

October 17, 2018

By E-mail

Board of Directors
Fort Ord Reuse Authority
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Re: CEQA compliance for adoption of Transition Plan

Dear Members of the Board:

On behalf of LandWatch Monterey County, I write to object to the proposed finding that the Board's adoption of the Transition Plan attached to the September 28, 2018 Board Report ("Transition Plan" or "TP") would be exempt from CEQA.

The Transition Plan, which is in the form of a proposed resolution, finds that the Transition Plan is exempt as an "organizational reorganization" because it "solely allocates assets, liabilities, and obligations for the Fort Ord Reuse Authority in advance of its ultimate dissolution." It also finds that the Transition Plan is exempt because it does not approve changes to land use, or change any project specific review by lead agencies, or change any projects contained in the Capital Improvement Plan ("CIP").

However, as the Transition Plan staff report admits, and as FORA has been advised by the City of Marina and LAFCO, there is no agreement that the Transition Plan assignments of obligations, including what FORA calls "obligations" to construct CIP improvements, are legally authorized or that the assignments will in fact occur. CEQA requires that FORA make findings as to the effect of the Transition Plan on existing mitigation plans and propose alternative mitigation as necessary. In light of FORA's failure to identify what is actually required as CEQA mitigation for the Base Reuse Plan and to secure agreements to continue valid mitigation commitments, FORA has not complied with CEQA.

In addition, significant changes to the Base Reuse Plan ("BRP") mitigations that would stem from the proposed Transition Plan, significant new circumstances, and significant new information, requires that FORA prepare a subsequent EIR to

acknowledge and propose mitigation for the new and more severe significant impacts. Relevant changes and new information include the inability to compel the existing mitigation measures; worsening seawater intrusion and overdraft conditions and the failure to develop the expected replacement for groundwater supplies, which were not anticipated by the BRP's EIR; and changes to CEQA's legal requirements that now preclude identifying and mitigating transportation impacts with reference to Level-of-Service criteria and require instead that analysis and mitigation be based on minimizing vehicle miles travelled and trip generation.

A. Mitigation measures for water supply impacts in the BRP.

Mitigation for an adopted plan may include either conditions identified in an EIR or policies and provisions of the plan itself. (CEQA Guidelines, § 15126.4(a)(2) ["In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design".]) The 1997 BRP and its Program EIR ("PEIR") identify a number of BRP objectives, policies, and programs intended to mitigate water supply impacts. In addition, FORA imposed a number of conditions intended to mitigate water supply impacts, notably through provisions of the Development Resources and Management Plan ("DRMP").

1. Existing mitigation measures for water supply in the BRP and BRP PEIR

The 1997 BRP acknowledges that continuing seawater intrusion caused by overdrafting the aquifer is an ongoing threat to water supplies. (BRP § 4.4.2.) The discussion identifies "safe yield" as "the amount of groundwater that can be pumped annually on a long-term basis without causing undesirable effects." (*Id.*) It acknowledges that groundwater pumping in Fort Ord is and has been in excess of safe yield. It acknowledges that groundwater pumping for Fort Ord development should be limited to the amount that does not aggravate or accelerate the existing seawater intrusion:

The Monterey County Water Resources Agency (MCWRA) has agreed that 6,600 acre-feet (AF) of water can be pumped each year at the former Fort Ord *provided that such withdrawals do not aggravate or accelerate the existing seawater intrusion.*

(BRP §4.4.2 [emphasis added].) The 6,600 afy pumping "right" conferred on the Army by MCWRA was expressly conditioned on, and limited in duration until, the expected implementation of an alternative water supply "Project" that would replace all groundwater pumping in the former Fort Ord.

After execution of this agreement and *until Project Implementation*, Fort Ord/POM Annex/RC may withdraw a maximum of 6,600 acre-feet of water per

year from the Salinas Basin, provided no more than 5,200 acre-feet per year are withdrawn from the 180-foot aquifer and 400-foot aquifer.

(1993 Annexation Agreement, § 4.c [emphasis added].) The referenced “Project Implementation” was the availability of a planned long term reliable water supply of at least 6,600 afy that would enable the Army or its successor to shut down all of the groundwater wells on the Former Fort Ord. (*Id.* at §§ 1.j and 1.k).

The Army subsequently assigned to FORA its right to pump water until that replacement Project was implemented. Unfortunately, the long term 6,600 afy replacement water supply for Fort Ord has never been implemented. However, there is no basis to claim that the MCWRA or the Army agreed to an indefinite use of the 6,600 afy, particularly if seawater intrusion were aggravated by its use.¹

Thus, the BRP PEIR makes clear that reliance on the “right” to pump 6,600 afy is not permitted if seawater intrusion continues; instead development must be limited so as not to exceed safe yield and it is imperative to provide alternative supplies. As hydrologist Timothy Parker explained:

The BRP PEIR provides specific policy requirements to ensure adequate, timely mitigation of seawater intrusion, mitigation that may need to be implemented before 6,600 afy is committed or pumped for new development. Policy B-1 requires that the FORA members “shall ensure additional water supply.” Policy B-2 requires conditioning project approval on verification of an “assured long-term water supply.” Policy C-3 requires the member agencies cooperate with MCWRA and MPWMD “to mitigate further seawater intrusion based on the Salinas Valley Basin Management Plan.” Program C-3.1 requires the member agencies to work with the water agencies “to estimate current safe yields within the context of the Salinas Valley Basin Management Plan for those portions of the former Fort Ord overlying the Salinas Valley and Seaside groundwater basins, to determine available water supplies.” . . .

The BRP PEIR explains that Policies B-1, B-2, and C-3 are intended to “affirm the local jurisdictions’ commitment to preventing further harm to the local aquifers . . . by limiting development in accordance with the availability of secure supplies.” (BRP PEIR, p. 4-55.) The explicit provisions for determination of safe yield and for acceleration of water supply projects if 6,600 afy cannot be supplied without further seawater intrusion clearly demonstrate the intent that the member agencies not simply defer action until 6,600 afy has been allocated to development projects if seawater intrusion continues. To the contrary, it seems

¹ See John Farrow, letter to City of Seaside City Council, October 12, 2016, pp. 11-17 [6,600 afy is neither a baseline nor a safe yield amount that can be pumped without impact].

clear that the BRP PEIR directed the member agencies “to mitigate further seawater intrusion” by, among other things, ensuring that groundwater pumping beyond the determined safe yield is not permitted for new development projects. The BRP PEIR’s cumulative analysis makes it clear that Policy C-3 does not permit uncritical reliance on a 6,600 afy allocation: “existing water allocations of 6,600 afy . . . would allow for development to proceed to the year 2015, provided that seawater intrusion conditions are not exacerbated (Policy C-3).” (BRP PEIR p. 5-5 (emphasis added).)²

The BRP PEIR impact analysis materially qualifies any reliance on the 6,600 afy allocation by stating that a potable water supply is “assumed to be assured from well water *until a replacement is made available by the MCWRA*,” but only “*provided that such withdrawals do not accelerate the overdraft and seawater intrusion problems in the Salinas Valley groundwater aquifer*.” (BRP PEIR p. 4-53 [emphasis added]). The BRP PEIR states that the 6,600 afy “could” support the first phase of Ord community development through 2015 and then notes “given the existing condition of the groundwater aquifer, there is public concern over the ability of the water wells to ‘assure’ even the 6,600 afy.” (BRP PEIR, p. 4-53.)

