

Monterey County

*Veterans Transitions Center
JDEC Room
220 12th Street
Marina, CA 93933*



Meeting Agenda - Final-revised

Thursday, August 9, 2018

1:00 PM

Special Meeting

Fort Ord Committee

Call to Order**Additions and Corrections**

The Commission Clerk will announce agenda corrections, deletions and proposed additions, which may be acted on by the Fort Ord Committee as provided in Sections 54954.2 of the California Government Code.

Public Comment Period

This is a time set aside for the public to comment on a matter that is not on the agenda.

Regular Agenda

- 1
 - a. Consider options for the Fort Ord Reuse Authority Draft Transition Plan relative to:
 1. Extending the Fort Ord Reuse Authority Community Facilities District;
 2. Identifying a successor to the Environmental Services Cooperative Agreement;
 3. Creating a Joint Powers Authority for habitat management in Fort Ord; and
 4. Completing the base-wide Habitat Management Plan and obtain base-wide State and Federal Incidental Take Permits.
 - b. Consider scheduling Special Meetings of the Fort Ord Committee in August and September to discuss Transition Plan options; and
 - c. Provide direction to staff and/or make a recommendation to the Board of Supervisors.

Attachments: [Fort Ord Committee Report](#)
[Att1-County Involvement in FORA Transition Planning](#)
[Att2-Financial Assets CFD](#)
[Att3-Counsel Memo re Habitat Conservation](#)
[Att4-Habitat Management Discussion](#)
[Att5-ESCA Discussion](#)

Other Items**Adjournment**

DOCUMENT DISTRIBUTION: Documents relating to agenda items that are distributed to the Fort Ord Committee less than 72 hours prior to the meeting are available for public inspection at the front counter of the Resource Management Agency, Monterey County Government Center, 1441 Schilling Place – South, 2nd Floor, Salinas, CA.

Documents distributed by County staff at the meeting of the Fort Ord Committee will be available at the meeting.

If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 USC Sec. 12132) and the federal rules and regulations adopted in implementation thereof. For information regarding how, to whom and when a person with a disability who requires a modification or accommodation in order to participate in the public meeting may make a request for disability-related modification or accommodation including auxiliary aids or services or if you have any questions about any of the items listed on this agenda, please call the Monterey County Resource Management at (831) 755-4800.

This page intentionally left blank

Agenda Item No. 1

This page intentionally left blank.



Ford Ord Committee

168 West Alisal Street,
1st Floor
Salinas, CA 93901
831.755.5066

Agenda Item #1

August 09, 2018

Introduced: 8/6/2018

Current Status: Agenda Ready

Version: 1

Matter Type: General Agenda Item

- a. Consider options for the Fort Ord Reuse Authority Draft Transition Plan relative to:
 1. Extending the Fort Ord Reuse Authority Community Facilities District;
 2. Identifying a successor to the Environmental Services Cooperative Agreement;
 3. Creating a Joint Powers Authority for habitat management in Fort Ord; and
 4. Completing the base-wide Habitat Management Plan and obtain base-wide State and Federal Incidental Take Permits.
- b. Consider scheduling Special Meetings of the Fort Ord Committee in August and September to discuss Transition Plan options; and
- c. Provide direction to staff and/or make a recommendation to the Board of Supervisors.

RECOMMENDATION:

It is recommended that the Fort Ord Committee:

- a. Consider options for the Fort Ord Reuse Authority Draft Transition Plan relative to:
 1. Extending the Fort Ord Reuse Authority Community Facilities District;
 2. Identifying a successor to the Environmental Services Cooperative Agreement;
 3. Creating a Joint Powers Authority for habitat management in Fort Ord; and
 4. Completing the base-wide Habitat Management Plan and obtain base-wide State and Federal Incidental Take Permits
- b. Consider scheduling Special Meetings of the Fort Ord Committee in August and September to discuss Transition Plan options and
- c. Provide direction to staff and/or make a recommendation to the Board of Supervisors.

SUMMARY:

State law requires that the Fort Ord Reuse Authority (FORA) submit a transition plan to the Monterey County Local Agency Formation Commission (LAFCO) on or before December 30, 2018. To achieve this timeline for LAFCO submittal, FORA staff has indicated that the FORA Board will need to consider and approve a plan not later than October 2018. Toward this goal, FORA released a public Draft Transition Plan on June 5, 2018.

On June 21, 2018, the Fort Ord Committee considered the Draft Transition Plan. During this meeting, staff indicated that it was in the process of analyzing the Draft Transition Plan and evaluating potential impacts and benefits of various options for the County. The Committee recommended that staff conduct this analysis and lay out options for the Committee and Board to consider. In addition, the Committee posed questions for staff to consider in its analysis of the various chapters outlined in the Draft Transition Plan. The Committee also discussed possible procedural pathways for County involvement in the FORA transition planning process.

The County, through RMA, hired a Management Specialist with expertise in finances, understanding of the County of Monterey, and experience with the Fort Ord redevelopment area to provide financial and policy analysis and expertise to help inform County decision-makers and staff regarding the FORA transition planning.

