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By E-mail
Board of Directors
Fort Ord Reuse Authority
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Re: **Certification of FEIR for the Fort Ord Multi-Species Habitat Conservation Plan**

Dear Members of the Board:

The FORA Board should not certify the Final EIR for the Fort Ord Multi-Species Habitat Conservation Plan. FORA cannot certify a valid EIR because it is not the lead agency. A lead agency must have the responsibility to carry out or approve the HCP, but FORA does not have either responsibility**.**

Furthermore, the EIS/EIR is inadequate because it was prepared for an HCP that will not be adopted by any agency. It is predicated on development assumptions that the land use agencies have now repudiated, and the EIS/EIR fails adequately to describe or assess the last-minute Alternative 4.

The EIS/EIR is also inadequate because it fails to propose enforceable and feasible mitigation and avoidance measures. As the land use agencies have concluded, and the FEIR admits, "the cost of the Draft HCP is too high and not feasible." (FEIR, p. 5-1.) The FEIR also fails to respond adequately to LandWatch's comments challenging the HCP's funding assumptions. Nor does the FEIR provide any evidence that Alternative 4 can be funded or that there are or can be any enforceable measures to ensure this. Finally, the EIR fails adequately to assess water supply impacts.

FORA need not take the risk of certifying this flawed FEIR because FORA does not intend to adopt an HCP. As LAFCO has explained, approving this EIR will add one more potential lawsuit to the litigation FORA leaves in its wake. The duty or interest to defend this lawsuit would fall on LAFCO and/or FORA's member agencies and would further deplete the resources FORA might otherwise pass on to benefit its member agencies.

A. FORA cannot certify a valid EIR because it is not the lead agency. It has no responsibility to carry out or approve the HCP.

FORA should not act to certify the HCP EIR because it is not the lead agency. "CEQA defines a lead agency as 'the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.' (Pub. Resources Code, § 21067.)" (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 905.) The draft EIS/EIR describes the project as follows:

> The Proposed Action is the issuance of ITPs by the USFWS and CDFW, and approval and implementation of the Draft Fort Ord HCP by the Permittees. The project addressed in the Draft Fort Ord HCP is the reuse and development of the former Fort Ord military base as presented in the HMP (Section 7 requirement of the Biological and Conference Opinion [USFWS, 1997]), Reuse Plan (EMC and EDAW, 1997), and subsequent updates.

(DEIS/EIR, p. 2-7.) FORA will have no responsibility for *carrying out* this project because it will no longer exist after June 30, 2020. Furthermore, FORA will have no responsibility for *approving* this project because FORA does not intend to approve *any* HCP project before it sunsets. Indeed, there is no longer any agreed plan for an HCP.

The project described in the October 2019 draft EIS/EIR is the September 2019 Draft HCP. When the land use agencies realized that the September 2019 Draft HCP was infeasible and unrealistic, a Habitat Working Group ("HWG") was formed in January 2020 to consider alternatives to that HCP. The HWG met from January to March 2020 and reported back to the FORA Board that the HCP reviewed in the draft EIS/EIR is neither realistic nor feasible because it does not reflect the land use agencies' Fort Ord development projections; because the agencies that were supposed to form a JPA to implement the HCP will not do so; and because these agencies want FORA to return to them the CFD taxes funds that FORA had sequestered to implement the HCP. The HWG's conclusions and recommendations were as follows:

> During its 11 meetings and culminating in its last meeting on March 27, 2020, the HWG determined that:
>
> 1. The Draft HCP as currently drafted does not reflect recent development projections, and as such, should no longer be proposed as a component of the Federal and State ITP applications.
>
> 2. If the Permittees desired to move forward with an ITP application at the Federal and/or State level, either individually or in some combination of the jurisdictions, the HCP should be revised to reflect a reduced and/or phased development approach, and not full build-out of the former Fort Ord as currently drafted. A reduced and/or phased development approach is anticipated to reduce

> total costs of implementing an HCP which may result in a feasible, realistic funding scenario.
>
> 3. The jurisdictions are not interested in forming a JPA at this time and also do not think it would be feasible to do so before FORA's sunset in three months, particularly in light of the global pandemic we are all experiencing.
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> 4. The jurisdictions would like the CFD fees to be individually allocated to the jurisdictions to carry out habitat management requirements under the HMP. The HWG recommended an allocation formula and discussed various types of agreements that could be used to transfer the funds. The Board has since discussed and taken initial steps to approve an allocation formula for the CFD funds.
>
> 5. The HWG discussed that the jurisdictions could receive these funds and then still form a JPA and continue collective habitat management discussions and permitting options later, if the jurisdictions desired to do so.
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> 6. The jurisdictions are aware that they are required to implement the HMP and intend to do so with their allocated funds.
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> 7. The HWG felt that the objective of the HWG Committee (to continue discussions and determine path forward) had been accomplished and as a result, there will be no more HWG meetings. Concurrent with the HWG meetings, the Board, as CEQA Lead Agency, considered options to complete the EIR process. The HWG and Board discussed the potential that the Final EIR could be used to support future permitting efforts. On March 12, 2020, the Board voted to complete the EIR. Because the Draft HCP as currently proposed is no longer supported and in order to reduce the risk of litigation, the Board is considering not approving the proposed project (i.e., the Draft HCP).

(FORA Board Report, April 17, 2020, Agenda Number 6e, Draft Federal Wildlife Agency Notification Letter.)

The HWG advised the FORA Board that there is a "[l]ack of collective interest in forming a habitat related Joint Powers Authority ('JPA') prior to the FORA June 30, 2020 sunset." (FORA Board Report, April 17, 2020, Agenda Number 6e.) Yet the draft HCP is critically dependent on formation of a JPA to implement the HCP, whose members would include FORA and the twelve ITP permittee jurisdictions. (Draft HCP, section 1.9.1.) The draft HCP proposes a single non-severable federal ITP and a single non-severable state ITP covering all 12 permittees. (Id.) The draft HCP proposes that these permittees *and* FORA, as the members of the JPA, would act collectively to implement the HCP, which would provide ITP coverage for the full buildout of the Fort Ord Reuse Plan, attaining certain scale economies.

As the HWG recommended, FORA will now distribute to the land use jurisdictions the $17 million in sequestered CFD taxes that the draft HCP had assumed would be available to fund the HCP. There is no longer any assurance that this $17 million will be used to implement collective action on the draft HCP, or, indeed, on any joint HCP involving the 12 permittees under a single federal ITP and a single state ITP.

FORA will go out of existence in less than a month and there is no longer any expectation that the HCP it developed will ever be approved. Thus, FORA cannot act as lead agency because it can neither implement nor even approve the project described in the draft EIS/EIR. And, in fact, FORA has no intention of approving any HCP before it sunsets.

No future agency can rely on an EIR certified by FORA because an EIR must reflect the lead agency's independent judgment and analysis. (14 CCR, § 15090.) Any agency that intends to adopt an HCP for the Fort Ord area in the future must act independently as the lead agency to certify the necessary EIR.