Accordingly, the BRP EIR evaluates the impacts of the BRP through 2015 in two distinct analyses, one of which assumes that 6,600 afy can be supplied without impacts and the other of which assumes that it cannot. In particular, it provides that “[a]ssuming groundwater wells on former Fort Ord were able to supply 6,600 afy,” an additional 7,932 afy of supply would be required by 2015. (BRP PEIR, p. 4-53.) However, it then provides in the alternative that “[i]f groundwater wells were unable to supply the projected 2015 demand of 6,600 afy of water for former Fort Ord land uses, e.g., *if pumping caused further seawater intrusion into the Salinas Valley Aquifer*,” *additional supplies would have to be developed sooner*, and recommends, for example, “that an alternate water supply source, such as on-site storage facilities, be considered.” (BRP PEIR, p. 4-54.)

In addition to policies requiring development of an alternative water supply, the BRP’s Development and Resource Management Plan, also identified as mitigation for BRP impacts and adopted as part of the BRP, provides that FORA shall allocate the assumed 6,600 afy of available water supply among the member jurisdictions and that those jurisdictions shall not approve development projects without a finding that the project can be served within the jurisdiction’s allocation. (DRMP, §3.11.5.4(a).) The DRMP also limits future residential development to 6,160 units to prevent outstripping the water supply. (DRMP, §3.11.5.4(b).)

2. Water supply provisions in Implementation Agreements

² Timothy Parker to John Farrow, Technical Memorandum, Oct. 8, 2016, pp. 8-9.

The existing Implementation Agreement provisions regarding water supply bar member agencies from committing water resources that are unavailable “whether through FORA allocation or otherwise.” However, as discussed below, nothing in the Implementation Agreements provide that obligations of the member agencies in the Implementation Agreements will survive the sunseting of FORA.

3. Water supply provisions in the 1998 Facilities Agreement and current Capital Improvement Program

The only water mitigation obligation recognized by the BRP Capital Improvement Program (“CIP”) is to fund and build a 2,400 afy non-potable water supply augmentation project.³ This non-potable supply was assumed in 1998 to be required to supplement the assumed 6,600 afy of potable water supply in order to facilitate development projected through 2015.⁴ FORA estimates that an additional \$17 million will be required to complete the water supply augmentation project.

FORA has assumed that MCWD is currently obliged to provide this augmentation supply. The basis of this as claim is the 1998 Facilities Agreement between FORA and MCWD. In that agreement, FORA retained authority to identify and approve water supply projects and to require MCWD to build them. (1998 Facilities Agreement, §§ 3.2, 4.2). However, that agreement will expire when FORA sunsets. (*Id.*, § 9.3).

4. Groundwater conditions now preclude any additional pumping for new development in Fort Ord under the BRP mitigation policies.

In light of the policies in the BRP and BRP PEIR that preclude reliance on groundwater for new development if increased pumping aggravates seawater intrusion or exceeds safe yield, any additional groundwater pumping cannot be permitted and additional supplies are now urgently required as mitigation under the BRP PEIR. As Parker explained in 2016 in connection with the then-proposed Monterey Downs

³ See 2017/2018 CIP, p. 3 [“The CFD implements a portion of the development fee policy by funding CEQA mitigations described in the BRP Final Environmental Impact Report (FEIR). These include Transportation/Transit projects, Habitat Management obligations, and Water Augmentation”], available at <http://www.fora.org/Reports/CIP-Current.pdf>.

⁴ The 2,400 afy water supply augmentation project was identified as the non-potable supply required in addition to the 6,600 afy of potable groundwater in order to complete the assumed Phase 1 BRP development through 2015. (See May 17, 1996 Final Public Facilities Implementation Plan, available at http://www.fora.org/Reports/BRP/BRP_v3_AppendixB-Business-Operation-Plan.pdf, [pdf page 160].)

development project, groundwater pumping for Fort Ord development now exceeds safe yield:

MCWRA has now determined that the safe yield of the Pressure Subarea is about 110,000 to 117,000 afy and that existing pumping exceeds this safe yield by about 12,000 to 19,000 afy.⁵ Indeed, the BRP PEIR acknowledges that pumping in the 180-foot and 400-foot aquifers had “exceeded safe yield, as indicated by seawater intrusion and water levels below sea level.” (BRP PEIR p. 4-63.) The BRP PEIR states that the “conditions of the 900-foot aquifer are uncertain”, including the safe yield and whether the aquifer is in overdraft. *Id.*⁶

Parker reviewed the situation in 2018 in connection with the proposed annexation of portions of Fort Ord into the MCWD service area, and concluded that conditions had further deteriorated:

As explained in my October 8, 2016 memorandum regarding the proposal to increase groundwater pumping to support the Monterey Downs project in the Ord community, seawater intrusion continues in the Salinas Valley Groundwater Basin (SVGB) due to overdraft conditions, despite various groundwater management projects.⁷ The situation has not improved since my 2016 memorandum. The most recent MCWRA mapping shows continued substantial increase in seawater intruded areas, which have occurred *despite* reductions in MCWD pumping during the 2006-2015 period.⁸ Groundwater levels continue to decline, especially in the 400-foot aquifer.⁹ MCWRA reports that acreage within the 500 mg/l or greater Chloride contour in the 400-foot aquifer has increased

⁵ MCWRA, State of the Salinas River Groundwater Basin, 2016 p. 4-25.

⁶ Timothy Parker to John Farrow, Technical Memorandum, Oct. 8, 2016, pp. 8-9.

⁷ Timothy Parker to John Farrow, Technical Memorandum, Oct. 8, 2016.

⁸ MCWRA, Historic Seawater Intrusion Map, Pressure 400-Foot Aquifer, June 7, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=19378>; MCWRA, Historic Seawater Intrusion Map, Pressure 180-Foot Aquifer, June 7, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=19376>; MCWD, 2015 Urban Water Management Plan (UWMP), Table 4.1 (reporting total MCWD pumping declined from 4,295 afy to 3,228 afy in that period), available at http://www.mcwd.org/docs/engr_files/MCWD_2015_UWMP_Final.pdf.

