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From: CPEO Moderator <cpeo@cpeo.org>
Date: Wed, 9 Aug 2000 13:37:27 -0700 (PDT)
Reply: [cpeo-military](#)
Subject: [CPEO-MEF] Part 2 PRESS RELEASE Fort Ord RAB Lawsuit Notice Filed

[This was posted to the list by Curt Gandy, OrdToxics@aol.com]

Please post on CPEO list server -- Thank you

Curt Gandy
FOTP Director

TEXT OF THE NOTICE FOLLOWS: (e-Mail, part 2 of 2 parts)

August 7, 2000

Via Registered Mail, Return Receipt Requested

Louis Caldera
Secretary, United States Department of the Army
110 Army Pentagon, Room 3E, Sp. 700
Washington, DC 20310

Re: Notice of Intent to Sue, Fort Ord, California
[42 U.S.C. Â§ 9659(a)(1)]

Dear Secretary Caldera:

Our offices represent the Fort Ord Toxics Project, Curt Gandy, Patricia Huth, Richard Bailey, Michael Weaver, Edward Oberweiser, Linda Millerick, and the National Caucus of Restoration Advisory Board Community Members (collectively 'Plaintiffs'). The purpose of this letter is to inform you that Plaintiffs intend to file suit against the U.S. Department of the Army, the U.S. Department of Defense, and William Cohen in his capacity as Secretary of Defense (collectively the 'Army') as more fully discussed below.

Plaintiffs' suit will allege that the Army has violated, and continues to violate, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Â§ 9601 et seq. ('CERCLA') and the Federal Facility Agreement for Fort Ord (the 'FFA'). Plaintiffs' suit will be brought pursuant to the authority of CERCLA section 310(a)(1), 42 U.S.C. Â§ 9659(a)(1).

ILLEGAL DISSOLUTION OF FORT ORD RESTORATION ADVISORY BOARD.

In about 1994, the Army established a Restoration Advisory Board ('RAB') at Fort Ord pursuant to the authority of 10 U.S.C. Â§ 2705(d). The RAB served as an important and effective forum for public education and public participation regarding the environmental restoration activities conducted by the Army at Fort Ord. In about May of 1999, however, the Army unilaterally disbanded the RAB. For the reasons discussed below, the Army's decision to disband the Fort Ord RAB was unlawful and a violation of both CERCLA and the FFA.

I The Army's Revised Community Relations Plan Is Unlawful.

The Army has now formalized its unilateral decision to disband the RAB by publishing and adopting a document entitled 'Community Relations Plan Update Number 1' (the 'Revised CRP'). The Revised CRP states that the Fort Ord RAB has been disbanded and that the Army will no longer support or maintain the RAB.

Both the FFA and CERCLA require the Army to develop and implement a community relations plan as a means of involving the community near Fort Ord in process of selecting response actions at the Base. Paragraph 26.2 of the FFA requires the Army to 'develop and implement' a community relations plan (hereinafter 'CRP'). The National Contingency Plan ('NCP') also requires that the Army prepare a formal CRP specifying the community relations activities to be undertaken by the Army during its response actions. 40 C.F.R. Â§Â§ 300.415(n)(3)(i) and 300.420(c)(2)(ii). The Revised CRP was adopted by the Army as required by these provision of the FFA and CERCLA. The Revised CRP is thus an integral part of the Army's selection of response actions at Fort Ord, and is subject to judicial review under CERCLA's citizen suit provision, 42 U.S.C. Â§ 9659(a)(1).

A court will overturn a decision made by a federal agency in the course of selecting a response action under CERCLA if the decision 'was arbitrary and capricious or otherwise not in accordance with law.' 42 U.S.C. Â§ 9613(j)(2).

Plaintiffs will allege that the Army's adoption of the Revised CRP was 'arbitrary and capricious or otherwise not in accordance with law' for at two reasons.

A. Violation Of Department Of Defense Guidance.

An agency action is considered arbitrary and capricious or otherwise not in accordance with law if the action fails to comply with the agency's own rules as set forth in the agency's internal guidance. Plaintiffs' suit will allege that the Army's Revised CRP is arbitrary and capricious and otherwise not in accordance with law because it fails to comply with the Department of Defense's 'Management Guidance for the Defense Environmental Restoration Program' ('DERP Guidance') in several respects.

First, the Army's decision to disband the Fort Ord RAB, as set formalized in the Revised CRP, violated section L.2.1 of the DERP Guidance because the decision was made unilaterally by the Army. Section L.2.1 states that a decision to disband (or 'adjourn') a RAB cannot be the unilateral decision of the DoD; and that '[t]he installation must make the decision to adjourn a RAB with general agreement from the RAB members and in consultation with the community as a whole.' Here, the Army's decision to disband the RAB, as formalized in the Revised CRP, was unilateral. The Army did not seek, nor did it receive, the general agreement of the RAB members for disbanding the RAB. Furthermore, the Army's decision to disband the RAB was not made in consultation with the community as a whole. The Army never consulted the community as a whole on the question of whether the Fort Ord RAB should be disbanded.

Second, section L.2.1 of the DERP Guidance specifies three circumstances under which RAB disbandment is appropriate: (1) where an installation has completed all of its environmental restoration actions; (2) where all remedies are in place and operating properly and successfully at the installation; and (3) there is no longer sufficient, sustained community interest in the restoration activities at the installation. None of these circumstances is present at Fort Ord, and the decision to disband the Fort Ord RAB, as formalized in the Revised CRP, was therefore improper.