FORA has not explained *why* it proposes to certify an EIR for a project it will not and cannot approve or carry out. As LandWatch objected in its February 10, 2020 letter, certifying the existing EIR/EIS without approving the HCP will *not* allow the agencies to proceed later with a subsequent EIR under CEQA section 21166 or to take advantage of the "prior project" baseline provisions applicable when an agency has already approved a project. Any agency acting to approve an HCP in the future will have to certify its own EIR for that HCP, not prepare an SEIR or addendum to this EIR.

FORA's counsel, Holland & Knight, has suggested that the lead agency may change over the course of project approval, citing *Gentry v. Murietta* (1995) 36 Cal.App.4th 1359, 1383. However in *Gentry*, after it became apparent that the City rather than the County would have to act approve the project, the County "deferred further consideration of the Project to the City" a*nd did not certify an environmental document for it.* (*Id.* at 1369.) Thus, the City, as the agency to approve the project, was required to act as a lead agency to certify the environmental document. *Gentry* does not consider or uphold the validity of a CEQA document certified by an agency that is not the lead agency. Here, if some other entity decides in the future to approve an HCP, it will have to act as a lead agency to certify the EIR. It may not simply act as a responsible agency.

In sum, there is simply no point in certifying the EIR without also approving a project. Because FORA cannot and will not approve an HCP, it should not vote on certification.

B. The EIR fails to provide an adequate description of any HCP project that is likely to be approved.

CEQA requires that a draft EIR provide a stable and complete project description with a level of detail adequate to enable analysis of environmental impacts. (14 CCR, § 15124.) The project described in the Draft EIS/EIR is the September 2019 Draft HCP, developed over a twenty year period and set out in a 600+ page document with 17 appendices. The September 2019 Draft HCP provides a project description that is required to assess impacts, including

- the expected location and intensity of future development, based on full buildout of the Fort Ord Reuse Plan;
- the expected location and intensity of other activities covered by the ITPs, based on full buildout;
- the expected levels of habitat impact and take, based on full buildout in specified locations;
- conservation strategies, based on full buildout and on the use of BLM land (Fort Ord National Monument) for mitigation;
- a plan for monitoring and adaptive management, based on full buildout;
- an implementation plan for the HCP by a JPA that includes FORA and twelve permittees subject to a single non-severable federal ITP and a single non-severable state ITP;
- an analysis of costs and funding, based on a detailed cost model and endowment funding analysis, that assumed (1) the rapid and complete buildout of the Fort Ord Reuse Plan, (2) continued collection of existing CFD taxes or equivalent amounts, and (3) attainment of scale economies from complete buildout and economies from use of BLM land for mitigation.

Consistent with the draft EIS/EIR, the proposed CEQA findings describe the project under CEQA review as "approval and implementation of the Draft Fort Ord HCP." However, neither FORA nor any other agency intends to approve the September 2019 Draft HCP for two reasons. First, the land use jurisdictions have concluded and advised FORA that the September 2019 Draft HCP was based on unrealistic development projections and was not financially feasible. Second, CDFW advised FORA that an ITP could not rely on mitigation using BLM lands, as is proposed in the September 2019 Draft HCP.

So after over twenty years of work to develop the September 2019 Draft HCP, the EIR consultants cobbled together a sketch of a new alternative, Alternative 4, which was

not discussed in the draft EIS/EIR. The description of Alternative 4 is materially incomplete as a basis for disclosing and mitigating project impacts, and this violates CEQA. (14 CCR, § 15126.6(d).) For example, the FEIR purports to quantify a reduced-scale projection of development and take by jurisdiction and total acreage, but it does not map these areas to be developed or identify the habitat and species present in the reduced-scale development areas. (FEIR, Table 5-1.)

The FEIR states that the future development for Alternative 4 will be "consistent with the development assumptions contained in the relevant land use plans of the affected land use jurisdictions." (FEIR, p. 5-2.) However, those land use plans, which FORA was required to find consistent with the Fort Ord Reuse Plan, all assume the complete buildout of the Fort Ord Reuse Plan. Indeed, the intensity and scale of future development described in the September 2019 Draft HCP are *also* consistent with these land use plans. So mere consistency with land use plans does not inform the public where the Alternative 4 development would take place, what type of development it would include, or when it would occur.

The FEIR states that future development under Alternative 4 would "likely" be "concentrated in the 4,241 acres of developed/disturbed areas to keep within the reduced level of incidental take," instead of the 5,051 acres of natural lands that contain habitat and species; but there is no assurance of this. (FEIR, p. 5-2.) This conclusion is based on the assumption that the 3:1 mitigation ratio would be attained only by using the non-Federal areas, consisting of the 3,304 acres of habitat management areas and the 5,051 acres of natural lands now designated as development areas that are within the Fort Ord Reuse Plan area but outside the BLM's FONM. Despite its reference to a "take 'limit' or 'cap'," the EIR does not describe an enforceable measure that would prevent a jurisdiction from permitting, or even concentrating, its future development in the 5,051 acres of natural lands. (FEIR, p. 5-1.) Indeed, it would be inconsistent with the land use jurisdictions' general plans to assume that they would *not* permit development in the 5,051 acres of natural lands that they have designated for development. Furthermore, even if the 3:1 mitigation ratio must be met, mitigation land may in fact be available in the BLM FONM areas or in other off-site areas, and, if so, this would permit development of all of the natural areas. It would also have potential impacts to off-site mitigation lands, which have not been disclosed because the EIR assumes without evidence that mitigation would not occur off-site.

In sum, the description of Alternative 4 does not provide the most basic information about the proposed alternative that is required for impact assessment: where it would be located and what resources it would affect.

The FEIR states that there "may be a reduction in the required AMMs and MMs" for Alternative 4, but it does not identify those reductions. (FEIR, p. 5-9.) The project description and the FEIR are inadequate because the FEIR fails to specify the "reduced" avoidance and mitigation measures that would be included in the Alternative 4 HCP project or the "reduced" mitigation measures from the EIS/EIR that would be required for

Alternative 4. The public has no way to determine what AMMs or MMs would be included and enforceable as part of the project or its CEQA mitigation.

The FEIR's cursory and qualitative discussion of the impacts from Alternative 4 (FEIR, pp. 5-9 to 5-13) is not adequate to support approval of Alternative 4 because it is not specific enough to enable informed decision making. (*Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 404.) For example, without knowing where the development would occur, what species and habitat resources it would affect, and what mitigation and avoidance measures would actually be imposed, there can be no adequate assessment of impacts or specification of mitigation. Furthermore, as discussed below, the EIR fails to demonstrate the feasibility of the mitigation and avoidance measures proposed in the September 2019 Draft HCP because there is insufficient evidence that the agencies can fund the needed endowment. *There is even less evidence that the agencies can fund whatever endowment would be needed for Alternative 4* because there has been no quantification of its cost and no projection of the available funds that might be raised through taxes or impact fees.

While CEQA may permit an agency to approve an alternative to the project proposed, it does not permit an agency to approve a project for which the EIR fails to provide an adequate description, impact analysis, or specification of mitigation. This EIR would not provide a sufficient basis to approve Alternative 4.