⁹ MCWRA, presentation of Groundwater Level Contours And Seawater Intrusion Maps, July 13, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=31294>.

from 11,882 acres in 2005 to 17,125 acres in 2015.¹⁰ Furthermore, because increases in intrusion may lag periods of drought, there may be substantial increases in intrusion still to come in response to the recent 4-year drought.¹¹

In light of the continuing advance of seawater intrusion, MCWRA staff have recommended a moratorium on new wells in the Pressure 400-Foot Aquifer within an “Area of Impact” proximate to the 500 mg/l Chloride front.¹² MCWRA also recommends a moratorium on new wells within the entirety of the Deep Aquifers of the 180/400 Foot Aquifer Subbasin pending investigation of its viability as a source of water (“Deep Aquifer” has been called variously including the 900-foot Aquifer, and herein is used to refer to multiple water-bearing units underlying the Pressure 400-Foot Aquifer).¹³

In sum, as set out in my 2016 memorandum and confirmed by subsequent investigations, future increased groundwater pumping above existing levels, particularly from the areas proximate to the seawater intrusion front, will contribute to seawater intrusion. Because MCWD’s current production wells serving the Ord community are located just inland of the seawater intrusion front in the 400-foot and Deep aquifers, increased pumping would aggravate seawater intrusion.^{14, 15}

The County of Monterey has in fact ordered the proposed moratoria on new wells and pumping.¹⁶ It is clear that groundwater conditions now preclude any further pumping for new Fort Ord development under the terms of the BRP mitigation policies.

¹⁰ *Id.*

¹¹ Timothy Parker to John Farrow, Technical Memorandum, Oct. 8, 2016, pp. 2-3.

¹² MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin, October 2017, pp. 2-9, available at <http://www.co.monterey.ca.us/home/showdocument?id=57394>. [version with appendices available through link for item 11 on MCWRA agenda for 10/16/17 at <http://www.co.monterey.ca.us/home/showdocument?id=57308>.]

¹³ *Id.*

¹⁴ MCWD, 2015 Urban Water Management Plan (UWMP), pp. 35, 45, available at http://www.mcwd.org/docs/engr_files/MCWD_2015_UWMP_Final.pdf.

¹⁵ Timothy Parker, letter to John Farrow, “Groundwater Impacts from Increased Pumping to Support Ord Community Development,” February 15, 2018.

¹⁶ Monterey County Ordinance 5302, May 25, 2018.

B. Mitigation measures in the BRP and BRP PEIR for transportation impacts.

The BRP EIR identifies increased travel demand on regional off-site roads as an unavoidably significant impact. (BRP PEIR, Table 2.5-1 and pp. 4-88 to 4-119.) The BRP PEIR identifies increased demand within the former Fort Ord as a less than significant impact based on compliance with specified policies and programs. (*Id.*) The BRP PEIR determines the significance of impacts and the efficacy of mitigation with reference to Level-of-Service (“LOS”) criteria. (BRP, PEIR, pp. 4-89 to 4-90, 4-101.) Mitigation measures include the construction of roadway improvements, depending on development, and compliance with various policies and programs to reduce travel demand. (BRP PEIR, Table 2.5-1 and pp. 4-88 to 4-119.)

The BRP’s DRMP section 3.11.5.3 calls for various forms of mitigation, including payment of fair shares toward roadway improvements. The objective of this program is to “insure compliance with Level of Service standards,” including FORA’s own Level-of-Service Standards. (DRMC, §3.11.5.3.)

Although FORA has described all of the traffic infrastructure projects included in its CIP as mitigation measures under the BRP, there is in fact no consensus that all of the proposed roads are required as mitigation measures rather than proposed merely as part of the BRP’s circulation plan or inserted into the CIP at some later date. (*See* City of Marina Resolution 2018-116, discussed below.) To the extent that some roads are identified as mitigation, there is no consensus as to which roads they are, or when they would be required. To the extent that proposed roads are identified as CEQA mitigation, they would not be required unless and until the development assumed to trigger their need had occurred. It is obvious that development has not proceeded at the rate anticipated in the BRP and BRP PEIR.

Furthermore, regardless of the transportation mitigation that may have been proposed in the BRP PEIR based on Level-of-Service criteria, as a result of passage of SB 743 in 2013, congestion and Level-of-Service effects will no longer be a permissible basis to identify significant impacts or to require mitigation under CEQA:

SB 743 requires OPR to amend the CEQA Guidelines to provide an alternative to LOS for evaluating transportation impacts. Particularly within areas served by transit, those alternative criteria must “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.” (Public Resources Code Section 21099(b)(1).) Measurements of transportation impacts may include “vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated.” (*Ibid.*) *Once the CEQA Guidelines are amended to include those*

*alternative criteria, auto delay will no longer be considered a significant impact under CEQA. (Id. at subd. (b)(2).)*¹⁷

OPR has written the new Guidelines, and the Natural Resources Agency has begun the formal rulemaking process under the APA. The public comment period closed in July 2018 and the Natural Resources Agency will adopt the new guidelines shortly.¹⁸ The new rules will certainly be in effect by 2020 when the Transition Plan becomes effective.

As a result of SB 743, future development projects will require analysis of transportation-related impacts based on vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated rather than Level-of-Service. CEQA will require consideration of feasible mitigation for significant impacts identified with reference to these significance criteria. However, mitigation under CEQA may not be mandated for impacts that are not significant. (CEQA Guidelines, § 15126.4(a)(3).) Accordingly, *it will not be permissible to mandate transportation mitigation that is based only on a project's impacts to Level-of-Service.* FORA must therefore re-evaluate its commitment to transportation infrastructure as required mitigation. This re-evaluation is particularly compelled if the only or primary reason for member agencies to undertake future roadway improvements that might be required by the Transition Plan is the argument that these improvements are required as CEQA mitigation.

C. The Transition Plan assumes that infrastructure construction obligations, some of which may be mitigation measures, will be met by assigning project construction obligations after FORA sunsets.

The Transition Plan assumes that all of FORA's existing infrastructure plans will be continued because it assumes that these are all binding commitments on FORA that can and will be assigned by FORA or by the Local Agency Formation Commission of Monterey County ("LAFCO") to a FORA successor entity and/or to the FORA member agencies. However, the Transition Plan fails to identify which of the projects are in fact mitigation and which are currently planned merely because they are desired by FORA or are part of the BRP or CIP but not compelled as mitigation. The Transition Plan lumps all of these infrastructure plans into the category of "Basewide Mitigation Measures and

¹⁷ Transportation Impacts (SB 743) - Office of Planning and Research, website, available at <http://opr.ca.gov/ceqa/updates/sb-743/> [emphasis added].

¹⁸ See Proposed Updates to the CEQA Guidelines, Nov. 2017, available at http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf; Current CEQA Guidelines Update, available at <http://opr.ca.gov/ceqa/updates/guidelines/>.

Basewide Costs,” without identifying the basis of the obligation for each project.¹⁹ For example, recital F states:

“FORA is obligated either by the California Environmental Quality Act, the Reuse Plan and/or the Authority Act (Government Code Section 67670 and following) to implement the Basewide Mitigation Measures and incur the Basewide Costs.”

