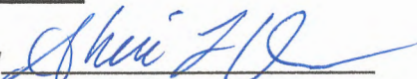
The first of your summary charts is titled Administrative Contracts, the contract of most interest and most potential liability is the CalPERS contract. As we have previously outlined the current range of terminated agency liability is between \$6.3M and \$8.8M. The second set of summary charts is the ESCA contracts and related regulatory documents. Of particular import related to those documents, is a new state legislation SB50 which prohibits property transfers from the Federal government from being recorded without giving State Lands Commission first right to secure surplus Federal property. This may significantly affect, and/or delay property transfers from the Department of Defense to FORA and/or the ultimate jurisdictions. Special counsel is working with the Executive Officer on options and interpretations of the new legislation, including some exemptions from the State Lands Commission process.

FISCAL IMPACT

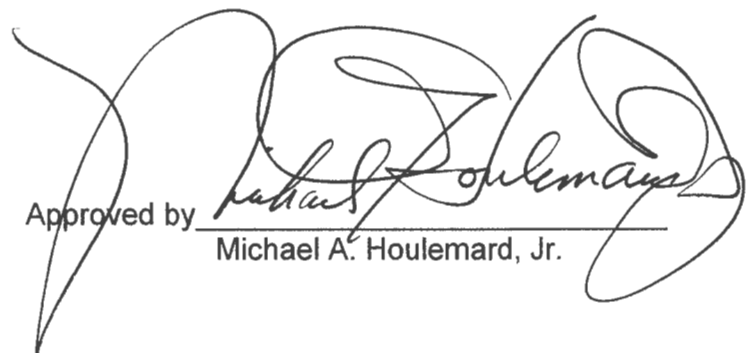
Reviewed by FORA Controller 

Staff time/legal are generally within the approved annual budget, and have been added to current staff workload. Staff anticipates presenting future transition plan budget items for Board consideration.

COORDINATION

Prepared by 
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Reviewed by 
Steve Endsley

Approved by 
Michael A. Houlemard, Jr.

ATTACHMENTS:

- Attachment A: TAC Charge and appointees
- Attachment B: Summary Chart: Administrative Contracts
- Attachment C Summary Chart: ESCA

Transition Ad-Hoc Committee (“TAC”)

2018 Charge

The Fort Ord Reuse Authority’s (FORA’s) legislative/State Law terminus is June 30, 2020. The TAC is a limited term *ad hoc committee*, formed to review a staff-generated comparative analysis for future FORA Board review. The analysis will contrast FORA Act continuation (including potential modifications) with FORA Act sunset and assignment of liabilities/obligations and resources/revenues to multiple successor agencies. The analysis will include:

- 1) Modifications to the existing FORA Act to address:
 - a. Governance/Membership/Voting.
 - b. Extension date.
 - c. Enforcement powers (prevailing wage, Base Reuse Plan, policies, etc.).
 - d. Affordable housing.
- 2) Multiple successor assignments with completion deadlines in a transition plan (by chapter) format for both tangible and intangible obligations.
 - a. Joint and several liability assignment.
 - b. Individualized/jurisdiction assignments and completion date.
 - c. Outstanding obligation and asset prioritization.
 - d. Enforcement of Basewide Costs and Mitigation Measures.

The TAC input is ongoing through June 1, 2018. The Committee Chair shall coordinate with staff on monthly progress reports to the Board.

Appointees:

Andre Lewis, Chair CSU Monterey Bay	Councilmember Alan Haffa City of Monterey
Councilmember Gail Morton City of Marina	Mayor Jerry Edelen City of Del Rey Oaks
Mayor Ralph Rubio City of Seaside	Supervisor Mary Adams County of Monterey
Councilmember Cynthia Garfield City of Pacific Grove	Director Debbie Hale Transportation Agency of Monterey County

TRANSITION PLANNING/SUMMARY CHART

ADMINISTRATIVE

SUMMARY OF OBLIGATIONS AND SOURCE

The most significant administrative FORA liabilities are 1) the California Public Employees Retirement System Contract obligations and 2) the Local Agency Formation Commission indemnification requirements. The other assets/liabilities are comprised of a set of insurance policies which cover a variety of matters, attendant funds to address unfunded terminated agency liabilities and FORA's plant and facilities (e.g. desks/chairs/equipment, etc.)

EXISTING CONTRACTS AFFECTING WATER

Please see **Exhibit 1**.

NOTES:

The CalPERS contract requires resolution of intent to terminate and one year notice to CalPERS.

LAFCO Indemnification Agreement obligations and potential liability could be substantial if LAFCO's approval of the transition plan is challenged.