Furthermore, CEQA does not contemplate that an agency approve an EIR without the intention to approve a specific project, whether that project be the project proposed in the draft EIR or an alternative to it. Thus, CEQA requires that findings be made with reference to the impacts and mitigation for a specific project. (14 CCR, §§ 15091, 15092.) Here, there is no intention to adopt the September 2019 Draft HCP, even though that is the project that is identified in the proposed findings. The last-minute Alternative 4, disclosed to the public only ten days before FORA's hearing to certify the EIR, is neither adequately described nor evaluated in the EIR, and the proposed findings are silent as to Alternative 4.

If FORA or any other agency does intend that the EIR support future approval of Alternative 4 in lieu of the September 2019 Draft HCP, it must revise and recirculate the draft EIS/EIR to provide an adequate description and analysis of Alternative 4. Recirculation is required because significant new information has disclosed that the draft EIS/EIR was so inadequate that it denied the public opportunity for meaningful comment. 14 CCR, § 15088.5(a)(4).) Furthermore, the likely infeasibility of funding Alternative 4 or concentrating development under Alternative 4 in the already disturbed lands will result in new or more substantial significant impacts, which also mandates recirculation. (14 CCR, § 15088.5(a)(1), (2).)

C. Avoidance and mitigation measures for the September 2019 Draft HCP are not enforceable or feasible because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level.

LandWatch reiterates its objections that the EIS/EIR does not identify enforceable, feasible mitigation and avoidance measures because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level. *The FEIR admits that the very jurisdictions that would be responsible for funding the project described in the September 2019 Draft HCP have stated that "the cost of the Draft HCP is too high and not feasible."* (FEIR, p. 5-1.)

The HCP states that its program would require annual spending of $2.6 million for the next 50 years, of which $2.2 million is assumed to come from a $38 million endowment fund. That endowment fund is assumed to be accumulated in the next eight years by taxes or fees generated by payments of the FORA Community Facilities District ("CFD") tax or an unspecified "replacement funding mechanism" to be adopted by the five land use jurisdictions. The rapid accumulation of the endowment in the next eight years is critical to the financial viability of the HCP, because the funding analysis assumes that a long period of 4.5% annual investment returns on the accumulated endowment fund will pay for the ongoing HCP costs. To make this happen, the HCP's financial analysis assumes the complete buildout of Fort Ord by 2030 – a buildout at the rate of 443 houses per year, 6.9 times faster than the historic rate of buildout of 64 units per year. A separate financial analysis prepared by the HCP consultant EPS in November demonstrates that if buildout proceeds at a mere 4.3 times the historic rate, the endowment would have to be $43 million, requiring higher fees and taxes, or recourse to the agencies' general funds. Contradicting both the HCP and the November EPS memo, a December 13, 2019 FORA staff report states that the endowment fund "is expected to cost $48 to $66 million."

Critically, there is no analysis of the required endowment if development proceeds at a pace consistent with historical development activity, although such a pace would require a substantially larger endowment, and correspondingly higher fees or taxes because investment returns on slower accumulation of fees and taxes would be substantially lower. The financial analyses also ignore the need to fund startup, capital, and restoration costs in the early years, which would further retard the endowment accumulation and lower its investment returns, requiring higher fees or taxes. There is also no acknowledgement of the risk of assuming 4.5% annual returns from inception of the endowment fund when money market funds today barely return 2%.

In short, the actual endowment funding obligation is unknown. However, the analysis in the EIS/EIR makes unrealistic and aggressive assumptions, which the land use agencies have now repudiated, in order to minimize this obligation.

In response to LandWatch's objections that the EIR's reliance on rapid and complete buildout is unsupported and unsupportable, the Final EIR simply reiterates the

assumptions made in the EIR and references its appended "Habitat Conservation Plan Endowment Case Flow Strategy," the very document that LandWatch's comments challenge and that the land use agencies have found unrealistic. (FEIR, p. 3-3.)

The FEIR continues to assume that over $16 million of CFD taxes it previously set aside to implement the HCP will remain available, *even though FORA will now distribute this money to the land use agencies, who need not use it for this purpose or act cooperatively at all*. (FEIR, pp. 3-4, 3-5, 3-6.) For example, LandWatch objected that there is no evidence that funding can be ramped up fast enough to meet initial fixed costs, to accumulate an endowment that will earn needed returns, and to implement the stay-ahead provision. The FEIR cites HCP section 9.3.5.1 to argue that funding is available for the first eight years without collecting additional taxes. (FEIR, p. 3-5.) However, *Section 9.3.5.1 assumes that this funding will consist of the $16 million set aside by FORA, which FORA will now distribute to the land use agencies.*

The EIR assumes that revenues obtained from fees or taxes at the level of the existing CFD taxes would be sufficient to implement the HCP. The FEIR fails to address LandWatch's detailed comments seeking evidence that funding could be adequate to accumulate the needed endowment in time to earn the projected returns and to implement the stay-ahead provisions without substantially increasing the required fees or taxes, potentially to a level that would preclude development.

LandWatch objected that the cost analysis and financing projections are predicated on economies of scale and the assumption of rapid buildout of the entire Base Reuse Plan. The land use agencies have made it clear that this assumption is invalid. This is significant new information that requires revision and recirculation of the EIR.

The cost analysis also assumes scale economies from a single, coordinated HCP and the use of the Federal BLM FONM land for mitigation. The Habitat Working Group, the land use jurisdictions, and CDFW have made it clear that these assumptions are invalid. This is significant new information that requires revision and recirculation of the EIR.

The HCP and the EIS/EIR do not disclose or specify an enforceable solution to the unresolved problem of implementing a committed, enforceable funding mechanism. More than half of the future development of Fort Ord expected to fund the HCP is represented by six previously entitled development projects. Because these projects' entitlements are vested, these projects are subject only to the exactions in place when they were approved; they cannot legally be subjected to newly enacted fees or taxes once the FORA CFD becomes uncollectible in 2020. *Thus, there is no apparent legal means to collect funds for over half of the HCP cost*. The FEIR addresses this objection by simply assuming these developers will voluntarily make payments and that the wildlife agencies will somehow address the adequacy of funding in the future. (FEIR, p. 3-6.) This is not the enforceable, certain mitigation that CEQA requires.

Even if this funding problem is resolved, there are others. If the agencies elect to use impact fees instead of CFD taxes as a "replacement funding mechanism," they will need to support them with an analysis to show that those fees have nexus and proportionality. Nexus and proportionality would require that the HCP costs be apportioned to the projects that actually cause the incidental take that triggers the need for the HCP. But it is not clear that the HCP program would be viable without the subsidies from other development. The FEIR does not address LandWatch's comment that there is no assurance that the nexus and proportionality mismatch can be solved..

Nor is it clear that the proposed funding through incremental assessment of development fees or taxes would be viable. The HCP's "stay-ahead" provision requires that the actively managed percentage of the total planned conservation acreage stay 5 or 20 percentage points ahead of the percentage of total baseline incidental take acreage. The HCP provides no analysis of the feasibility of meeting this stay-ahead provision; but there are several reasons why, and scenarios in which, it would not be feasible. For example, unless fees or taxes are directly related to a project's incidental take, there can be no assurance that the project would generate sufficient mitigation funding; but none of the proposed cost apportionment approaches do in fact relate fees or taxes to incidental take. Furthermore, the proposed endowment funding assumes that HCP costs would be incurred on a level basis from year to year, but that is not accurate. The lumpy startup, capital, and restoration costs essential to the stay-ahead goal would be incurred before sufficient funding were available. The FEIR does not address this comment. And, again, there is no longer any assurance that the $16 million set aside by FORA would be available for startup costs.