As discussed below, CEQA requires certain actions and findings when an agency proposes to abandon or change previously identified mitigation measures, which measures might include infrastructure projects. However, as discussed below, FORA has offered no convincing argument that there is any obligation to complete the BRP’s infrastructure plans, much less the CIP project list, much of which is not identified in the BRP or BRP PEIR as mitigation.

¹⁹ The definition of “Basewide Mitigation Measures,” found in the Implementation Agreements, includes infrastructure projects that are not specifically identified in the BRP PEIR, which further confuses the identification of actual CEQA mitigation:

“Basewide Mitigation Measures include: basewide transportation costs; habitat management capital and operating costs; water line and storm drainage costs; FORA public capital costs; and fire protection costs. The Basewide Mitigation Measures are more particularly described in the Fort Ord Comprehensive Business Plan, described in Section 1 {f), the Development and Resource Management Plan, and the Findings attached to the Base Reuse Plan.”

(See, e.g., Seaside Implementation Agreement, available at <https://www.fora.org/Reports/ImplementAgreements/seaside-ia.pdf>.) Many of these measures are clearly not intended to mitigate significant environmental impacts under CEQA but are merely the development infrastructure that the BRP proposes. The definition confuses the BRP project itself with its required mitigation. For example, the referenced “Section 1 {f)” of the Comprehensive Business Plan (available at https://www.fora.org/Reports/BRP/BRP_v3_AppendixB-Business-Operation-Plan.pdf) includes not just CEQA mitigation but infrastructure that may be desired for “marketability” and to facilitate development; and it does not identify the improvements with any specificity. It is unclear from the definition’s reference to multiple sources to identify mitigation measures whether the definition intends that a mitigation measure needs to be listed in *each* source to count as CEQA mitigation or merely identified, in very general terms, in *one* source. FORA staff have mischaracterized infrastructure projects as required CEQA mitigation in order to persuade member agencies to include them in the CIP or to construct them well before there is any actual need for them.

Nonetheless, the Transition Plan treats all of the infrastructure projects in the CIP as if they are mandatory obligations that can and must be assigned to FORA successor entity and/or to the FORA member agencies.

In particular, Section 1 of the Transition Plan:

- Finds that the member agencies are required to continue to fund base reuse until all basewide costs and mitigation measures have been retired;
- Finds that, accordingly “the Board assigns its rights in the Implementation Agreements to its successor who is responsible to complete the projects in the CIP;”
- Finds that the Transition Plan may be implemented via Transition Plan Implementation Agreements to be developed in the future; and
- Finds and directs that the Transition Plan Implementation Agreement shall generate revenues to implement CIP projects.

Section 2 of the Transition Plan purports to assign assets and liabilities to each member agency.

Section 3 of the Transition Plan provides for transportation projects:

- That FORA assigns responsibility to complete CIP transportation projects to member agencies; and
- That FORA assigns costs for these roads based on projected Community Facility District (“CFD”) taxes.

Section 3 provides regarding water supply:

- That FORA finds its water allocations are fair and equitable and reflected in the Implementation Agreements;
- That FORA finds that the Implementation Agreements may need to be enforced by denying water connection permits or by MCWD developing an augmented water supply;
- That FORA finds that “transferring obligation to finance water augmentation, water, and wastewater infrastructure to MCWD to implement the Reuse Plan is appropriate at FORA sunset;”
- That FORA finds that if MCWD cannot finance these projects, then the continuation of the CFD or jurisdictional replacement allows for funds;
- That FORA assigns the \$17 million cost of water augmentation projects to its member agencies.

D. In fact, there is no certainty that whatever mitigation is now compelled will be continued under the Transition Plan because there is no apparent legal authority or agreement that either FORA or LAFCO may assign any obligations to member agencies or to a FORA successor.

As noted, the Transition Plan fails to specify what planned improvements are in fact mandated as mitigation or what would trigger the obligation to construct such an improvement. The Transition Plan's assumption that unspecified mitigation will continue seems to be based on an unsupported belief that either FORA or LAFCO may simply assign the unspecified mitigation obligations to other entities. That assumption is not valid.

1. LAFCO does not believe that it has authority to compel assignment of existing obligations to member agencies or to a successor entity.

As LAFCO's Executive Officer has pointed out, LAFCO lacks authority to require that any agency accept the obligations that FORA proposes to assign to them:

To summarize the August 8 memo, neither AB 1614 nor statewide LAFCO law (the Cortese-Knox-Hertzberg, or CKH Act) appears to give LAFCO any legal basis to impose such requirements on any public agency on the context of FORA dissolution.²⁰

LAFCO staff correctly state that FORA must arrange and negotiate the actual transfer of its existing roles and responsibilities to other agencies because "LAFCO cannot carry those actions out on FORA's behalf."²¹

2. FORA's analysis that infrastructure projects can be assigned is not valid.

As LandWatch has previously explained,²² FORA's assumption that the existing BRP and its implementing agreements somehow impose continuing obligations on its member agencies is unsupported by accurate legal analysis.

As noted, FORA staff have simply assumed that the land use agencies would be obliged to undertake the roads, water augmentation, and habitat projects contained in the

²⁰ Kate McKenna, LAFCO Executive Officer, Fort Ord Reuse Authority (FORA) Dissolution Process update, Aug. 27, 2018, p. 2.

²¹ *Id.* at p. 3.

²² John Farrow, letter to Monterey County Board of Supervisors Fort Ord Committee, "Funding and implementation of common roads, water projects, and habitat management after FORA sunsets," August 14, 2018.

FORA CIP after FORA sunsets. It remains fundamentally unclear whether this assumption with regard to any specific infrastructure project is based on the claim that the infrastructure project was identified in the BRP PEIR as mitigation, or merely on the claim that it was included in the BRP or inserted into the CIP at some point, or some other claim.

In response to LandWatch's Public Records Act requests for legal analysis of post-FORA obligations, FORA identified only Jon Giffen's January 10, 2018 memo captioned "Assignability of Implementation Agreements (Part 1)."²³ FORA advised LandWatch on August 9, 2018 that further analysis has not been completed.

FORA Counsel Giffen's initial analysis is not convincing. First, Giffen expressly considers only whether the Implementation Agreements are "assignable," *not whether the Implementation Agreements create enforceable obligations by the land use jurisdictions that would survive FORA.*

Second, FORA Counsel Giffen merely *implies* that the Implementation Agreements create a continuing obligation for the land use jurisdictions to fund what FORA lumps together as the "Basewide Costs and Basewide Mitigation Measures." His argument is that the land use jurisdictions "could not reasonably have expected that FORA's credit would assure [their] full completion" because Section 6(f) contains provisions that contemplate that possibility. This argument has no weight. Section 6(f) merely obligates the land use jurisdictions to "initiate a process to *consider*" other financing mechanisms if FORA cannot pay Basewide Costs and undertake Basewide Mitigation Measures, and Section 6(f) specifically provides that it does *not* require the "Jurisdictions to adopt any specific financing mechanisms *or contribute any funds to alleviate FORA's funding insufficiency.*" In short, Section 6(f) does not create an enforceable obligation for the land use jurisdictions themselves to fund FORA *even when FORA exists*, much less after FORA sunsets.