Administrative Contracts

Contract	Year	Asset/Liability Pledge/Obligation	DATE COMPLETION	Multi-Agency	Multi-Agency Notes
CalPERS Contract	1997	Liability		All voting members	*FORA has set aside approximately \$7M in assets to address terminated agency unfunded Liability
CalPERS Contract Amendment 1	1999	Liability		All voting members	*FORA has set aside approximately \$7M in assets to address terminated agency unfunded Liability
CalPERS Contract Amendment 2	2003	Liability		All voting members	*FORA has set aside approximately \$7M in assets to address terminated agency unfunded Liability
LAFCO Indemnification Agreement	2018	Liability		All voting members	May require a substantial contribution should LAFCO be sued on transition plan
General Umbrella Policy	Annual	Liability/Asset		All Members*	May want to extend policy to provide coverage during any possible Statute of limitations time period
Commercial Property/Premises Liability	Annual	Liability/Asset		All Members*	May want to extend policy to provide coverage during any possible Statute of limitation time period
Worker's Compensation Policy	Annual	Liability/Asset		All Members*	May want to extend policy to provide coverage during any possible Statute of limitation time period
Director's Liability Policy	Annual	Liability/Asset		All Members*	May want to extend policy to provide coverage during any possible Statute of limitation time period
Crime Bond Policy	2006	Liability/Asset	Ongoing	All Members*	May want to extend policy to provide coverage during any possible Statute of limitation time period

Notes:

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MEMORANDUM

TO: FORT ORD REUSE AUTHORITY

**FROM: GEORGE SCHLOSSBERG
BARRY STEINBERG
NEO TRAN**

DATE: JANUARY 19, 2018

**RE: ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT
AUTHORITIES**

Introduction:

This Memorandum is in response to your request for information regarding the federal role and federal requirements for a Local Redevelopment Authority (“LRA”) to implement the closure and redevelopment of the former Fort Ord under the Defense Base Closure and Realignment Act of 1990, as amended, and other applicable federal law and regulations. We are providing this information in our role as the federal base closure counsel for the Fort Ord Reuse Authority (“FORA”), and our advice is provided in the context of FORA’s relationship, agreements, and obligations with the federal government.

Role of Federally Recognized Local Reuse Authorities:

The Defense Base Closure and Realignment Act of 1990 (as amended, the “Base Closure Act”), defines a local redevelopment authority (“LRA”) as

“... any entity (including any entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan.”¹

¹ Base Closure Act, § 2910(9).

ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT AUTHORITIES

January 19, 2018

An LRA serves as the primary link between the Department of Defense (“DOD”), the installation, and other federal and state agencies on one hand, and the local communities on the other hand, for all matters related to the closure and redevelopment of the former military installation pursuant to the Base Closure Act.² It is the single entity charged with identifying local redevelopment needs and preparing a comprehensive redevelopment plan (“Community Reuse Plan”) that balances all of the disparate requirements of the surrounding community; such federal deference is given to the Community Reuse Plan that DOD is required to consider such Community Reuse Plan in the environmental review process that guides the disposal of the surplus federal property.

Generally, the Secretary of Defense will recognize a single LRA per closed installation.³ However, since skills and authorities needed to develop a Community Reuse Plan are different from those needed to implement such a plan, DoD regulations permit the sequential recognition of two LRAs: (i) a “Planning” LRA for the initial planning phase leading to the preparation and adoption of the Community Reuse Plan, and (ii) an “Implementation” LRA for the subsequent implementation phase leading to the redevelopment and build-out of the former installation in accordance with the Community Reuse Plan. FORA has sought and received such sequential recognition, first as a Planning LRA, and subsequently as an Implemental LRA. As the Department of Defense Base Redevelopment and Realignment Manual (“Manual”) explains:

*Initially, the LRA should focus on crafting the base redevelopment plan. During the base closure process, it is not uncommon for one entity to be recognized as the LRA for reuse planning purposes, and a follow-on entity designated to coordinate and oversee implementation of the plan. In some cases, the LRA also may want to implement all or part of the redevelopment plan. Not all communities will choose to create an implementation LRA. Implementation responsibilities, including restructuring or dissolving the planning LRA, should await completion of the redevelopment plan and a financial feasibility analysis of alternative scenarios for actual redevelopment.*⁴

The DOD’s Office of Economic Adjustment (“OEA”) will recognize an Implementation LRA only if the LRA pursues an economic development conveyance (“EDC”).⁵ FORA submitted an EDC application in 1997 seeking to acquire at no cost significant portions of the surplus federal property comprising the former Fort Ord, and entered into that certain *Memorandum of Agreement between the United States of America and the Fort Ord Reuse Authority for the sale of portions of the former Fort Ord*, dated June 20, 2000, as amended (“EDC Agreement”). The EDC Agreement has been amended seven (7) times since 2000, most recently on January 5, 2018. Among other things, the consideration to the United States for the

² Section C3.2.2 of the Base Redevelopment and Realignment Manual, Office of Deputy Under Secretary of Defense (Installations and Environment), March 1, 2006 (“Base Redevelopment and Realignment Manual”).