Staff proposes to continue to analyze the Draft Transition Plan and relevant agreements and documents for impact to the County, and lay out options for the Fort Ord Committee and Board of Supervisors to consider. In addition to the regularly scheduled Fort Ord Committee meeting on August 23, 2018, staff recommends that the Fort Ord Committee schedule Special Meetings of the Committee in August and September, of approximately 4 additional hours, to facilitate transition planning discussion, consider options, and develop Committee recommendation(s) to the Board of Supervisors. Staff's proposal is that each of the meetings would focus on particular subject areas involved in the transition planning.

Staff is requesting direction as to how the Committee would like to proceed in making recommendations on the Draft Transition Plan. The Committee could choose to wait to make a recommendation to the Board of Supervisors until the Committee has considered all the transition topics, whereupon staff would present an omnibus recommendation from the Committee to the full Board of Supervisors in late September or early October. Alternatively, the Committee could make recommendations to the Board after each Committee meeting related to the topics covered at that meeting and could direct staff to begin presenting those recommendations to the full Board over a series of sessions. If the Committee wishes to provide direction to staff and/or make recommendations on the topics considered at today's meeting, then staff recommends that the Committee consider making a recommendation to the Board of Supervisors regarding:

- Extension of the Fort Ord Reuse Authority Community Facilities District;
- Successor to the Environmental Services Cooperative Agreement;
- Creation of a Joint Powers Authority for habitat management in Fort Ord;
- Fort Ord Reuse Authority completion of the base-wide Habitat Management Plan and pursuit of base-wide State and Federal Incidental Take Permits.

DISCUSSION:

See Attachment 1: County Involvement in FORA Transition Planning Discussion

See Attachment 2: Financial Assets-Community Facilities District

See Attachment 3: County Counsel Memorandum Regarding FORA Transition: Habitat Conservation

See Attachment 4: Habitat Management Discussion

See Attachment 5: Environmental Services Cooperative Agreement Discussion

The FORA Draft Transition Plan dated June 5, 2018 is available to view at

[<http://www.fora.org/Board/2018/Packet/060818BrdTransitionPlanningPacket.pdf.>](http://www.fora.org/Board/2018/Packet/060818BrdTransitionPlanningPacket.pdf)

Additional information and materials regarding FORA's Transition Planning is available at <http://www.fora.org/Transitiontaskforce.html>.

OTHER AGENCY INVOLVEMENT:

RMA represents the County on the FORA Administrative Committee and has monitored FORA's Transition Planning. The CAO and County Counsel, in addition to RMA, is also meeting regularly with FORA staff regarding transition planning, and are available to assist and advise the County in the coming months regarding the FORA transition.

FINANCING:

The potential impacts and possible benefits to the County as a result of the FORA's Transition Plan could be significant, and is a critical piece of what staff is analyzing. County staff time to prepare this report and participate in the Transition Planning process is included in the FY19 baseline budget. See Attachments 1, 2, 3, 4 and 5 for discussion information about the possible financial implications of options being considered in the transition planning process.


BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

FORA was established to facilitate the transfer and reuse of the former Fort Ord, to minimize the disruption caused by the base closure on the local economy, and to provide for the reuse and development of the base to maintain and enhance the local economy, and to maintain and protect the unique environmental resources of the base. Managing and preparing for a smooth transition of FORA is important for protecting County interests and reducing fiscal impacts. Part of the physical infrastructure remaining is in unincorporated Monterey County.

- ☒ Economic Development
- ☒ Administration
- ☐ Health & Human Services
- ☒ Infrastructure
- ☐ Public Safety

Prepared by: Melanie Beretti, Property Administration/Special Programs Manager (x5285)

Prepared by: Carlos Urrutia, Management Specialist

Approved by: Carl P. Holm, AICP, RMA Director 

Attachments:

Attachment 1: County Involvement in FORA Transition Planning Discussion

Attachment 2: Financial Assets-Community Facilities District

Attachment 3: County Counsel Memorandum Re FORA Transition: Habitat Conservation

Attachment 4: Habitat Management Discussion

Attachment 5: Environmental Services Cooperative Agreement Discussion



This page intentionally left blank

Attachment 1

This page intentionally left blank.

Attachment 1

County Involvement in FORA Transition Planning

It is legislatively required that the Fort Ord Reuse Authority (FORA) Board of Directors approve and submit a transition plan to the Monterey County Local Agency Formation Commission (LAFCO) on or before December 30, 2018. To achieve this timeline for LAFCO submittal, FORA staff has indicated that the FORA Board will need to consider and approve a plan not later than October 2018. Toward this goal, FORA released a public Draft Transition Plan (FORA Plan) on June 5, 2018.

Due to the complexity of issues presented with transition planning for the Fort Ord Reuse Authority (FORA) dissolution on June 30, 2020, and to meet the transition planning timeline proposed by FORA, staff proposes to continue to analyze the Draft Transition Plan and relevant agreements and documents for impact to the County, and lay out options for the Fort Ord Committee and Board of Supervisors to consider. Staff recommends that the Fort Ord Committee schedule approximately 4 hours of Special Meetings in August (in addition to the Regular Fort Ord Committee meeting on August 23, 2018) to facilitate transition planning discussion, consider options, and develop Committee recommendation(s) to the Board of Supervisors as appropriate.

In addition to the regularly scheduled Fort Ord Committee meeting on August 23, 2018, staff recommends that the Fort Ord Committee schedule Special Meetings of the Committee in August and September, of approximately 4 additional hours, to facilitate transition planning discussion, consider options, and develop Committee recommendation(s) to the Board of Supervisors. Staff's proposal is that each of the meetings would focus on particular subject areas involved in the transition planning.