Finally, the HCP and the EIS/EIR do not provide an honest discussion of funding assurances in the event that Fort Ord is not built out by 2030. Even though the HCP assures the land use agencies that there would be no recourse to general funds, the HCP later proposes that the agencies that happen to own the habitat lands should incur the management cost for that land in the event of funding shortfalls. This arbitrary and inconsistent assignment of risk should not be palatable to those agencies. Nor are the proposals to rely on volunteers or "prison crews" to manage HCP lands realistic. Like the financial assumptions, these operational proposals reveal magical thinking.

The FEIR excuses this magical thinking by claiming that the LandWatch is confusing baseline conditions with mitigation measures, citing *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1037-1038. But the assumption of the complete and rapid buildout of the Base Reuse Plan within eight years is neither a baseline condition nor a mitigation measure. It is a critical assumption *about the future* on which the feasibility of mitigation depends. Rapid and complete buildout of the Base Reuse Plan cannot be assumed as a predicate for a mitigation measure because it depends on third parties and economic conditions and cannot be imposed by FORA or by any agency as an enforceable condition of the HCP. If the HCP is adopted, the ITP is issued, and the development does not occur as projected, the needed funding will not be

adequate, and the HCP implementation will fail. The HCP does not provide assurances that can avoid this outcome with any reasonable certainty.

Nor can the assumption that BLM land be used for mitigation be an enforceable condition. Nor can the assumption that all land use agencies participate in a single non-severable ITP be enforceable.

Thus, unlike the situation in *Environmental Council of Sacramento*, there is not "ample evidence" to support the critical assumptions that mitigation will be feasible under future conditions. To the contrary, here, the very agencies that would have to implement the HCP have already said that there will not be a rapid and complete buildout of the Base Reuse Plan and that the proposed "mitigation and preservation . . . are not certain," and the FEIR admits this. (FEIR, p. 5-1.) CDFW has indicated that it will not approve reliance on BLM land for mitigation. Thus, this EIR is akin to the EIR in *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, which was invalid because the agency admitted that there was uncertainty whether the mitigation would be funded or implemented.

The FEIR claims that the mitigation in the draft EIS/EIR and the AMMs and MM in the HCP are adequately specified and would be enforceable through permit conditions, conditions of approval, adoption of implementing ordinances and policies, and adoption of a Mitigation Monitoring and Reporting Program. (FEIR, p. 3-10.) LandWatch's point in objecting to the analysis of funding assumptions is not that an agency would not implement mitigation in the EIS/EIR and the MMs and AMMs in the HCP *if it had the money to do so.* LandWatch's point is that neither the HCP nor the EIS/EIR demonstrate that there is any realistic expectation that there could be sufficient funding to implement the HCP as proposed. The mitigation measures in the EIS/EIR compel certain mitigation actions, but they do not specify or compel an assured funding mechanism. The purported funding mechanisms are discussed in the HCP document itself, but those mechanisms are not assured or enforceable, there is no evidence that they will be sufficient, and there is ample evidence that they will not be sufficient.

LandWatch's objections to the HCP's discussion of funding have simply not been addressed. The necessary fees and taxes are not in place and there is no specified mechanism that would compel the permittees to fund the HCP. Half of the needed revenues depend on voluntary payments from entitled developers, and there is no identified solution to this problem. The $16 million dollar reserve will no longer be available, and there is no identified solution to this problem. There is no evidence that the needed endowment can be collected, and there is substantial evidence to the contrary. There is no analysis supporting the contention that the stay-ahead provision could be met, despite LandWatch's request for this analysis and its identification of the specific factors that preclude meeting the stay-ahead condition. The FEIR's failure to provide reasoned good faith responses to LandWatch's comments on the validity of the funding assumptions violates CEQA. (14 CCR, § 15088.)

In light of the evidence of the infeasibility of funding the September 2019 Draft HCP, the specifics of enforceable mitigation measures, i.e., identification of specific funding mechanisms and ordinances, should not have been deferred.

In sum, neither FORA nor any agency seeking to approve an HCP in the future could make the requisite findings that mitigation is sufficient, because there is no committed, enforceable funding mechanism and no evidence that it is feasible.

D. Avoidance and mitigation measures for Alternative 4 are not enforceable or feasible because there are no programs to fund them and because there is no evidence that they can be funded at the necessary level.

The cost to implement Alternative 4 and the feasibility of generating needed revenues would vary from the HCP described in the September 2019 Draft HCP due to a number of factors. For example, unit costs would increase due to the reduction of economies of scale. Unit mitigation and avoidance costs may increase due to the inability to attain synergies in mitigation efforts through the use of BLM land. The relative size of the needed endowment as a percentage of total costs would increase, and the future investment returns on the endowment would decrease, because the entire endowment would not be collected in the next eight years under the realitic development scenario. The proportion of development generating relatively higher fees and taxes (e.g., residential development) may change under the Alternative 4 land use assumptions, which, in any event, are not identified in the EIS/EIR.

LandWatch's comments requested an analysis of the cost and funding effects of reduced and phased development and pointed out that the existing evidence indicates that the HCP would not be feasible with reduced or phased development because the endowment costs would be substantially increased. Although LandWatch requested an analysis of the cost and funding effects of reduced or phased development and an assessment of the feasibility of the avoidance and mitigation measures under such a scenario, the FEIR does not provide this information. This violates CEQA. (14 CCR, § 15088.)

Instead of evaluating the feasibility of the HCP for realistic development projections and in light of the uncertainty of BLM land for mitigation, the FEIR simply reiterates the cost and funding analysis for the full-scale rapid buildout of the entire Base Reuse Plan in the Draft HCP. For example, in responding to LandWatch's comments that the endowment funding estimates have varied from $9 million to $66 million, the FEIR defends the "detailed estimates of costs" in the Draft HCP. (FEIR, p. 4-142.) However, the EIS/EIR does not provide any analysis of the cost or feasibility to implement the mitigation and avoidance measures that would be required under Alternative 4. The information is not in the draft EIS/EIR because Alternative 4 was neither defined nor assessed there.

Nor does the EPS Sensitivity Analysis, which purports to evaluate reduced scale or phased development scenarios, provide any evidence that Alternative 4 can be funded. The FEIR states that the EPS Sensitivity Analysis "should not be construed as offering an alternative estimate of endowment requirements, as the sensitivity analysis was based on hypothetical cost and revenue scenarios." (FEIR, p. 4-143; see also 4-516 [EPS Sensitivity Analysis not intended to provide a more refined analysis of costs and its cost reduction assumptions are hypothetical].)

In sum, neither FORA nor any agency seeking to approve an HCP in the future for Alternative 4 could make the requisite findings that mitigation is sufficient, because there is no committed, enforceable funding mechanism and no evidence that it is feasible.