³ 32 C.F.R. §174.6(a).

⁴ Base Redevelopment and Realignment Manual, Section C3.2.3.

⁵ Base Redevelopment and Realignment Manual, Section C3.2.3.

ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT AUTHORITIES

January 19, 2018

EDC Agreement and the conveyance of the many acres of surplus federal property and other interests in property and water interests to FORA at no cost, is FORA's obligation to implement the Community Reuse Plan that was the basis for the EDC Application.

Requirements for LRA to Implement the Community Reuse Plan:

At a fundamental level, an Implementation LRA (such as FORA) needs the requisite resources, ability, and authority to implement the Community Reuse Plan. For example, if the Community Reuse Plan envisions certain limitations on the use of the property, the Implementation LRA needs to be able to assert appropriate land use controls. If the Community Reuse Plan is dependent upon certain infrastructure improvements prior to development, the Implementation LRA must have the financial resources, or access to capital, and legal authorities sufficient to place the infrastructure in a timely manner. And where resources are limited, the Implementation LRA must have the ability to allocate those resources across the surplus property in a fair and impartial manner that guarantees the success of the Community Reuse Plan. And most importantly, the Implementation LRA must be able to comprehensively monitor and enforce the many environmental use restrictions placed on the property by the federal quitclaim deeds conveying the surplus property to FORA, as well as comprehensively enforce any contractual obligations FORA has undertaken in the course of its relationship with the federal government.

Redevelopment of an installation such as Fort Ord pursuant to the Base Closure Act has several key factors rooted in the federal base closure ("BRAC") process that differentiate it from other non-BRAC large-scale development projects:

- The Implementation LRA is the only entity eligible to receive BRAC property under an Economic Development Conveyance ("EDC").⁶ Therefore, the Implementation LRA must have the legal authority to negotiate and enter into the EDC with DOD, receive and manage the property under its name, and lease, dispose, or development such property as a single project in accordance with the Community Reuse Plan pursuant to the Base Closure Act. It is likely that many more amendments to the EDC Agreement will be required as the surplus federal property is redeveloped, and the build-out contemplated by the Community Reuse Plan continues, and only the Implementation LRA may seek and enter into these amendments. Importantly, the EDC Agreement provides that should the Army determine that additional water rights are excess to the needs of the Army, FORA shall have the first right of refusal to any such transfer rights. Absent, such central allocation of water rights in support of the Community Reuse Plan, it is unlikely that the Army would transfer such water rights to the community.

⁶ 32 C.F.R. 174.9(b).

ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT AUTHORITIES

January 19, 2018

- The Implementation LRA serves as the local authority on behalf of federal agencies to seek, monitor and implement Public Benefit Conveyances and Homeless Assistance Provider land conveyances. This is a continuous process that often requires the Implementation LRA to enforce or take over Legally Binding Agreements entered into with Homeless Providers or other recipients of surplus federal property in accordance with the Community Reuse Plan.
- The Implementation LRA must have sufficient financing, or the ability to acquire such financing, to carry out the economic development objectives set forth in the Community Reuse Plan. Specifically, the Implementation LRA must have the authority and status to accept federal funding from the DOD Office of Economic Adjustment (“OEA”), or other federal agencies or entities. However, OEA requires that its funds be segregated and dedicated to implementation of the Community Reuse Plan and not co-mingled with other funding sources. Additionally, to the extent required by the EDC Agreement or any amendments to the EDC Agreement, the Implementation LRA must have the authority to meet federal requirements for “back-end” revenue sharing, which may include segregating total project revenues to meet federal accounting standards.
- The Implementation LRA must have sufficient financing, or the ability to acquire such financing, to implement and manage in a comprehensive manner the infrastructure requirements necessary to carry out the economic development objectives set forth in the Community Reuse Plan.
- The Implementation LRA has unique federal environmental remediation obligations and authorities that permit the Implementation LRA to pursue certain conveyances of surplus property in advance of its remediation in accordance with federal environmental requirements. In fact, and as discussed below, FORA has undertaken this obligation, by (i) accepting from the Army an “Early Transfer” of environmentally contaminated surplus federal property, and (ii) by entering into an Environmental Services Cooperative Agreement (“ESCA”) with the United States. Both the Early Transfer and the ESCA involve continuing obligations that will likely not be completed by the time FORA is set to sunset.