More generally, the Implementation Agreements at most merely obligate the land use jurisdictions to (1) levy *FORA's* development fees and assessments on future property owners "in accordance with FORA's adopted fee policy" and (2) to impose deed restrictions that require future land owners pay a "Fair and Equitable Share of Basewide Costs and Basewide Mitigation Measures" through some type of financing mechanism. Nothing in the Implementation Agreements appears to impose an obligation on the land use jurisdictions *themselves* to pay for "Basewide Costs and Basewide Mitigation Measures" or to develop and implement a funding mechanism that could be imposed on landowners after the demise of FORA.

²³ Jon Giffen, memorandum, "Assignability of Implementation Agreements (Part 1), Jan. 10, 2018, available at the FORA transition website at http://b77.402.myftpupload.com/wp-content/uploads/011018_Board_Memo-CFD-Dev_Fees-LAFCO.pdf.

FORA Counsel Giffen notes that an assignment cannot occur without a willing assignee but then concludes that *FORA* is not actually looking to assign *FORA*'s rights and obligations but is contemplating that *LAFCO* will be able to "pass along to the appropriate successor entity (ies) authority to continue the levying and collection of special taxes, fees, and assessments on property once within *FORA*'s jurisdiction after *FORA* ceases to exist." This analysis seems to acknowledge that there will *be* no assignment by *FORA* of obligations under the Implementation Agreements. More problematically, the analysis addresses only the *authority* to raise revenues, not the *obligation* to do so *or* the obligation to fund and implement road, water, and habitat projects. Furthermore, the analysis simply *assumes* that there will be a successor agency to *FORA* and that somehow the CFD can be transferred to that agency, *even though neither the FORA Act nor the Mello-Roos Act now provide for this.*²⁴ The only successor agency that has been identified other than a *FORA* extension is a hypothetical Joint Powers Authority ("JPA"). But if the land use jurisdictions refuse to join that JPA because, for example, they conclude the "Basewide Costs and Basewide Mitigation Measures" cannot be imposed on them without such a JPA, then there will *be* no entity to which to assign *FORA*'s rights to continue collecting the CFD. There is no legal analysis that suggests that the land use agencies could be compelled to participate in a go-forward

²⁴ *FORA* has relied on Mello-Roos Community Facilities District (CFD) taxes to raise revenues for transportation, habitat, and water supply projects. As *FORA* has concluded, the *FORA* CFD will terminate when *FORA* sunsets, because neither the *FORA* Act nor the Mello-Roos Act permit transfer of the existing CFD to another successor agency. Thus, the ability to raise revenues from projects that already have vested development entitlements will terminate, because no new taxes or impact fees can be imposed on entitled development projects with vested rights. *FORA* has projected that post-2020 CFD taxes on the six entitled development projects would have totaled \$72.2 million.

These six projects are identified by *FORA* staff as The Dunes, Seahaven, and Cypress Knolls in Marina; East Garrison in the County; Seaside Resort in Seaside; and the RV Resort in Del Rey Oaks. (See Draft Transition Plan Study Session, presentation to *FORA* Board, page 12, June 8, 2018, available at http://fora.org/Board/2018/Presentations/06/TAC-Board_StudySession_060818.pdf.) *FORA* staff projects post-2020 CFD taxes would have been \$14 million for the County's single project; \$55 million for Marina's three projects; \$2.6 million for Seaside's single project; and \$42,370 for Del Rey Oaks' single project. (*Id.* at 13.)

No new exactions can legally be imposed on vested development. While the City of Marina has negotiated a *voluntary* agreement with one entitled project developer to replace its CFD taxes with other payments, there is no assurance that other developers with vested entitlements would agree to make payments that are no longer legally required. Furthermore, the City of Marina has not agreed to use the replacement CFD revenues from that one developer to fund the mitigation projects that *FORA* mistakenly assumes the Transition Plan can compel the member agencies to fund.

agency with specific duties, e.g., the duty to construct specific infrastructure projects or to impose or enforce particular development restrictions.

3. The City of Marina has found that FORA may not impose obligations on member agencies to fund or construct particular infrastructure projects.

The City of Marina in its recent Resolution 2018-116 found that FORA does not have the authority to impose infrastructure construction obligations on member agencies. Specifically, the Marina resolution found:

- The FORA CIP projects are not compelled as mitigation measures.
- The implementation agreements do not require land use jurisdictions to fund base-wide costs and mitigation measures.
- FORA itself is not obligated to incur basewide costs or to complete basewide public facilities.
- FORA has failed to specify what right or obligation it has to assign obligations and FORA does not have the power unilaterally to assign liabilities and obligations.
- Neither FORA nor LAFCO have authority to impose revenue generating obligations on the Land Use Jurisdictions.
- Continuation of the Implementation Agreements is unnecessary and illogical.

Clearly, the City of Marina is not prepared to accept obligations proposed under the Transition Plan without further discussion and agreements. It is also clear that the City of Marina does not agree with the scope of infrastructure construction obligations proposed by FORA. It is foreseeable that other member agencies will take similar positions.

4. FORA staff admit that there may be no resolution of its claim that the Transition Plan can create enforceable obligations short of litigation.

The FORA staff report acknowledges that LAFCO staff and its legal counsel have opined that LAFCO lacks power to compel implementation of the transition plan and that the FORA Act does not empower the FORA Board to make assignments in the absence of agreements. (FORA Board Report, Sept, 28, 2018, Agenda number 8e, p. 2.) FORA staff insist that LAFCO does have authority to impose the Transition Plan assignments in order to fulfill the plan. (*Id.*) However, FORA cannot compel LAFCO to take action that LAFCO declines to take. Thus, FORA staff admit the issue will not be resolved without reaching agreements on assignments, legislation, or litigation. (*Id.* at 2-3.)

E. FORA should actually negotiate agreements to identify and transfer certain infrastructure construction projects.

In light of Marina's refusal to participate in the Transition Plan, LAFCO's refusal to mandate its provisions, FORA's lack of authority to impose infrastructure construction

obligations unilaterally, and the uncertain outcomes of legislation or litigation, there can be no certainty that existing mitigation measures that happen to require infrastructure construction would continue under a Transition Plan without agreements by the member agencies to undertake specified infrastructure projects.

If FORA does obtain such an agreement with one member agency, it is not at all certain that other member agencies would agree to the proposed assignment of all of the existing CIP infrastructure projects and funding arrangements. For example, some may refuse to construct particular roadway improvements in light of SB 743 and their budgetary constraints. Or some may refuse to honor the existing BRP water supply mitigation provisions. Until the member agencies actually negotiate future agreements, the Transition Plan cannot simply assume that the existing BRP and CIP infrastructure proposals and mitigation plans will remain intact.