E. The FEIR fails to address the water supply impacts of the HCP.

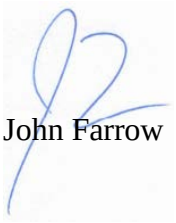
The FEIR fails to respond adequately to LandWatch's comments that the implementation of the HCP would result in significant impact to groundwater resources and would make a considerable contribution to significant cumulative impacts.

The FEIR defends its lack of analysis by claiming that the level and intensity of future development are speculative. Absurd. The EIS/EIR's analysis of the adequacy of avoidance and mitigation measures is premised on specific assumptions about future development based on existing general plans and the Base Reuse Plan. The same development assumptions determine water supply impacts. The EIR is inadequate because it failed adequately to evaluate the impacts of providing water for future development that would be enabled by the HCP as well as the water needed to implement mitigation measures for the HCP itself.

The FEIR also purports to rely on the water supply impact analysis in previous environmental documents. (*See, e.g.*, FEIR, p. 4-505.) LandWatch provided detailed comment explaining that these prior analyses are no longer adequate. LandWatch identified significant new information that requires a subsequent environmental review under CEQA section 21166, including changes to the Base Reuse Plan itself, changes in circumstances, and new information. This significant new information includes comments by hydrologist Timothy Parker. The FEIR simply ignores this information. The failure to provide a subsequent review in light of the significant new information and the failure to respond to LandWatch's comments violates CEQA.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



John Farrow

JHF:hs

Cc: Kate McKenna, McKennaK@monterey.lafco.ca.gov
Stephen P. Henry, fw8fortordhcp@fws.gov
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Dino Pick, DPick@delreyoaks.org
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Hans Uslar, uslar@monterey.org
Craig Malin, cmalin@ci.seaside.ca.us
Charles McKee, mckeecj@co.monterey.ca.us

June 11, 2020

MPC
MONTEREY PENINSULA
COLLEGE

DELIVERED VIA EMAIL

FORA Board of Directors
920 2nd Avenue, Suite A
Marina, CA 93933

Re: Board Agenda Item 7b (2018 Transition Plan Update)

Dear FORA Chair/Supervisor Jane Parker and FORA Board of Directors:

On behalf of the Monterey Peninsula Community College District ("MPC"), I am writing to respectfully request that, relative to Agenda Item 7(b), the FORA Board of Directors add language to the 2018 Transition Plan Update designating the County of Monterey as FORA's successor agency for purposes of carrying out habitat management obligations under the Agreement Regarding Public Safety Officer Training Facilities.

I. Background.

In 2003, MPC entered into the Agreement Regarding Public Safety Officer Training Facilities between the County of Monterey ("County"), FORA, and MPC, attached as Exhibit "A" (the "Agreement"). This agreement resolved a ten-year conflict between MPC and the County over the conveyance and use of the East Garrison property. Pursuant to the Agreement, MPC agreed to release its rights to the East Garrison (with its accompanying development value and modest habitat management requirements) in favor of the County, in order to, among other things, "help the County meet [its] need for workforce housing within the East Garrison." In return, MPC received rights to certain sites within Parker Flats and at the MOUT, including a large habitat reserve (the "Facility Sites") - areas with little development value and significant habitat management requirements, for development of its public safety training facilities. MPC's police officer and firefighter training programs serve the entire region. As an inducement to MPC's acceptance of this arrangement, and in recognition of the benefit conferred upon the County in receiving East Garrison, FORA agreed to assume the habitat management obligations on the Facility Sites, to wit:

> "14. Habitat Management. ***Responsibility for management of identified habitat on the Facility Sites shall be assumed by FORA***, subject to MPC's obligation to pay reasonable fair share assessments for the cost of such habitat management as part of its contribution to Basewide Costs as provided in Section 13 of this Agreement.[1] ***Except for***

[1] Under Section 13 ("Infrastructure") of the Agreement, MPC's financial contribution to any and all infrastructure improvements on the Facility Sites, including any habitat management considered to be Basewide Costs, was capped at a maximum amount of $500,000.00.

such payment, MPC shall have no responsibility for habitat management on the Facility Sites" (emphasis added).

Despite FORA's assumption of habitat management responsibilities on the Facility Sites in Section 14 of the Agreement, MPC has been informed that FORA will not fulfill its obligation after its June 30, 2020, dissolution. However, Section 17(B) of the Agreement ("Termination for Legal Reasons") provides that "if any legislation, regulation, rule, court decision or other government action has a material adverse effect on the operation of this Agreement...***then the parties shall attempt to amend this Agreement so as to avoid any adverse consequences***. To date, this has not happened.

Additionally, with the end of efforts to implement a basewide Habitat Conservation Plan, at its special meeting on April 17, 2020, the FORA Board adopted a Community Facilities District ("CFD") habitat funds distribution pursuant to agenda item 6(a)(iii), whereby it approved the needs-based approach to habitat management based on acreage embodied in "Alternative 1". While such an approach has merit, MPC's Facility Sites were unfortunately not included within the County's habitat acreage for purposes of calculating the County's funding allocation under Alternative 1.

II. Consideration.

MPC now finds itself in a rather tenuous position: (i) MPC will not receive a share of the CFD funds previously set aside for basewide habitat management; (ii) FORA appears unwilling/unable to uphold its habitat management obligations under the Agreement after its June 30, 2020 dissolution; and (iii) there is no collective entity or effort to manage habitat basewide. Therefore, MPC respectfully requests that the FORA Board add specific language to the 2018 Transition Plan Update designating the County as its successor under the Agreement for purposes of carrying out FORA's habitat management obligations on the Facility Sites.

Such an approach is consistent with the June 10, 2020, letter from the Local Agency Formation Commission of Monterey County ("LAFCO"), wherein LAFCO requested that FORA "add language that designates responsible successor agencies, as required by the FORA Act...please include successors for legal, financial and/or any other unresolved matters, known and unknown." This request is also in keeping with the County's letter to FORA dated March 24, 2020, wherein the County requests additional funding from FORA in order "to assist with new anticipated duties being assumed by the County, including, but not limited to...habitat management responsibilities." Put simply, the County received the lion's share of the benefit under the Agreement, and the County stands to receive approximately 80% of the FORA CFD funds set aside for basewide habitat management – as such, it seems appropriate that the County assume FORA's habitat management responsibilities on the Facilities Sites under the Agreement, lest MPC suffer a material adverse consequence.

Thank you for your consideration of this matter.

AGREEMENT
REGARDING PUBLIC SAFETY OFFICER TRAINING FACILITIES

This Agreement ("Agreement") is entered into between the **County of Monterey**, a political subdivision of the State of California ("County"), **Monterey Peninsula College**, a California community college ("MPC") and the **Fort Ord Reuse Authority**, a public entity organized and operating under Title 7.85 of the California Government Code ("FORA").

RECITALS

A. The United States of America, acting through the Department of Defense and the Army (the "Army"), owns the real property within the former Fort Ord, identified as Polygons 11b, 19a, 21a, 21b and 21c in the Fort Ord Reuse Plan (the "Property"). The Army entered into a Memorandum of Agreement dated June 23, 2000, with FORA to transfer portions of the Property to FORA pursuant to a remediation and removal schedule.