Unique Environmental Matters Relating to Fort Ord:

1. Federal Superfund Site: Fort Ord has been designated as a national priorities list (NPL) site, the formal title of a Superfund site. In addition to munitions and explosives of concern (“MEC”) issues for which FORA is being paid to remediate, the groundwater at the former base is contaminated and requires remediation. This groundwater remediation is being performed by the Army, not FORA, and is not likely to be completed in the next twenty (20)

ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT AUTHORITIES

January 19, 2018

years. As a consequence, there are constraints on access to and the use of groundwater and those constraints are reflected in the deeds to the property. These constraints, coupled with continuing obligations to address the potential of encountering MEC, necessitate a comprehensive long term plan consisting of monitoring, inspection, and enforcement obligations. These are the responsibility of FORA initially, and eventually will pass by deed to the end users of the property. In addition to FORA, the local jurisdictions in which the property is located will be obligated to exercise their municipal authority to ensure compliance with the long term environmental obligations imposed on the property.

2. Early Transfer: The transfer of title to real property out of the federal inventory requires a federal determination that all action necessary to protect human health and the environment *has been taken*.⁷ This statutory requirement establishes a condition precedent to transfer, which in the case of the former Fort Ord, could not be met by the Army owing to the environmental contamination of the property as a result of military activities, including the use and disposition of MEC. In order to accelerate the conveyance of contaminated properties, federal law permits an expedited disposal process, a so-called “Early Transfer,” whereby the determination that all remedial action has been taken is deferred,⁸ when sufficient guarantees can be put in place that (i) the required remediation will take place post-transfer, and (ii) that suitable protections for human health and the habitat can be established during the remediation process.

The Early Transfer process for a California NPL site requires, by statute, the approval of the Administrator of the United States Environmental Protection Agency (“EPA”) and the concurrence of the Governor of California. As a condition for this approval and concurrence, FORA was required to enter into an Administrative Order on Consent (“AOC”) with EPA and California Department of Toxic Substances Control (“DTSC”), establishing the process, schedule, documentation, and regulatory oversight of the MEC work for which the Army is responsible, and FORA is performing. In essence, the AOC creates an enforcement mechanism by the federal and State regulatory agencies binding FORA, as the single point of responsibility to complete the agreed upon work of the AOC. Should FORA sunset prior to the completion of this AOC mandated environmental work, the assignment of this responsibility would need the consent of EPA.

3. Environmental Services Cooperative Agreement: In order to satisfy the remediation requirements for an Early Transfer, FORA entered into an environmental services cooperative agreement (“ESCA”) with the Army, whereby the Army would fund the environmental investigation and remediation of MEC through a grant to FORA,⁹ thereby avoiding the incremental funding of Army contractors over many years. In the case of the former Fort Ord, this enables FORA to remediate the surface and near surface areas many years sooner than would have occurred had the Army pursued its usual funding and contracting process. It is estimated that the combination of an early transfer and cooperative agreement funding has

⁷ 42 USC 9620(h)(3)

⁸ 42 USC 9620(h)(3)(C)

⁹ 10 USC 2701(d)

ROLE OF FEDERALLY RECOGNIZED LOCAL REDEVELOPMENT AUTHORITIES

January 19, 2018

accelerated FORA's beneficial use of the surface area by as much as 10 years. Should FORA sunset prior to the completion of the ESCA, the assignment of this responsibility would need to be negotiated with the Army.

Conclusion:

Should FORA sunset in 2020, and not be replaced by a single entity empowered to comprehensively implement the Community Reuse Plan and the ESCA, the multiple Fort Ord communities will face additional development challenges and possible liabilities resulting from potential defaults under the ESCA that will make it more difficult to achieve the desired common economic development goals of the Community Reuse Plan, as well as face individual financial burdens heretofore efficiently absorbed by FORA through economies of scale.

The federal government will correctly insist on a single entity to assume the financial, management and administrative obligations of the AOC and the ESCA, and the individual governmental units enforcing the land use restrictions contained in the hundreds of federal quitclaim deeds will need to coordinate their enforcement approaches to enforce identical and common land use restrictions. Moreover, applications for Federal assistance for common infrastructure required to implement the Community Reuse plan will need to be coordinated to avoid destructive competition while assuring timely completion of the infrastructure and development.

I trust this Memorandum is responsive to your request for information. If you have any questions or concerns, please call George Schlossberg directly at 202-828-2418, or contact him by email at george.schlossberg@kutakrock.com.