F. FORA must propose replacement mitigation or acknowledge that the Transition Plan will result in unmitigated significant impacts.

FORA's proposed finding that the Transition Plan is not a project subject to CEQA or is exempt as a mere reorganization cannot be supported in light of the uncertainty whether existing mitigation commitments would be continued and the likelihood that at least some mitigation measures would not be assured of implementation or would be abandoned or materially changed.

CEQA requires that mitigation be certain and enforceable. (CEQA Guidelines, §15126.4(a)(2) ["Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments"].) An agency may modify or delete a previously adopted mitigation measure only if the agency follows specific steps that FORA has not followed here, including identifying the mitigation measures that may change, reviewing the continuing need for those mitigation measures, and making required findings. (E.g., *Napa Citizens for Honest Gov't v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 359; *Katzeff v. Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 614.) The lead agency must address the reason for altering mitigation measures and the effect of doing so in a legally adequate CEQA document. An agency may not modify a mitigation measure in a way that reduces its effectiveness without preparing an SEIR to assess the effects of the change. (E.g., *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1174; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.)

Because the Transition Plan would render existing mitigation commitments uncertain, FORA's claim that approval of the Transition Plan does not trigger CEQA compliance is not supported under the law and the facts. As an initial matter, FORA must identify specifically what mitigation obligations were created under the BRP. It must then identify what infrastructure projects remain to be completed and what policies that constrain future development must still be enforced as the required as mitigation under the BRP. Not all infrastructure projects are CEQA mitigations. FORA has

acknowledged that some are “obligations” through FORA’s choice, not through a CEQA requirement. FORA should clarify which it thinks is which. Obviously, there are differences of opinion on this question among member agencies, FORA, and members of the public. That information must be stated by FORA so a public process can be followed to address these issues.

FORA must then demonstrate that some specific agency will in fact assume the responsibility for carrying through each identified CEQA mitigation in the form of an infrastructure project and that some specific agency will assume the duty of enforcing each CEQA mitigation that is in the form of a development restriction. If there is no such commitment to each CEQA mitigation, then FORA must provide legitimate reasons for modifying or abandoning that mitigation and the public must be allowed to comment on it. If after following the analytical process required, FORA proposes to find that implementation of any existing mitigation measure is infeasible, FORA must follow specific steps before FORA can consider approving the Transition Plan. FORA has not followed the required steps here.

Finally, CEQA requires findings as to all of this information before FORA acts to adopt a Transition Plan.

1. Uncertainty of water supply mitigation.

In the absence of FORA’s or LAFCO’s authority to assign existing mitigations and in the absence of actual enforceable agreements to accept these mitigations, there can be no finding that existing water supply mitigation commitments will remain intact.

First, the Transition Plan would not commit any agency to furnish the augmented water supply. FORA cannot compel MCWD to construct future improvements because the 1998 Facilities Agreement will expire when FORA sunsets and there is no certainty that the “assignments” in the Transition Plan would be legally effective.

Second, for the same reason, the Transition Plan would not compel MCWD or the FORA member agencies to honor the 6,160 new residential unit cap in the BRP’s Development Resource and Management Plan, § 3.11.5.4.

Third, there would be no commitment to the continuation of water supply allocations in DRMP § 3.11.5.4 because there is no certainty that MCWD would be bound by FORA’s prior water allocations. After FORA is dissolved, and in the absence of the 1998 Water/Wastewater Facilities Agreement or a binding transition plan addressing water supply issues, MCWD’s provision of water supply might be constrained only by MCWD’s commitments under the October 2001 “Assignments Of Easements On Former Fort Ord and Ord Military Community, County of Monterey, And Quitclaim Deed For Water And Wastewater Systems.” This Assignment would purport to constrain MCWD to assume and comply with the terms and conditions of the October 24, 2001 “Federal Instruments” that conveyed the water systems from the Army to FORA

and then from FORA to MCWD. These Federal Instruments include, as consideration for the transfers, the assumption of the Army's obligation "to cooperate and coordinate with parcel recipients, MCWRA, FORA, MCWD, and others to ensure that all owners of property at the former Fort will continue to be provided an *equitable supply of water* at equitable rates."²⁵ However, the meaning of "equitable supply" is not defined. Critically, there is no assurance that the equitable supply consideration will take into account the existing water allocations.

Fourth, and more critically, even if MCWD were to honor the existing allocations of a purported 6,600 afy water "right," MCWD may interpret "equitable" by simply reaffirming the unsustainable commitment to increase Ord Community groundwater pumping for new development up to 6,600 afy regardless of environmental impacts and regardless of the mitigation policies identified in the BRP and BRP PEIR that preclude reliance on groundwater if its continued use is in excess of safe yield or exacerbates seawater intrusion. (See BRP PEIR, pp. 4-53 to 4-55 [continued reliance on purported 6,600 afy right is not permitted if withdrawals would aggravate sea water intrusion].) For example, nothing in the Transition Plan compels MCWD or the member agencies to honor BRP commitment to eliminate groundwater overdraft as soon as practically possible per Water and Hydrology Objective B. As hydrologist Parker explained, the BRP PEIR identifies specific BRP Water and Hydrology policies that require adequate, timely mitigation of seawater intrusion. In light of the continuing seawater intrusion and the failure to determine and honor a safe yield for the Deep Aquifer or for the Salinas Valley Groundwater Basin generally, the following policies now must be implemented before any additional groundwater (much less 6,600 afy) is committed or pumped for new development:

- Policy B-1 requiring that the FORA members "shall ensure additional water supply;"
- Policy B-2 requiring conditioning project approval on verification of an "assured long-term water supply;"
- Policy C-3 requiring the member agencies cooperate with MCWRA and MPWMD "to mitigate further seawater intrusion based on the Salinas Valley Basin Management Plan;" and
- Program C-3.1 requiring the member agencies to work with the water agencies "to estimate current safe yields within the context of the Salinas Valley Basin Management Plan for those portions of the former Fort Ord overlying the Salinas Valley and Seaside groundwater basins, to determine available water supplies."

These and other applicable Policies and Programs have not been honored, despite the fact that they are identified as mandatory mitigation in the BRP PEIR. For example, the 6,600 afy replacement water supply project promised in §§ 1.j and 1.k. of the 1993 Annexation Agreement has not been built. No agency has determined the safe yield of

²⁵ Department of the Army, Easement to FORA for Water And Wastewater Distribution Systems Located On Former Fort Ord," 2001, paragraph 2 [emphasis added].

the Deep Aquifer. Land use agencies continue to approve development requiring water supply on the mistaken assumption that pumping may be increased to 6,600 afy, despite the overwhelming evidence that increased pumping exacerbates seawater intrusion. Before a FORA Transition Plan turns the responsibility for managing the Fort Ord water supply over to another agency, FORA must ensure that the mitigation in the BRP PEIR is honored or must provide the analysis and take other specific steps under the law that FORA has not taken here.