B. The County is programmed to acquire the Property from FORA pursuant to the terms of an Implementation Agreement entered into between the County and FORA, dated May 8, 2000 (the "Implementation Agreement").

C. The United States Department of Interior, Bureau of Land Management ("BLM") is programmed to receive other portions of the Property known as the former Military Operations/Urban Terrain Facility (the "MOUT Facility") from the Army pursuant to an agency-to-agency transfer.

D. MPC is seeking an area within the Property for development of a public safety officer training center and EVOC facility (collectively the "Training Facility") and it has rights to certain lands within Polygon 11b in the Fort Ord Reuse Plan (the "East Garrison") by virtue of a United States Department of Education Public Benefit Conveyance request for lands in the East Garrison for development of the Facility.

E. Because of various potential land use conflicts with other prospective users in the East Garrison, the Parties entered into a Memorandum of Intent entitled Proposed County of Monterey/FORA/MPC Points of Agreement regarding Public Safety Officer Training Academy (the "MOI") for the purpose of seeking resolution of said land use conflicts by County and FORA obtaining for MPC an acceptable alternate site within the former Fort Ord for the Training Facility.

F. The Parties have worked together to identify other potential areas within Polygons 19a, 21a, 21b and 21c ("Parker Flats") that could accommodate development of the Training Facility. MPC has developed a conceptual plan

for the development of such potential areas as the Training Facility, a copy of which is attached hereto as Exhibit A.

G. To assist in resolving the potential land use conflicts, BLM has agreed to relinquish its rights to a conveyance of the MOUT Facility and to allow the MOUT Facility to be transferred by the Army to the County or directly to MPC for MPC's use as part of the Training Facility.

H. To resolve the potential land use conflicts in accordance with the MOI and to help the County meet the need for workforce housing within the East Garrison, the Parties have agreed to an exchange of uses between the East Garrison, Parker Flats and the MOUT Facility as described herein.

AGREEMENT

1. **Location of the Training Facility at Parker Flats.** The Parties mutually agree that sites exist within Parker Flats and the MOUT, as shown schematically on the map attached as Exhibit B (collectively, the "Facility Sites"), that are suitable for development of the Training Facility by MPC. The Parties anticipate that FORA will obtain title to the Facility Sites under its June 23, 2000 agreement with the Army and, in turn, that FORA will transfer title to the Facility Sites directly to MPC in accordance with the Implementation Agreement and this Agreement.

2. **Transfer of Facility Sites.** The County and FORA shall, at no cost (excepting reasonable and customary sharing of recordation and processing fees), transfer title to the Facility Sites to MPC within forty-five (45) days after receiving title to said properties.

3. **Release of Rights at East Garrison.** MPC hereby agrees to release its rights to and rescinds its public benefit conveyance application for lands at East Garrison effective October 14, 2003. This action shall be immediately communicated in writing to the Department of the Army, the Department of Education, Fort Ord Reuse Authority and the County of Monterey.

4. **Release of Reversionary Rights to MOUT.** County hereby agrees to release its rights to any reversionary interest in the MOUT facility effective October 14, 2003. This action shall be immediately communicated in writing to the Department of the Army, Fort Ord Reuse Authority and MPC.

5. **Multi Agency Memorandum of Understanding (MOU).** The County, MPC and FORA will use their best efforts to ensure Army and BLM approval of the MOU to implement the Parker Flats/East Garrison land use modifications previously approved by the MPC Board of Trustees and the Board of Supervisors on September 23, 2003

6. **EVOC Facility.** MPC agrees that the EVOC Facility shall include an adequate firebreak and provisions for noise mitigation.

7. **Eucalyptus Road.** FORA and the County shall be responsible for the closure and rerouting of portions of Eucalyptus Road, which shall include provisions for the development of a recreational trail parking access point to be evaluated in an appropriate transportation plan. In addition, FORA agrees to consider an amendment to its CIP to provide high prioritization for the rerouting of a portion of Eucalyptus Road to a location generally northwest of the Facility Sites that will allow for full development of the Training Facility by MPC.

8. **Usage of MOUT Facility.** Prior to its use of the Facility Sites as described herein, MPC shall reach agreement with the appropriate federal and local law enforcement agencies on their required levels of usage of the MOUT Facility. In addition, MPC shall devise a schedule for usage of the MOUT Facility by said agencies that guarantees the following annual levels of usage without payment of usage fees:

U.S. Military	45 day visits (Non-exclusive)
FBI	30 day visits (Non-exclusive)
Monterey County Sheriff's Department	12 day visits (Non-exclusive)
BLM	5 day visits (Non-exclusive)

9. **Relocation of Buildings.** If requested by MPC, and to the extent resources are available, FORA shall assist with relocation of surplus existing buildings from East Garrison or elsewhere at Fort Ord to the Facility Sites to provide scenario training, classrooms and related facilities for use by MPC at the Training Facility.

10. **Water Service.** Prior to the transfer of the Facility Sites to MPC, the County and FORA shall provide written confirmation that adequate potable water will be available to MPC for use at the Training Facility. This shall be in accordance with the Board of Supervisors December 10, 2002 allocation of up to 52.5 acre feet of water for use exclusively for a public safety officer training facility at Parker Flats, as described in Resolution No. 02-439. MPC shall incorporate low flow fixtures and water conservation measures at the Training Facility to the reasonable satisfaction of the County and FORA. At such time as reclaimed water is available for non-potable uses at the Training Facility, all uses at the such facility that do not require potable water for health and safety reasons shall use reclaimed water if feasible.

11. **Biological Services.** The County shall fund the services of Zander Associates to perform biological services in connection with reconfiguring and enlarging Polygon 21b for use as a firing range and also in connection with the expansion of a portion of the MOUT Facility it increase the number of firing stations.

12. **Ordnance Cleanup.** The County and FORA shall request that the Army assign early priority to ordnance and explosives cleanup at Polygon 21b and to establish an acceptable explosive safety arc for the Training Facility.

13. **Infrastructure.** The County and FORA shall establish a high priority for the extension of utilities and related infrastructure as listed in Exhibit C attached hereto (the "Infrastructure Improvements") to the Training Facility as an early project requirement to enable development of the Facility Sites. To the extent that the Infrastructure Improvements are considered to be "Basewide Costs" as defined in Section 1(f) of the Implementation Agreement, payment of costs associated with the extension of the Infrastructure Improvements shall be apportioned in accordance with Sections 6 and 7 of the Implementation Agreement. For the purposes of this Agreement, the Parties agree that MPC's share of the costs for the Infrastructure Improvements shall be no more than Five Hundred Thousand Dollars ($500,000.00), subject to adjustment for any deferred payment in accordance with adopted FORA practice.

14. **Habitat Management.** Responsibility for management of identified habitat on the Facility Sites shall be assumed by FORA, subject to MPC's obligation to pay reasonable fair share assessments for the cost of such habitat management as part of its contribution to Basewide Costs as provided in Section 13 of this Agreement. Except for such payment, MPC shall have no responsibility for habitat management on the Facilities Sites.

15. **Funding Assistance.** The Parties acknowledge MPC's concerns regarding the financing of infrastructure and facilities improvements on the Property necessary for development of the Training Facility. Accordingly, the County and FORA agree to provide reasonable support and legislative assistance to MPC in attempting to secure Federal, State and other sources of funding for MPC's site development, construction and operation of the Training Facility in accordance with an estimated budget to be prepared by MPC.