G.R.S. & N.T.T.

TRANSITION PLANNING/SUMMARY CHART

ENVIRONMENTAL SERVICES CONTRACTS

SUMMARY OF OBLIGATIONS AND SOURCE

Environmental cleanup (especially military munitions) of Fort Ord lands is an extensive and complicated task. The environmental issues run the gamut from regulatory Superfund site designation (and delisting) of the entire former Fort Ord lands to removal and long term monitoring of munitions and explosives of concern (“MEC”). There are state and federal regulatory and contractual assets/liabilities and obligations running between multiple parties, e.g. Army to FORA, Army to Department of Toxic Substance Control and Environmental Protection Agency to FORA and multiple jurisdictions. In exchange for property transfer to local hands and to align clean up with local and regional demands, FORA and the Army entered into a clean up agreement in which the Army paid for clean up services. FORA just entered an amended agreement in which additional funds from the Army are provided to complete the reporting and additional regulatory requirements going forward to 2028. This includes how to proceed should activities in the future discover unexpected MEC, which will expose the property owner/developer of land to potential liabilities and determinations (creating lengthy delays, injury or impossibility of affecting ultimate end use plans).

EXISTING CONTRACTS AFFECTING WATER

Please see Exhibit 1.

NOTES:

Administrative Order on Consent can be assigned, but it is subject to Army/Regulator review of assignee(s) technical, managerial and financial ability to perform remaining obligations.

See Kutak Rock memorandum on Federal contractual ESCA issues, pages 4-6.

Environmental Services					
Contract	Year	Asset/Liability Pledge/Obligation	DATE COMPLETION	Multi-Agency	Multi-Agency Notes
FORA-City of Monterey ESCA Property Management MOA	2007	Asset/Obligation	Dependent upon Property transfer	N/A	
Pollution Legal Liability Insurance (PLL) - ESCA Insurance Policy Coverages A, B & C	2007	Asset			1. Requires Written Consent to successor
FORA-County ESCA Property Management MOA	2007	Asset/Obligation	Dependent upon Property transfer		
FORA-CSUMB ESCA Property Management MOA	2007	Asset/Obligation	Dependent upon Property transfer		
FORA-DRO ESCA Property Management MOA	2007	Asset/Obligation	Dependent upon Property transfer		
FORA-MPC ESCA Property Management MOA	2008	Asset/Obligation	Dependent upon Property transfer		
FORA-Seaside ESCA Property Management MOA	2007	Asset/Obligation	Dependent upon Property transfer		
ESCA Cooperative Agreement Award (End date amended 2017)	2007	Asset/Liability	2037	County***	
ESCA Cooperative Agreement Award-Amendment 1	2017	Asset/Liability	2028	County***	
FORA-LFR Fort Ord Remediation Services Agreement	2007	Asset/Liability	?2019/2020?	County***	Assignable
US EPA-Army-State of CA Federal Facility Agreement	1990	Obligation/Liability		County	
US EPA Administrative Order on Consent	2007	Liability/Obligation		County/Seaside/Monterey/Del Rey Oaks Marina/CSUMB/UC/MPC/MCW D	Requires 120-notice/Financial and Technical Expertise/Approval by EPA/DTSC
Pollution Legal Liability Insurance (PLL) CHUBB	2015	Asset/Liability/Obligation			Requires consent
MOU Regarding Development of the Central Coast Veterans Cemetery	2009	Liability/Obligation		County/Seaside	
Remedial Design/Remedial Action, Land Use Controls Implementation, Operations and Maintenance Plan, Parker Flats MRA Phase I*	2009	Liability/Obligation	No End Date	County of Monterey	
G1 Land Use Covenant Implementation Plan and Operations Maintenance Plan (LUCIP/OMP)	2018**	Obligation	No End Date	Enforcement by Successor	
G2 LUCIP/OMP	2018**	Obligation	No End Date	Enforcement by Successor	
G3 LUCIP/OMP	2018**	Obligation	No End Date	Enforcement by Successor	
G4 LUCIP/OMP	2018**	Obligation	No End Date	Enforcement by Successor	
IAR LUCIP/OMP	2018**	Obligation	No End Date	Enforcement by Successor	
MOA Jurisdictions and DTSC Concerning Monitoring and Reporting on Environmental Restrictions on the Former Fort Ord	2008	Liability/Obligation	No End Date	County/Seaside/Monterey/Del Rey Oaks/Marina, CSUMB/UC/MPC	
Notes:					
* Agreement will be replaced with new LUCIP Agreement/Restriction					
** LUCIP/OMP agreements are expected to be finalized in 2018					