Staff proposes the following topics for today's meeting and the Committee's Regular Meeting on August 23, 2018:

Fort Ord Committee Special Meeting – August 9, 2018 (2 hours)

- Procedural pathways for County involvement in FORA transition planning;
- Habitat (Chapter 4);
- Environmental Services (Chapter 6); and
- Financial Assets – Community Facilities District (Chapter 5).

Fort Ord Committee Regular Meeting – August 23, 2018 (2 hours)

- Continued items from August 9, if needed;
- Transportation (Chapter 3); and
- Financial Assets – Property Taxes and Land Sales/Rental Receipts (Chapter 5)
 - To include consideration of proposal for Building Removal.

Staff proposes that the Committee consider scheduling Special Meetings, of approximately 4 additional hours, to facilitate transition planning discussion, consider options, and develop Committee recommendation(s) regarding the following proposed transition planning subject areas:

Attachment 1

County Involvement in FORA Transition Planning

Fort Ord Committee Special Meeting – TBD August or September 2018 (2 hours)

- Continued items from prior meeting;
- Water/Wastewater (Chapter 2);
- California Environmental Quality Act (Chapter 9); and
- Miscellaneous Contracts (Chapter 7).

Fort Ord Committee Special Meeting – TBD August or September 2018 (2 hours)

- Continued items from prior meeting;
- Transition Planning Alternatives;
- Transition Staffing; and
- Recommendation to the Board of Supervisors regarding Transition Plan.

Staff is also requesting direction as to how the Committee would like to proceed in making recommendations on the Draft Transition Plan. The Committee could choose to wait to make a recommendation to the Board of Supervisors until the Committee has considered all the transition topics, whereupon staff would present an omnibus recommendation from the Committee to the full Board of Supervisors in late September or early October. Alternatively, the Committee could make recommendations to the Board after each Committee meeting related to the topics covered at that meeting and could direct staff to begin presenting those recommendations to the full Board over a series of sessions. If the Committee wishes to provide direction to staff and/or make recommendations on the topics considered at today's meeting, then staff recommends that the Committee consider making a recommendation to the Board of Supervisors regarding:

- Extension of the Fort Ord Reuse Authority Community Facilities District;
- Successor to the Environmental Services Cooperative Agreement;
- Creation of a Joint Powers Authority for habitat management in Fort Ord; and
- Fort Ord Reuse Authority completion of the base-wide Habitat Management Plan and pursuit of base-wide State and Federal Incidental Take Permits.

Attachment 2

This page intentionally left blank.

Attachment 2

Financial Assets-Community Facilities District Discussion

Discussion:

A major source of funding the Base Reuse Plan (BRP) is the Special Tax imposed by the FORA CFD. FORA is scheduled to sunset on June 30, 2020 and the CFD will cease to exist, along with the Special Tax. Remaining BRP infrastructure and other impact mitigation measures, estimated at \$194.5 million, will not have been completed by the FORA sunset date and must be funded from other sources, unless FORA is extended. Funding sources under consideration by FORA and its Transition Plan Committee include:

- FORA Extension
- Continuation of CFD under a JPA
- Individual jurisdiction-based replacement CFDs
- Nexus based fees.

FORA Extension: If FORA is extended, the CFD will continue to fund infrastructure and other BRP measures, until the end of the extension period. It is possible that when any such extension sunsets again, there will remain unfinished considerable infrastructure and BRP measures, unless the extension is lengthy (10 + years). Under a short extension scenario, funding after FORA would remain uncertain. FORA could be extended, temporarily to aid in transition and long term, as taxing and funding agency, to preserve the CFD and to fund some of the activities assigned to other agencies. (See FORA transition issue paper.)

Continuation of CFD under JPA: It may be possible to continue the present CFD under a Joint Powers Authority, created by the individual entities with BRP obligations within their jurisdictional territories. Under this option, the decision making on taxing levels, funding allocations, and priority setting would be transferred to the JPA. This JPA would exist strictly for the purpose of funding the needed infrastructure and other BRP measures. This option would allow for the orderly transition of funding responsibilities.

Individual jurisdiction-based replacement CFDs: Each individual jurisdiction, Monterey County, Seaside, and Marina, could form CFDs within their jurisdictions and could continue to collect a Special Tax in the amounts needed to complete the BRP infrastructure. The option to create individual CFDs within Marina, Seaside, and the County raises a series of issues, including:

- Until the CFD is established, the development agreement calling for the developer to support the creation of a CFD can be amended, without input from the rest of the affected parties, unless the affected parties are also signatory to the agreement. If the replacement CFD is created prior to the dissolution of FORA, the creation documents, setting the Maximum Annual Tax and the intended uses, can also be amended, without the County having a say. This issue could be addressed by giving the County and other affected jurisdictions the right, by formal agreement, have a say in any amendment to the development agreement or the CFD formation documents.

Attachment 2

Financial Assets-Community Facilities District Discussion

- Agreeing to create a CFD and agreeing to the terms of the CFD can be two different things. CFDs cannot be imposed unilaterally by a jurisdiction because the affected property owners are entitled to vote on the creation of the CFD and on the amount of the Special Tax.
- The County may not be able to create a CFD within the County. It may not have the ability to get property owners, such as East Garrison, to agree to a separate CFD.
- Coordinating priorities for the three or more CFDs would be difficult and would require some entity to prioritize the schedule and use of the funds collected.