With respect specifically to subsection (3) of section L.2.1, there remains at Fort Ord sufficient and sustained community interest in the restoration activities at Fort Ord to justify a RAB. Criteria for determining 'sufficient and sustained [community] interest' include: (1) the closure of an installation that involves the transfer of property to the community; or (2) at least 50 local citizens petition for an advisory board. DERP Guidance at sections L.2.a(1) and L.2.a(2). Both of the secriteria are satisfied at Fort Ord. Fort Ord is a closed installation that will be transferring property to the community. In addition, on September 24, 1999, the installation commander for Fort Ord was presented with a petition signed by more than 50 local citizens demanding re-establishment of the Fort Ord RAB. As a result, there is sufficient, sustained community interest in the restoration activities at Fort Ord to justify continuation of the RAB.

B. Retaliation For Prior Lawsuit.

In early 1998, the Fort Ord Toxics Project, along with several community members of Fort Ord RAB, filed suit against the Army alleging that the Army was in violation of CERCLA because it (the Army) had failed to perform a Remedial Investigation/Feasibility Study ('RI/FS') to address the serious dangers posed by unexploded ordnance on Fort Ord. FOTP and the RAB community members prevailed in that suit. After United States District Court Judge Jeremy Fogel announced his intention to issue judgment in favor of the plaintiffs, the Army agreed to

commence an RI/FS to address unexploded ordnance. Based on the Army's agreement to begin an RI/FS, the plaintiffs and the Army entered final settlement of that case in early 1999.

Almost immediately after the plaintiffs and the Army agreed to settle that previous case, the Army's installation command at Fort Ord took action to disband the Fort Ord RAB.

Plaintiffs will allege that the Army's act of disbanding the RAB was done in retaliation for the previous lawsuit filed by FOTP and several RAB community members.

II Failure To Properly Implement Ordnance And Explosives Community Relations Plan.

Plaintiffs will also allege that between May of 1999 and the present, the Army has violated CERCLA and the FFA by failing to comply with the provisions of an adopted community relations plan entitled, 'Community Relations Plan Ordnance and Explosives Program Fort Ord, California, Final March 1998 (hereinafter the 'OE CRP').'

The Army published and adopted the OE CRP in March of 1998 in accordance with its obligations under paragraph 26.4 of the FFA and CERCLA (see, 40 C.F.R. §§ 300.415(n)(3)(i) and 300.420(c)(2)(ii)).

Numerous provisions in the OE CRP require the Army to maintain and support the RAB as a forum for public involvement in the Fort Ord ordnance and explosives program. Examples of such requirements include, without limitation, a requirement that the Army:

[p]rovide regular updates to the Fort Ord RAB. The RAB will provide a forum for discussion and exchange of information between the Army and other community members. These for[a] will include technical presentations and informal discussions regarding OE investigations, removal actions, and plans and techniques for further study.

OE CRP at p. 5-2.

The OE CRP also contains a list of specific community relations activities that are required to take place prior to and during OE investigations and removal actions. OE CRP at p. 6-2. The following is included in that list:

Restoration Advisory Board (RAB)

. . . The DENR staff attends scheduled meetings and provides updates on various topical OE subjects or as requested by community members through the RAB agenda committee. Members of the RAB may be provided OE maps, reuse overlays, safety briefings, examples of inert OE, a field office visit, and various other materials to assist them in their mission. The RAB review committees are provided with updates on OE activities.

OE CRP at p. 6-6. Other provisions in the OE CRP also require the Army to maintain and support the RAB.

Ever since it unilaterally disbanded the Fort Ord RAB in May of 1999, the Army has failed to maintain and support the Fort Ord RAB as a forum for public participation in the Fort Ord ordnance and explosives program. Such failure violates the above-referenced provisions of the OE CRP.

Since both the FFA and CERCLA require the Army to develop and implement a CRP, the Army's failure to comply with the OE CRP also constitutes a violation of the FFA and CERCLA.

This is not an exhaustive list of the claims that the Plaintiffs will assert in their lawsuit. For example, Plaintiffs will also allege that, because the Army discontinued the Fort Ord RAB in violation of the DERP Guidance, the Army's discontinuance of the RAB is subject to injunction pursuant to the Administrative Procedures Act. Plaintiffs may also allege that the Army is currently holding meetings of the Fort Ord Technical Review Committee in violation of the Federal Advisory Committee Act, 5 U.S.C. Appendix 2. Finally, the Plaintiffs may also allege that the Secretary of Defense has unlawfully failed to prescribe regulations regarding the establishment, characteristics, composition, and funding of restoration advisory boards as required 10 U.S.C. Â§ 2705(d)(2)(A).

Please direct any questions regarding this notice letter to me.

Respectfully submitted,
Cox & Moyer

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Cc (Via Registered Mail, Return Receipt Requested):

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Felicia Marcus Regional Administrator United States Environmental Protection Agency, Region IX 75 Hawthorne Street San Francisco, CA 94105	Attorney General, State of California The Honorable William Lockyer Office of the Attorney General 1300 I Street Sacramento, CA 95814
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The Honorable Gray Davis Governor, State of California State Capitol Building Sacramento, CA 95814	Edward Lowry Director, California Department of Toxic Substances Control 400 P Street, 4th Floor Sacramento, CA 95814
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