2. Uncertainty of transportation projects.

FORA's position is that that the CIP transportation infrastructure projects are all mandated to be constructed. LandWatch and others, including the City of Marina, have disputed and continue to dispute this mandate claimed by FORA. Without express agreements by the member agencies, there is no certainty that the member agencies will accept what FORA characterizes as an obligation to fund and complete any particular project. As argued above, there is no apparent legal basis to find an enforceable obligation for the member agencies to spend the sums specified in the Transition Plan on the existing set of CIP projects.

Furthermore, in light of the pending implementation of SB 743, which will *bar* the imposition of Level-of-Service based CEQA mitigation on development projects, there can be no certainty that the member agencies would accept a proposed assignment of an obligation to complete a roadway identified in the current CIP even if that roadway had previously been identified validly as CEQA mitigation. FORA assumed a need for some roadways based on a determination by FORA about an assumed obligation to meet previously described Level-of-Service standards.

While it is possible that the FORA member agencies may *choose* to build roads in the future to maintain certain Level-of-Service standards, neither FORA nor LAFCO can compel that outcome, particularly if it is not even mandated as CEQA mitigation. As a practical matter, FORA must obtain agreements from member agencies about future transportation projects and their funding as part of the Transition Plan if FORA is to have any certainty about their construction. This matter cannot be deferred for the so-called Transition Plan Implementation Agreements because FORA is obliged under CEQA to address the effects of its Transition Plan *before* it adopts it.

As a legal matter, FORA must acknowledge that the transportation projects and any CEQA mitigation in the BRP PEIR that *compels* maintenance of Level-of-Service standards cannot feasibly be honored through the Transition Plan in light of SB 743. FORA must clearly identify the existing transportation mitigation, including both infrastructure and development restrictions, prepare the appropriate CEQA analysis, and make findings regarding the continuing legal and practical feasibility of each CEQA mitigation. If FORA proposes to find that a particular CEQA mitigation is infeasible, FORA must take specific steps before adopting such a finding. FORA has not taken any of these steps.

It is likely that past transportation mitigations calling for meeting Level-of-Service standard will no longer be legally feasible as compelled CEQA mitigation in light of SB 743. However, many of the BRP trip reduction policies identified as transportation mitigation would remain feasible. (See BRP PEIR, Table 2.5-1, section 4.7 – Traffic and Circulation [listing policies and programs that reduce travel demand].) In the Transition Plan, these trip reduction policies should be identified as feasible mitigation to the extent that they reflect enforceable commitments by member agencies through the appropriate enforceable mechanisms. Finally, FORA should identify additional or alternative mitigation that is properly based on minimizing vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated.

G. A subsequent EIR is required under Public Resource Code § 21166 because there will be significant changes to the project, significant new circumstances, and significant new information, which will result in new or more severe impacts.

The Transition Plan is not merely a change of organization. As discussed above, as currently drafted it would abandon existing commitments to a system of mitigation measures. If revised to reflect new agreements to undertake specified mitigation measures, it would likely change the existing substantive commitments. Absent such agreements it is too early to determine what those commitments might be. At any rate, because the proposed Transition Plan is not exempt from CEQA as a mere organizational change, FORA must comply with CEQA by preparing a CEQA review. Here, that review must be a subsequent EIR.

CEQA requires that an agency prepare a subsequent EIR for its subsequent discretionary decisions regarding an already-approved project if there will be significant changes to the project, significant new circumstances, or significant new information, any of which will result in new or more severe impacts. Public Resources Code, § 21166. Here, FORA's adoption of the Transition Plan is a discretionary decision about an already-approved project, the Base Reuse Plan.

Here, there will clearly be changes to the project, because the BRP and its implementing agency will be discontinued and replaced with some other arrangements. As discussed above, the Transition Plan as currently proposed would effectively abandon existing mitigation commitments contained in the BRP and BRP PEIR because it does not provide enforceable assignments of those commitments to another agency. This requires FORA to prepare an SEIR. (*Sierra Club v. County of San Diego, supra*, 231 Cal.App.4th at 1174 [agency may not modify a mitigation measure in a way that reduces its effectiveness without preparing an SEIR to assess the effects of the change] ; *Lincoln Place Tenants Ass'n, supra*, 130 Cal.App.4th at 1508 [reason for altering mitigation measures and the effect of doing so must be addressed in an SEIR or an addendum].)

Furthermore, there are significant changes in circumstances and significant new information with respect to water supply and transportation impacts. These changes and new information are likely to result in new or more severe significant impacts. Accordingly, FORA should prepare a subsequent EIR before approving the Transition Plan.

Critically, the Transition Plan does not contemplate any change in land use. The Transition Plan claims that this supports a finding of exemption. To the contrary, exemption is improper precisely *because* the Transition Plan proposes to approve the continuation of a land use plan while it undercuts existing mitigation commitments and does so in the face of significant new information and changed circumstances that demonstrate that water supply and other impacts will be significant and more severe.

1. An SEIR is required to evaluate and mitigate water supply impacts.

In approving the Transition Plan, it is no longer possible for FORA to rely on the 1997 Fort Ord Reuse Plan EIR due to changes in circumstances, new information, and failure to implement the Fort Ord Reuse Plan itself. Thus, there is significant new information and changed circumstances since 1997 that demonstrates that the analysis in the Base Reuse Plan PEIR is outdated and that new analysis is required. This information includes, for example,

- DWR, Critically Overdrafted Basins, January 2016 – identifying the Salinas Valley Groundwater Basin as critically overdrafted and therefore requiring an accelerated Groundwater Sustainability Plan under the Sustainable Groundwater Management Act.
- MCWRA, State of the Salinas River Groundwater Basin, January, 2015 – identifying existing pumping from the Basin as unsustainable and recommending pumping reductions in the Pressure Subarea from which this project proposes to increase pumping.
- MCWRA, Protective Elevations to Control Seawater Intrusion in the Salinas Valley, 2013 – acknowledging the need for additional groundwater management projects to deliver water to replace coastal area pumping.
- Testimony of Robert Johnson, MCWRA, to Monterey County Planning Commission, Oct. 29, 2014 – acknowledging that the demand projections used for the Salinas Valley Water Project understated actual demand, that the Salinas Valley Water project would not be sufficient to halt seawater intrusion, and that additional groundwater management projects are needed.
- MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin, Oct. 2017 – acknowledging that seawater intrusion has leapfrogged forward through 2015 and recommending

that pumping cease in the areas of impact, recommending a moratorium on extractions from new wells in the 900-foot Deep Aquifer. As explained by Parker and the 2018 MCWRA report recommending a moratorium on new wells in the Deep Aquifer, there is no evidence of significant recharge to the Deep Aquifer, and increased pumping will result in its depletion and will induce seawater intrusion in the overlying aquifers

This and other information cited by hydrologist Parker demonstrates that there have in fact been substantial changes in the environmental setting of the proposed area over the past 20 years that would warrant new analyses. First, seawater intrusion has advanced another two miles inland since the 1997 BRP PEIR, constituting a substantially more severe significant effect than shown in the BRP PEIR. Within the meaning of Public Resources Code § 21166(b) and (c) this is a “substantial change[] . . . with respect to the circumstances under which the project is being undertaken” as well as “new information, which was not known and could not have been known” at the time of the BRP PEIR.