Some of these concerns can be addressed through agreements between the interested parties.

Nexus-based fees: Instead of generating revenue through a CFD, jurisdictions can impose development impact fees to mitigate the impact of development. Such fees can only be imposed by following nexus-based analyses and the fee can only be imposed to address the proportionate share of the impact by each type of land use. Imposition of such fees are not subject to a vote of those affected, but the fee can be challenged by any affected party. Such fees could be imposed by individual jurisdictions, a JPA, and entity such as TAMC or the Marina Coast District. Coordination challenges, such as those described above under the individual CFD discussion, may still be encountered and the advantage of allocating costs using factors such as economic development impacts on specific land uses are not available. One further complication may be that Jurisdictions may not be able to impose new development fees on already entitled development.

Possible Approach:

If the BRP is to be completed, funding is imperative. Maintaining the existing CFD will continue to provide funds required for implementation of Base Reuse Plan required infrastructure. It will also provide future flexibility, should the BRP be changed in the future. Currently FORA is not using full CFD Maximum Special Tax amount. Options for extending the CFD and the Special Tax include:

- Extend FORA, as is, for a period (Kick can down the road)
- Extend FORA, for a specified period, with a gradual reduction in functions and powers. Gradually transfer FORA functions to other entities, following a plan such as the one suggested by the Transition Task Force.
- Let FORA sunset as scheduled and seek legislation to transfer CFD authority to new jurisdiction, i.e. a JPA.

Under any of these options the CFD may be able to be extended and transferred to another jurisdiction by seeking an amendment of Government Code Section 53368.1, which allows the transfer of a CFD from a County to a City (and vice versa) to authorize a transfer from any legislative body established to implement a base reuse plan to a County, City, or JPA. This should be pursued even if FORA is extended because FORA will go away, eventually. There may be other available legislative approaches to transferring the CFD to a JPA.

Attachment 2

Financial Assets-Community Facilities District Discussion

Fiscal Impact

After June 30, 2020, the FORA CFD is expected to generate \$72 Million from already entitled development and \$55.2 million from currently unentitled development subject to the Special Tax, a total of \$127.2 Million. Prior to dissolution, the CFD is expected to generate \$19.2 million. The largest contributors to the CFD post 2020 are: Marina, \$55,333,761 (all entitled); Seaside, \$29,659,102 (\$2.6 Million entitled); Monterey County, \$13,980,905 (all entitled); UCMB, \$7,966,189 (all unentitled); Del Rey Oaks, \$20,075,070 (\$20,032,700 unentitled); City of Monterey, \$192,946 (all unentitled). The entitled development revenue would be most at risk, unless the individual jurisdictions are able to replace the FORA CFD with one of their own. This would require renegotiation of existing Development Agreements and cannot be done unilaterally by any of the jurisdictions.

If FORA is extended or a JPA is created and the CFD is successfully transferred to the JPA, the revenues would be protected. The FORA CFD creation documents allow CFD Special Tax funds to be used for the collection and administration of the tax.

This page intentionally left blank

Attachment 3

This page intentionally left blank.

MONTEREY COUNTY

OFFICE OF THE COUNTY COUNSEL-RISK MANAGEMENT

168 WEST ALISAL STREET, 3RD FLOOR, SALINAS, CALIFORNIA 93901-2439
(831) 755-5045 FAX: (831) 755-5283



CHARLES J. McKEE
COUNTY COUNSEL-RISK MANAGER

Wendy S. Strimling
Senior Deputy County Counsel

MEMORANDUM

DATE: August 2, 2018
TO: Fort Ord Committee of the Board of Supervisors
FROM: Wendy S. Strimling, Senior Deputy County Counsel
SUBJECT: FORA Transition: Habitat Conservation

The Fort Ord Reuse Authority (FORA) is currently preparing a transition plan to submit to the Local Agency Formation Commission (LAFCO) on or before December 30, 2018, pursuant to Government Code section 67700. To evaluate County's options and make policy recommendations regarding the FORA transition, the Fort Ord Committee of the Board of Supervisors has requested legal analysis of a number of subjects involved in the transition planning. This memo addresses the subject of habitat conservation specifically.

In considering the "habitat liabilities/obligations" identified in the FORA Draft Transition Plan, the Fort Ord Committee raised several questions regarding the County's obligations and options, including the following questions:

1. What are County's obligations under the Habitat Management Plan? Does County need a regional approach/creation of a Joint Powers Authority (JPA) to manage the County's obligations under the Habitat Management Plan?
2. What is the alternative to adoption of a basewide Habitat Conservation Plan?
3. Can a JPA be formed without adoption of an HCP?

These questions involve environmental, financial, and practical considerations as well as legal considerations. The purpose of this memo is to provide the legal framework for considering these issues.