16. **Other Assistance.** The County and FORA agree to provide reasonable support and legislative assistance to MPC to further their efforts to implement a public safety officer training facility at Parker Flats and the MOUT.

17. **Termination.**

    A. **Termination on Default.** Any party shall be entitled to terminate this Agreement if another party fails to perform in any material respect any material obligation required of it hereunder, and such default continues for sixty (60) days after the giving of written notice by the non-defaulting party, specify in the nature and extent of such default; provided, however, that if such default is not cured within sixty (60) days, but is capable of being cured within a reasonable period of time in excess of sixty (60)

days, then the non-defaulting party shall not be entitled to terminate this Agreement if the defaulting party commences the cure of such default within the first 60 day period and thereafter diligently and in good faith continues to cure such default until completion.

B. **Termination for Legal Reasons.** If any legislation, regulation, rule, court decision or other government action has a material adverse effect on the operation of this Agreement, or if any term is deemed illegal by any party, then the parties shall attempt to amend this Agreement so as to avoid any adverse consequences. If the parties, acting in good faith, are unable to make the required amendments, this Agreement shall be terminated.

18. **Title.** Title to the Facility Sites shall be conveyed to MPC subject only to such encumbrances and covenants which do not render the Facility Sites unusable for MPC's intended use, to wit, the development and use as the Training Facility. Neither the County nor FORA shall be obligated to provide MPC with a policy of title insurance, and any such policy of title insurance shall be at MPC's sole expense.

19. **Dispute Resolution.** The parties to this Agreement all desire to avoid the cost and delay attendant on litigation. To that end, all parties agree that if any dispute arises relating to this Agreement, including but not limited to its meaning, interpretation, effect or the enforcement of the provisions hereof, then the party who believes a dispute has arisen shall give written notice of such to the other parties. For a period of thirty (30) day after the giving of such notice, the parties shall attempt to resolve the dispute by informal discussions among themselves, using the services of a mediator, if the parties agree that such a mediator would facilitate resolution of the dispute.

20. **Amendments.** This Agreement may be amended, modified or supplemented, but only in writing signed by each of the Parties hereto.

21. **Entire Understanding.** This Agreement sets for the entire agreement and understanding of the Parties in respect to the transactions contemplated hereby and supersedes all prior agreements, arrangements and understandings relating to the subject matter hereof and is not intended to confer upon any other person any rights or remedies hereunder. There have been no representations or statements, oral or written, that have been relied on by any party hereto, except those expressly set forth in this Agreement.

22. **Severability.** If any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not be affected thereby.

23. **Waiver.** The failure of a party hereto at anytime or times to require performance of any provision hereof shall in no manner affect its right at a

later time to enforce the same. No waiver by a party of any condition or of any breach of any term contained in this Agreement shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in other instance or a waive or any other condition or breach of any other term.

24. **Relationship of Parties.** Nothing contained in this Agreement shall be interpreted or understood by any of the Parties, or by any third persons, as creating the relationship of principal and agent, limited or general partnership, or joint venture between the Parties or their respective agents employees or contractors.

25. **Notices.** Any notice, tender, delivery or other communication pursuant to this Agreement shall be in writing and shall be deemed to be properly given if delivered, mailed or faxed in the manner provided herein, to the following persons:

If to the County:	Ms. Sally Reed County of Monterey 230 Church Street Building 3 Salinas, CA 93901 Fax (831) 755-5081
If to FORA	Mr. Michael Houlemard Fort Ord Reuse Authority 100 12th Street Marina, CA 93933 Fax (831) 883-3675
If to MPC:	Dr. Kirk Avery Monterey Peninsula College 980 Fremont Street Monterey, CA 93940 Fax (831) 655-2627

If sent by mail, any notice, delivery or other communication shall be deemed effective forty-eight (48) hours after deposited in the United States Mail, with postage prepaid, and addressed as set forth above. If sent by facsimile, any notice, delivery or other communication shall be deemed effective upon the receipt by the send of a faxed acknowledgement of receipt from the recipient. If personally delivered, or if delivered by overnight mail, any notice, delivery

or other communication shall be deemed effective upon the delivery to a person apparently authorized to accept receipt at the address set forth above.

26. **Counterparts.** This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which together shall constitute on and the same instrument.

IN WITNESS WHEREOF, the authorized representatives of the Parties have signed this Agreement as of the date last written below.

County of Monterey

By _____
Fernando Armenta, Chair
Monterey County Board of Supervisors

Date 10-14-03

Fort Ord Reuse Authority

By _____
Jerry Smith, Chair
Board of Directors

Date 10-14-03

Monterey Peninsula College

By _____
Jane Parker, Chair SUPERINTENDENT/ PRESIDENT
Monterey Peninsula College Board of Trustees

Date 10-14-03

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County of Monterey

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Fernando Armenta, Chair
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Fort Ord Reuse Authority

By _____
Jerry Smith, Chair
Board of Directors

Date 10-14-03

Monterey Peninsula College

By _____
Jane Parker, Chair Superintendent/President
Monterey Peninsula College Board of Trustees

Date 10-14-03

Fort Ord Reuse Authority

2020 Taxable Tax Allocation Bonds

Total Issue Sources And Uses of Funds

Closing Date 6/25/2020

	Issue Summary
Sources Of Funds	
Par Amount of Bonds	$30,705,000.00
Total Sources	**$30,705,000.00**
Uses Of Funds	
Deposit to CalPERS Termination Payment Fund	4,000,000.00
Escrow Term Bond for Marina	6,500,000.00
Combined Costs of Issuance*	1,573,596.07
Deposit to Capitalized Interest Fund for Escrow Term Bond (From Marina's Portion of Bond Proceeds)	1,167,715.48
Long Term Administrative Expense Account Deposit	10,000.00
Proceeds for Building Removal Available Immediately Upon Closing	
Marina Share (52.25%)	8,561,968.07
Seaside Share (34.50%)	6,424,384.36
TAMC Share (7.0%)	1,303,498.28
MCWD Share (5.25%)	977,623.71
MST Share (1.0%)	186,214.04
Total Uses	**$30,705,000.00**

**Combined Costs of Issuance represents fees associated with bond insurance, underwriting, legal, advisory, rating agencies, trustee, fiscal consultant, actuarial fees, and other professional fees*

Report On Bond Sale

FORA's 2020 Tax Allocation Bonds sold on June 10, 2020, and were very well received by the capital markets. The bonds were over-subscribed (i.e. more offers to buy the bonds than there are bonds available), which allowed the underwriting team to be very aggressive on lowering the interest rates on the bonds. The final all-in true interst cost on the financing (analagous to an APR on a home mortgage) was 3.59%. The team also strategically increased the demand for the bonds by use of the bond insurance to "wrap" a higher, "AA" bond insurer rating around the "BBB+"-rated FORA bonds.