Second, the expected basin management plan, the cooperation in mitigation of seawater intrusion and development of new water supply, and the determination of safe yield required by BRP policies, including Hydrology and Water Quality Policies B-1, B-2, and C-3 have not materialized, and this is a substantial change in the BRP itself. The significant advance in the seawater intrusion front since 1997 should have precluded any reliance on the presumption that there is 6,600 afy of water to use without impact and should have triggered the obligation under the Fort Ord Reuse Plan to accelerate the provision of alternative supplies for any new development.

Case law is clear that additional analysis of water supply impacts is required under section 21166 when new information shows more severe impacts or the planned water sources are not implemented timely:

To the extent that a subsequent subdivision proposal relies on different water sources than were proposed in the specific plan it implements, or the likely availability of the intended water sources has changed between the time of the specific plan and the subdivision application (*or more has been learned about the effects of exploiting those sources*), changes in the project, the surrounding circumstances or the available information would exist within the meaning of section 21166, requiring additional CEQA analysis under that section . . .

(*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412,438 [emphasis added]; *see also id.* at 431, n. 7.) Here, the new information about the severity of cumulative impacts and the changes to circumstances and to the project itself with regard to water supply create an obligation under Public Resources Code § 21166 to prepare an SEIR for the Transition Plan, whether adopted in its proposed form or with new mitigation commitments.

Critically, FORA must acknowledge in an SEIR that any additional groundwater pumping would make a considerable contribution to the existing significant cumulative impact to the Salinas Valley Groundwater Basin. FORA must acknowledge that there is no longer any reason to assume that pumping 6,600 afy for Fort Ord use can be done without impact, and that mitigation must be adopted that requires that future development be accommodated only with alternative, non-groundwater water supplies. If FORA finds that provision of alternative water supplies is not feasible, it must explain why, and it must then identify overriding considerations for continued development that are sufficiently compelling to permit the further destruction of the aquifer.

2. An SEIR is required to evaluate and mitigate transportation impacts.

As with water supply, there have been changed circumstances and new information that compel preparation of an SEIR to evaluate and mitigate future transportation impacts. If the Proposed Transition Plan were to be adopted, the changed circumstances and new information include:

- The lack of any enforceable commitment that the member agencies or other agencies raise revenues to fund and actually construct the currently identified improvements in the FORA CIP, which FORA has described as mitigation for the BRP;
- The lack of any future obligation under CEQA to maintain Level of Service standards; and
- The legal *prohibition* on determining significance of transportation impacts with reference to congestion or Level-of-Service standards;
- The new affirmative duty to determine the significance of transportation impacts and to devise mitigation measures with reference to vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated.

This significant new information and changed circumstances will likely result in new or more severe impacts because the 1997 BRP was not devised to minimize vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated. Thus, an SEIR is required to evaluate transportation impacts associated with the adoption of the Transition Plan.

Conclusion

LandWatch urges you to consider this information and the underlying records carefully before you act. LandWatch offers to meet with FORA decision makers and senior officials to discuss the issues in this letter and how to resolve them, before the FORA Board acts. FORA, not LandWatch, controls the schedule here. FORA has time to address its omissions because it has more than two months before it needs to submit a plan to LAFCO.

Yours sincerely,

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



John Farrow

JHF:hs

Documents supplied electronically with this letter:

1. John Farrow, letter to City of Seaside City Council, October 12, 2016, pp. 11-17, attaching Timothy Parker to John Farrow, October 8, 2016, Technical Memorandum.
2. MCWRA, State of the Salinas River Groundwater Basin, 2016.
3. MCWRA, Historic Seawater Intrusion Map, Pressure 400-Foot Aquifer, June 7, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=19378>.
4. MCWRA, Historic Seawater Intrusion Map, Pressure 180-Foot Aquifer, June 7, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=19376>.
5. MCWD, 2015 Urban Water Management Plan (UWMP), http://www.mcwd.org/docs/engr_files/MCWD_2015_UWMP_Final.pdf.
6. MCWRA, presentation of Groundwater Level Contours And Seawater Intrusion Maps, July 13, 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=31294>.
7. MCWRA, Recommendations to Address the Expansion of Seawater Intrusion in the Salinas Valley Groundwater Basin, October 2017, available at <http://www.co.monterey.ca.us/home/showdocument?id=57394>. [version with

- appendices available through link for item 11 on MCWRA agenda for 10/16/17 at <http://www.co.monterey.ca.us/home/showdocument?id=57308>].
8. John Farrow, letter to MCWD Board of Directors, Feb. 19, 2018, attaching Timothy Parker, letter to John Farrow, "Groundwater Impacts from Increased Pumping to Support Ord Community Development," February 15, 2018.
 9. Monterey County Ordinance 5302, May 25, 2018.
 10. Transportation Impacts (SB 743) - Office of Planning and Research, website, available at <http://opr.ca.gov/ceqa/updates/sb-743/>.
 11. Proposed Updates to the CEQA Guidelines, Nov. 2017, available at http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf.
 12. Current CEQA Guidelines Update, available at <http://opr.ca.gov/ceqa/updates/guidelines/>.
 13. Kate McKenna, LAFCO Executive Officer, Fort Ord Reuse Authority (FORA) Dissolution Process update, Aug. 27, 2018.
 14. John Farrow, letter to Monterey County Board of Supervisors Fort Ord Committee, "Funding and implementation of common roads, water projects, and habitat management after FORA sunsets," August 14, 2018.
 15. Jon Giffen, memorandum, "Assignability of Implementation Agreements (Part 1), Jan. 10, 2018.
 16. City of Marina Resolution No. 2018-116.
 17. Department of the Army, Easement to FORA for Water And Wastewater Distribution Systems Located On Former Fort Ord," 2001.
 18. DWR, Critically Overdrafted Basins and map, January 2016,
 19. MCWRA, Protective Elevations to Control Seawater Intrusion in the Salinas Valley, 2013.
 20. Testimony of Robert Johnson, MCWRA, to Monterey County Planning Commission, Oct. 29, 2014.
 21. FOPRA-MCWD Water-Wastewater Facilities Agreement and 2001 Amendment, 1998.
 22. MCWD-WRIME Deep Aquifer Study, 2003.