Habitat Management Plan

The United States Army developed the *Installation-Wide Multispecies Management Plan for Former Fort Ord, California*, dated April 1997 ("Habitat Management Plan" or "HMP") for the Army's closure and disposition of the former Fort

Ord to comply with the federal Endangered Species Act (ESA).¹ The HMP was required as a result of the Biological Opinion issued by the United States Fish and Wildlife Service (USFWS) for the closure of Fort Ord in order to reduce the incidental take of species listed under the ESA and loss of those species' habitat associated with the decommissioning of the former Army base. The federal Environmental Impact Statement and Final Supplemental Environmental Impact Statement prepared for the base closure also recommended preparation of the HMP as mitigation for potential loss of species and habitat.

The HMP is an "installation-wide" plan. It applies basewide but categorizes the land within the former Fort Ord on a parcel by parcel basis into the following HMP management categories: Habitat Reserve, Habitat Corridor, Development with Reserve Areas or Development with Restrictions, Borderland Development Along NRMA (Natural Resource Management Area) Interface, Development, and Future Road Corridors. The categories have different levels of restrictions on development and requirements for habitat management. The goal is "to promote preservation, enhancement, and restoration of habitat and populations of HMP species while allowing development on selected property that promotes economic recovery after closure of Fort Ord." (HMP, Chapter 4, pa. 4-1.) So, for example, lands categorized as "Habitat Reserve" are to be managed to conserve and enhance threatened and endangered species, while the HMP places no management restrictions on "Development" lands.

The County of Monterey has agreed to fulfill the requirements of the HMP with respect to former Fort Ord lands that have habitat management requirements and that have been transferred to or will transfer to the County. The County of Monterey signed the HMP as a "concurring agency," whereby County concurred with the management requirements stated in the Habitat Management Plan for the Fort Ord lands that the County was to receive. (Board of Supervisors' Order, dated July 29, 2003, authorizing concurrence with the management requirements of the HMP.) The HMP requires entities with management responsibilities for lands categorized as Habitat Reserve, Habitat Corridor, or Development with Reserve Areas or Development with Restrictions to monitor conservation areas and corridors; the County is one of the entities with such responsibilities. (HMP, at p. 4-20.) Responsibilities include requiring avoidance of impacts to HMP target species and conserving and managing the areas in accord with the goals and objectives of the HMP and parcel-specific requirements in the HMP. (*Id.*) The HMP requires the land transfer deeds to contain covenants to implement the HMP. Thus, the deeds transferring land from FORA to the County have contained the specific use restrictions of the HMP and the conservation, management, monitoring and reporting requirements of the HMP if and as applicable to the particular parcels being transferred. (We refer you to staff for the specific requirements applicable to specific parcels.) Additionally, the Fort Ord Base Reuse Plan and the County's Fort Ord Master Plan require implementation of HMP policies. (See Biological Resources Policies.)

Habitat Conservation Plan

The proposed Habitat Conservation Plan (HCP) serves a different function than the HMP. The HMP enabled Army closure of the former Army base in compliance with the federal Endangered Species Act (ESA), and it established a comprehensive

¹ The 1997 HMP is a revision of an earlier HMP published in February 1994.

basewide framework for species and habitat conservation; however, the HMP did not provide future landowners with “take” authorization under the federal ESA or its state counterpart, the California Endangered Species Act (CESA). The proposed Habitat Conservation Plan is intended to provide the basis for incidental take authorization under state and federal law. Thus, while the proposed HCP would incorporate the HMP and supersede the HMP as the primary habitat conservation plan for non-federal recipients of Fort Ord lands, it also serves a different function—providing the basis for issuance of “incidental take” permits under state and federal law for several identified species. Without a habitat conservation plan approved by the federal and state wildlife resource agencies, the County would remain obligated to fulfill the management requirements under the HMP but would not have take authorization.

While a discussion of the federal ESA or CESA is beyond the scope of the memo, in sum these laws protect listed endangered and threatened species (and in the case of federal law, their critical habitat). The ESA prohibits the taking of listed endangered and threatened species. (16 USC sec. 1538(a)(1).) “Take” is broadly defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 USC sec. 1532 (19).) By regulation, “harm” includes significant habitat modification or degradation. Private or local government development projects that have no federal involvement and that could result in a take of listed species would violate the ESA unless the applicant obtains an “incidental take permit.” To grant an incidental take permit, the USFWS must find that the take “is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” (16 U.S.C. sec. 1539(a)(1) (B).) The incidental take permit cannot be issued unless the applicant submits a “conservation plan” that specifies the impact that will result from such taking, the steps applicant will take to minimize and mitigate the impacts, reasons why alternative actions to such taking are not being used, and such other measures as may be required by USFWS. (16 U.S.C. sec. 1539(a)(2).) The USFWS must find that the taking will be incidental, that the applicant will minimize and mitigate the impacts to the maximum extent feasible, that the applicant will ensure that adequate funding for the plan will be provided, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. (16 USC sec. 1539(a)(2)(B).) Under the CESA, the California Department of Fish and Wildlife (CDFW) similarly must issue a permit under Fish and Game Code section 2081 to authorize incidental take, provided, among other things, that the take is minimized and fully mitigated and that the applicant commits to adequate funding and monitoring of the mitigation.

The HMP does not provide take authorization. The HMP explicitly states that it does not provide take authorization under federal ESA, although it was intended to “simplify” future regulatory compliance and form the basis for a habitat conservation plan that would support the issuance of an incidental take permit to the future land recipients under section 10 of the ESA. (HMP, p. 4-9.) The HMP also notes that future landowners must still comply with applicable measures for state-listed threatened and endangered species required under the California ESA, CEQA, and other regulations.