OFFICE OF THE CITY ATTORNEY

440 Harcourt Avenue
Seaside, CA 93955
www.ci.seaside.ca.us

Telephone 831-899-6890
Facsimile 831-718-8602

June 10, 2020

Fort Ord Reuse Authority
920 2nd Avenue, Suite A
Marina CA 93933

RE: Claim of REI v. FORA
Surplus II building removal contract

Dear FORA Board:

It is Seaside's understanding that the above-referenced matter is currently in mediation and that FORA has received government claim similar to a claim received by the City of Seaside and others. It is the City's position that the building removal performed pursuant to the contract was a base wide obligation and therefore FORA's debt alone. Seaside is not a successor or assign to the contractual obligations as between FORA and the contractor. Accordingly, we encourage both the Plaintiff and FORA Board to resolve this matter prior to June 30, 2020. Both the FOR A Act and the Health and Safety Code have a process for addressing FORA's debt. As you are aware, only FORA debts arising prior to June 30, 2020 will be eligible for repayment pursuant to Health and Safety Code section 33492.71 to the extent there are any unencumbered revenues. Any FORA debts arising after June 30, 2020 will be ineligible for payment as provided by Health and Safety Code section 33492.71.

Sincerely,

Sheri L. Damon
City Attorney
City of Seaside

Enc.
Cc: Joshua Metz, Executive Officer
Jon Giffen, Authority Counsel

FELDMAN & ASSOCIATES, INC.
ATTORNEYS AT LAW
11030 SANTA MONICA BOULEVARD
SUITE 109
LOS ANGELES, CALIFORNIA 90025
(310) 312-5401
FACSIMILE (310) 312-5409

May 27, 2020

VIA E-MAIL AND MAIL

Board Secretary or Clerk
City of Seaside
440 Harcourt Avenue
Seaside, CA 93955

RE: Resource Environmental, Inc./ Fort Ord Reuse Authority ("FORA")
Our Client: Resource Environmental, Inc.
Project: Hazardous Material and Building Removal at Surplus II
Project No.: S201

Dear Board Secretary or Clerk:

This office represents Resource Environmental, Inc., ("REI") a contractor who performed work on the above referenced project. REI is seeking to collect certain sums of money from the Ford Ord Reuse Authority ("FORA") and the City of Seaside ("Seaside") that are owed to REI.

This government code claim is being directed to Seaside because FORA has an obligation to pay its debts and honor its contracts pursuant to Government Code section 67700. However, if REI is not paid before June 30, 2020, when FORA dissolves, FORA is obligated to transfer its assets and liabilities to successor agencies. It is our understanding that the real property that was improved by REI will be transferred to Seaside, so Seaside will be responsible for the liabilities as the successor agency. This understanding is based in part on Article 11 of the Construction Contract which specifically mentions Seaside.

It would be best if Seaside made sure that REI was paid in full prior to June 30, 2020.

The following list represents the reasons why REI is owed money by FORA and Seaside on the above mentioned project:

A. Unpaid Change Order

REI is owed approximately $126,477 in unpaid contract funds for Change Order 2.

The brief explanation for Change Order 2 is that FORA initiated Change Order No. 2 since FORA did not provide plans showing the location of certain underground utilities. The purpose of Change Order No. 2 was to locate utilities not shown on the plans, for safety reasons, and to mark the location of the utilities by putting paint marks on the ground. Harris and Associates, the project manager for FORA, reviewed the price quotations for Change Order No. 2, found them acceptable for the scope of work found in the quotations, had the Change Order signed, and then the work was performed. This amount was already billed in payment application 10, but not paid. There is no reason this approved Change Order, which was completed, was not paid.

B. Unpaid Retention

REI is owed approximately $150,094.96 in unpaid retention.

FORA withheld a five percent (5%) retention from nine approved (9) payment applications. The retention is still being withheld by FORA for no known reason. Therefore, REI demands it be paid the full amount of the retention. This amount was already billed in payment application 11, but not paid.

C. Unpaid RFCs (excluding number 16)

REI is owed approximately $890,769.68 for Requests for Change ("RFCs") 5, 6, 7, and 11-14. These RFCs are for extra work performed by REI.

However, as a result of the contractually required meet and confer process the parties were able to reach an agreement to resolve these seven outstanding RFCs. The agreement reached between the parties resolved RFCs 5 through 14 for $640,000.00. The parties could not reach an agreement as to RFC 16 mentioned below. If FORA wants to deny that the meet and confer process resulted in the resolution of these RFCs then REI is owed $890,769.68. However if FORA chooses to honor the agreement that was reached as a result of the contractual meet and confer process, then REI is owed the amount of $640,000.00 to resolve RFCs 5 through 14.

D. Unpaid RFC 16

REI is owed $1,120,254.45 for RFC 16.

RFC 16 is a claim for the extra work and costs associated with the high-density concrete that REI encountered throughout the Project. This high strength concrete was not disclosed to REI in the plans or specifications.

Based on many prior experiences at the project site (approximately 40-60 other building demolitions), and decades of experience in demolition/construction, it was proper for REI to assume that the concrete poured was required to be 2,500 psi concrete, in-line with all the other

buildings that our client demolished. If it was high strength concrete, which this turned out to be, FORA was required to disclose this to all bidders pursuant to Public Contract Code section 1104.

E. Interest, Penalties, and Attorneys' Fees

REI seeks interest for the unpaid Change Order and RFCs, penalties for the unpaid retention, and attorneys' fees as allowed by the contract and the law.

This correspondence is REI's formal presentation of claims for additional compensation under Government Code section 910, et seq. The total of REI's claims exceeds $2,287,596.09 plus interest, penalties and attorneys' fees.

Pursuant to California Government Code Section 910, REI is also providing you with the following information:

1. The name and post office address of the claimant:

Resource Environmental, Inc.
6634 Schilling Avenue
Long Beach, CA 90805

2. The address to which REI desires notices be sent:

Mark A. Feldman, Esq.
Tait Viskovich, Esq.
Feldman & Associates, Inc.
11030 Santa Monica Boulevard, Suite 109
Los Angeles, CA 90025

3. The date, place and other circumstances of the occurrence or transaction which gave rise to the claims asserted:

The damages, interest and attorneys' fees for which REI seeks reimbursement relates to work performed through approximately June of 2019. The place and other circumstances which gave rise to the claim are more fully described above.

4. A general description of the indebtedness:

The indebtedness is more fully described above but exceeds $2,287,596.09 plus interest, penalties, and attorneys' fees.

5. The name(s) of the public employee(s) causing the damages:

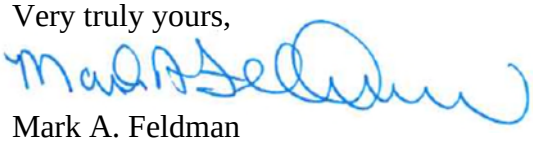
Peter Said, Mario Rebholz, Frank Lopez, and others unknown to REI at this time.

6. If the dollar amount of the claim exceeds $10,000.00, the claim shall indicate jurisdiction of this matter:

Monterey County Superior Court

We expect that you will promptly resolve this matter and provide REI with a cashier's check for the full amount of the claim, including interest and penalties.

Very truly yours,



Mark A. Feldman
for FELDMAN & ASSOCIATES, INC.

cc: Tait J. Viskovich, Esq.;
Resource Environmental, Inc.