Accordingly, using the framework of the HMP, FORA has taken the approach of preparing a basewide Habitat Conservation Plan (HCP) to accompany applications to USFWS and CDFW for incidental take of listed species under the ESA and CESA. The HCP has been under preparation since approximately 1997. FORA can explain the various hurdles it has encountered in developing the plan.

If the County needs to undertake any development that would result in a take of a federally listed species, it would need a habitat conservation plan that satisfies the federal requirements. Federal and state law do not necessarily require a basewide approach, but the HMP was “installation-wide” and was intended to simplify the process of obtaining incidental take permits. Further investigation would be advisable to determine if there are agreements that commit FORA or any of the land recipient entities to a basewise conservation approach. If there are no such contractual constraints, then the law does not prohibit a more individualized approach to seeking take authorization, such as each jurisdiction or development applicant pursuing individualized take authorization, but these other approaches raise many practical and financial issues to consider, including management and funding of any basewide HMP management responsibilities and allocation of the CFP dollars already collected by FORA for habitat conservation.

Joint Powers Agency

In conjunction with preparation of a basewide HCP, FORA has been preparing a draft joint powers agreement to create a Joint Powers Authority (JPA) to administer the HCP. The Joint Exercise of Powers Act (California Government Code section 6500 et seq.) authorizes two or more public agencies to enter into agreement to jointly exercise powers common to the contracting parties (Gov’t Code sec. 6502), so legally, the various public agencies have the legal authority to create a JPA, regardless of whether an HCP is adopted. However, if the JPA were to be approved prior to adoption of an HCP, the agreement must not be predecisional; it cannot legally assume adoption of the HCP ahead of that adoption. The joint powers agreement could address habitat management in any number of ways. For example, a JPA could be formed to implement existing HMP requirements, to assume responsibility from FORA for pursuing the incidental take permits and HCP, and to provide a process for consideration of amendments to the JPA in the event of adoption of a basewide HCP. Alternatively, a JPA could be formed solely for implementation of the HMP, or it could authorize the JPA to determine whether to pursue a basewide approach or other approach to pursuit of incidental take authorization. We would be happy to advise further about specific concepts for the JPA as they develop.

Conclusion

Given the complex history, the legal and factual issues associated with the FORA transition, and the evolving transition plan, we provide this advice with the caveat that it is based on our legal analysis to date and our current understanding of the facts. We would be happy to provide additional analysis of these issues as the FORA transition planning proceeds.

cc: Melanie Beretti, RMA
Nick Chiulos, Assistant CAO

Attachment 4

This page intentionally left blank.

Attachment 4

Habitat Management Discussion

Discussion

Existing Habitat Obligations

The BRP requires habitat conservation and management. Currently, habitat management is being done under the provisions of the *Installation-Wide Multispecies Management Plan for Former Fort Ord, California*, dated April 1997 (“Habitat Management Plan” or “HMP”). All agencies signatory to the HMP and those who receive properties within Fort Ord are required to comply with the provisions of the HMP. The signatories include, BLM, The Army, UCSC, The County, the City of Marina, State Parks, Caltrans, and MPRPD. Habitat management is currently being done by several of the agencies mentioned. FORA participates in habitat management through an annual contract with UCSC.

The conservation and restoration activities in the HMP are broadly described, leaving some room for interpretation and further refinement. To fully implement the HMP on the County properties, it is anticipated that both State and Federal Incidental Take Permits (ITP) would be necessary. To make the ITP applications, a Habitat Conservation Plan (HCP) is needed for the Federal ITP and a Mitigation and Management (MMP) for the State ITP; these documents are commonly a single combined document. Because the goals of the HMP are to conserve and restore habitat, staff anticipates the HCP/MMP would be fairly straightforward and the issuance of ITPs would be supported by the wildlife agencies.

The County is anticipated to own 1,849 acres of the 18,540 acres of total habitat management lands on the former Fort Ord; the US Bureau of Land Management (BLM) will own the majority of habitat lands, 14,645 acres planned to be part of the Fort Ord National Monument (FONM). The primary species of concern on the County properties is the California Tiger Salamander (CTS). It is anticipated that the County could mitigate the HMP activities within its own habitat lands.

The East Garrison developer, UCP East Garrison LLC (UCP), secured a State ITP for the development, and UCP, FORA and the County entered into a *Memorandum of Agreement Regarding Habitat Management on Portions of the Parker Flats Reserve at the Former Fort Ord, California* (MOA) to allow a CTS Preservation and Habitat Restoration Area (CTS PHRA) be preserved and managed to mitigate the development’s impacts to CTS. The MOA contemplated the completion of the under-development *Installation-Wide Multispecies Habitat Conservation Plan* (HCP) and subsequent issuance of State and Federal ITPs for anticipated base-wide development. The MOA requires UCP to fund management and monitoring activities at the CTS PHRA at Parker Flats, until the HCP ITPs have been issued and not more than five (5) years; if the HCP ITPs are not issued prior within five years (by 2020), the MOA term may be extended and UCP remains responsible for funding CTS management activities for the extended term.

Prior to or in the absence of HCP ITPs being issued, FORA’s existing habitat liabilities/obligations (HMP; MOA CTS management) as well as CFD funding collected for habitat management may be assigned to the individual habitat land owners or to a Joint Powers Authority (JPA).

Basewide Habitat Conservation Plan and Incidental Take Permits

Attachment 4

Habitat Management Discussion

The HMP is an approved plan by the USFWS. However, the HMP does not provide specific authorization for incidental take of Federal or State listed species to existing or future non-federal land recipients under the Federal and State Endangered Species Acts. FORA and the Fort Ord property owners have been working with the wildlife agencies to complete an HCP and receive base-wide Federal and State ITPs. The participating agencies are currently working on developing the HCP, but it is not known when or if the HCP will be adopted. Due to different permit issuance requirements, the base-wide HCP is much more rigorous than the HMP, yet is required for the issuance of Federal and State ITPs. A base-wide HCP ITP approach is a more holistic approach for protecting and managing protected species. It also provides the greatest security to future developments as it establishes a set amount of mitigation requirements for a defined amount of development.

The Draft HCP being developed proposes to provide take coverage for the following activities on County Fort Ord lands: habitat management activities (including HMP implementation); CTS mitigation for East Garrison; the activities described in the County's Draft Fort Ord Recreation and Habitat Area Master Trails Plan and Open Space Management Plan (FORHA Plan); and potential future development on developable parcels within the County's jurisdiction, including possible improvements at Laguna Seca Race Track.

As discussed above, implementation of the HMP and CTS mitigation for the East Garrison development could likely be accomplished on County lands without issuance of base-wide HCP ITPs, and should be fully funded assuming the County receives a fair-share of the anticipated \$21 million of CFD funds FORA will have collected by its sunset in 2020. It is also anticipated that a certain amount of the proposed activities and development anticipated in the Draft FORHA Plan could be handled with individual ITPs; however, at some point, future development on County lands would be expected to exceed a threshold that makes a base-wide HCP ITPs preferable for mitigating the development. It is difficult to determine what threshold level of development could tip the scales making a base-wide HCP ITP approach preferable for the County over obtaining individual project ITPs.

FORA Draft Transition Plan Consideration Summary

When FORA sunsets, it will be necessary to delegate the responsibility for habitat management to a successor agency(ies). The Transition Task Force recommendation is that this should be done through a JPA of member agencies, with habitat management responsibilities. The JPA would have responsibility for habitat management under the HCP, but if the HCP is not adopted, habitat management responsibilities under the HMP will still exist and will need to be managed and funded. Funds collected for habitat management from the CFD can be used either for HMP or HCP habitat management. It has been suggested that the JPA should be formed now, rather than wait until a decision on the HCP is made or wait until FORA goes away. It is felt that the transition plan will be more likely to be accepted by LAFCO if the successor agencies are formally established. The JPA would most likely include The County, and some or all the city members of FORA, with habitat management responsibilities.

Attachment 4

Habitat Management Discussion

Options:

- Form JPA as soon as practicable, but prior to the scheduled date of FORA dissolution, with broad responsibility for habitat management, with a proviso that should the HCP be approved, its management and funding would come under the jurisdiction of the JPA. The responsibilities for habitat management could be performed by FORA, until dissolution. This option would provide a structure for habitat management irrespective of adoption of the HCP.
- Form JPA after FORA sunsets, irrespective of HCP status and incorporate HCP, if adopted. This option creates a condition like the first option, but it does not provide the assurances that may be required by LAFCO.
- Form JPA when the HCP is approved, and if the HCP is not approved prior to FORA dissolution then each jurisdiction could assume responsibilities under the HMP. This option allows existing habitat obligations to be met, but results in an unknown time frame and increase uncertainty over habitat management for future development after FORA sunsets.
- Abandon HCP adoption efforts, do not form a JPA, and let each jurisdiction assume its responsibilities under the HMP. Adoption of an HCP provides mitigation assurances for BRP planned development. When each development project obtains individual ITPs, there is risk to future development should mitigation lands be exhausted (earlier development), which could preclude the regulatory agencies from continuing to issue incidental take permits in the future. This would have economic development impacts. This would be a much less expensive option and would probably not require the \$48-60 million endowment.

Suggested Approach

Forming a JPA as soon as practicable to handle existing base-wide habitat management responsibilities, with provisions to bring the HCP under its financing and management responsibility, would provide a smooth transition when FORA sunsets. FORA would continue to fund and manage habitat until its dissolution, when the responsibilities would be transferred to the JPA. The JPA could be administered and staffed by the County or one of the member agencies. If the HCP is approved, this approach only works if the CFD funding is secured and produces the estimated \$48-60 million. Without the CFD funding, there would not be enough money to fund the HCP. CFD funding could come from the existing CFD or from successor individual jurisdiction CFDs. (Please note concerns about individual CFDs described in another issue paper.)

Fiscal Impact

The FORA CFD provides funding for habitat conservation and management in the FORA territory. FORA estimates that the implementation of the HCP, post 2020, will be done through an endowment in the approximate amount of \$48-60 million. The amount of the endowment is a moving target and will not be determined until the HCP is adopted. Funds for the endowment are being generated by the FORA CFD. FORA sets aside 30% of revenues from the CFD to fund the endowment. It is estimated that by the FORA sunset date, there will be approximately \$21 million available for habitat

Attachment 4

Habitat Management Discussion

management. The FORA CIP and the calculations by EPS, under contract to FORA estimates and additional \$46 million of CFD funds, for habitat conservation, after FORA sunsets.

Should a JPA be established, as a JPA member agency the County would not be free from liability. Should the JPA dissolve, the County would still be required to do its part in the management of an HCP or the HMP. The HMP responsibilities seem to have been managed for several years, without great expense of funds. FORA currently spends about \$100,000 in habitat management through the University of California, Santa Cruz (UCSC) to manage 560 acres of habitat currently owned by UCSC.

Adoption of the HCP would bring greater responsibilities and increased liability, particularly if the CFD is not extended or replaced. There is no guarantee that, even if the \$48-60 million endowment fund was created, it would be sufficient to cover the HCP obligations, in the long term, as new species may be designated or other unknown circumstances could arise. In adopting the HCP, the County should exercise due diligence to make sure that the responsibilities are funded adequately. Also, JPA administration would take funding and the JPA member agencies should ascertain that the CFD revenues can be used for that purpose, or that the endowment will cover JPA administrative costs. The CFD, if extended, will sunset in the early 2050s, but the generation of revenues would end when development is complete.

If the HCP is not adopted, it is possible that the CFD funds on hand at the FORA sunset date would suffice to meet existing habitat obligations. However, as long as the CFD remains active, funds for habitat management will continue to be generated.

Attachment 5

This page intentionally left blank.

Attachment 5

Environmental Services Cooperative Agreement Discussion

Discussion:

FORA and the Army entered into an Environmental Services Cooperation Agreement (ESCA), whereby FORA took responsibility for the removal of munitions and remediation of lands destined to be used for development and other economic purposes. The Army funded the work through a grant to FORA, in the approximate amount of \$99 Million. The remediation portion of the work has been completed, but the transfer process is still underway for certain parcels. Monitoring, reporting, and managing regulatory requirements for the development of these parcels will also be required, through the year 2028. FORA received additional funds, in the approximate amount of \$6.8 million from the Army to pay for the additional effort required.

The Cooperative Agreement Award between the Army and FORA (March 30, 2007) envisioned the eventual dissolution of FORA and stipulated that the responsibilities under the ESCA agreements would be transferred to a successor entity. The Award states that LAFCO “shall designate a successor.” (Award, sec. 5.2.2.) Furthermore, the parties agreed “that the designated successor shall be a municipal entity that should be able to meet the financial and technical obligations and responsibilities required under this Agreement and AOC [the Administrative Order of Consent].” The Award further requires that the successor in interest “be limited to one of the following municipal entities:

1. Monterey County
2. Seaside
3. Marina
4. A Joint Powers Agency if created under California law for the purpose of succeeding FORA’s obligations, liabilities, and duties.”

The Army’s approval of the successor to the ESCA agreement is required. Additionally, FORA is required to “exercise best efforts to secure acceptance by USEPA of the LAFCO designation of the successor.” (Award, sec. 5.2.2.).

Options

- Extend FORA to June 30, 2028 to manage the ESCA. FORA would not need to perform all or any of the other duties it currently performs.
- Allow FORA to sunset on June 30, 2020, or later, and create a JPA to complete the responsibilities under the ESCA.
- Allow FORA to sunset on June 30, 2020, or later, and agree that the County will take over the responsibilities under the ESCA.

Suggested approach:

FORA’s staff assigned to manage the ESCA have the knowledge to perform the work required. It may not make sense to extend FORA for this activity only, because there are more efficient options to provide the required oversight of staff assigned to do the work. However, if FORA is extended for other purposes, this could be one of its functions.

Attachment 5

Environmental Services Cooperative Agreement Discussion

If FORA sunsets, the County could provide the administrative oversight and could incorporate the FORA staff into the County work force, whether a JPA is formed or not. It does not make sense to create a separate organization to accomplish the required work; however, assumption of such responsibilities by the County would most certainly involve additional staffing and resources. Discussion and analysis with FORA on the anticipated effort and costs of this effort should be conducted to determine what financial resources are necessary to the County or JPA successor to perform this function. It would also be advisable that discussions should be had with the FORA staff assigned to this task about their willingness to transfer to County employment. This is a specialized skill that may be hard to find in the market place.

Prior to making any final decision, the County should conduct a thorough review of any liabilities that may attach to the ESCA and its amendment. The ESCA provides that the successor assumes all liabilities, obligations, and responsibilities under the ESCA. There is an insurance liability policy, purchased by FORA, which should be evaluated regarding coverage for work performed in the remediation. Discoveries of previously unknown hazards should be covered by the Army. Also, the County should ascertain that the resources allocated by the Army to complete are enough. If not, the County could seek additional resources or assurances from the Army during the take-over negotiations.

If the County is willing to accept the assignment of the ESCA, or if a JPA is proposed to be formed, discussions with the Army regarding the process should be initiated as soon as practicable. Under either the County or the JPA option, it may be advisable to keep the responsibility with FORA for as long as it is in existence.

Fiscal Impact

If the available resources to complete the work are deemed sufficient and that additional legal liability is not identified by the County, the assumption of the ESCA responsibilities should not be a fiscal impact on the County. However, it will represent increased work burden to whatever division is chosen to oversee the work, and may carry administrative oversight costs that may not be covered by the allocated funds.