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October 26, 2005

Mr. Curt Gandy, Executive Director, FOTP
Fort Ord Toxics Project, Inc.
P.O. Box 1904
Monterey, CA 93942-1904

Re: *Fort Ord Toxics Project v. Army*

Dear Curt:

Enclosed are two copies of the October 6, 2005 Notice of Intent to Sue letter for your files and further handling..

Thank you for your courtesy and cooperation in this matter.

Very truly yours,



SCOTT J. ALLEN

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October 6, 2005

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Secretary, United States Department of the Army
110 Army Pentagon, Room 3E, Sp. 700
Washington, D.C. 20310

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

Dear Mr. Secretary:

I represent the persons listed below (hereinafter the "Plaintiffs"). The purpose of this letter is to notify you that the Plaintiffs intend to file suit against the Army pursuant to the citizen suit provision of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9659(a)(1). The Plaintiffs' suit will challenge the "Record of Decision No Further Action Related to Munitions and Explosives of Concern – Track 1 Sites No Further Action with Monitoring for Ecological Risks from Chemical Contamination at Site 3 (MRS-22), Former Fort Ord, California," dated March 10, 2005 (hereinafter the "Track 1 ROD").

The Plaintiffs' suit will allege that the Track 1 ROD is contrary to law (specifically the provisions of CERCLA and the NCP) and/or is arbitrary and capricious for the following reasons:

1. CERCLA section 120(e)(1), 42 U.S.C. § 9620(e)(1), requires the Army to conduct an RI/FS at Fort Ord because Fort Ord is on the National Priorities List. Sections 120(a)(1) and 120(a)(2), 42 U.S.C. §§ 9620(a)(1) and (2), require the Army to comply with the provisions of the National Contingency Plan (NCP) in performing the RI/FS and selecting a ROD at Fort Ord. According to the NCP, 40 C.F.R. 300.430(d)(4), an RI/FS must include a site-specific baseline risk assessment "to characterize the current and potential threats to human health and the environment." The baseline risk assessment is a vital component of the RI/FS, and the results of the risk assessment is used to "establish acceptable exposure levels for use in developing remedial alternatives in the FS." *Id.* Remediation goals are established based on the acceptable exposure levels derived in accordance with the factors set forth in 40 C.F.R. 300.430(e)(2)(i). No baseline

risk assessment was performed for MEC hazards for any of the sites at issue in the Track 1 ROD; nor were acceptable exposure levels or remediation goals derived in a manner required by the NCP. Thus, the Army's selection of the Track 1 ROD violates the provisions of the requirements of the CERCLA statute and the NCP.

2. The NCP requires the Army to develop and analyze alternatives as part of the Feasibility Study portion of the RI/ FS. 40 C.F.R. 300.430(e)(1), (e)(2), (e)(3). The purpose of the alternative analysis of the FS is to ensure that all "relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected." *Id.* at 300.430(e)(1). The FS must also include consideration of one or more "innovative treatment technologies" if the technologies offer the potential for comparable or superior performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated treatment technologies. 40 C.F.R. 300.430(e)(5). Further, each of the alternatives must be subjected to detailed analysis in accordance with 40 C.F.R. 300.430(e)(9), including without limitation evaluation of each alternative according to the "nine criteria" in 40 C.F.R. 300.430(e)(9)(iii). The Army's FS for the sites at issue in this Proposed Plan does not include an alternatives analysis, certainly not an alternatives analysis that comports with the requirements of the NCP. The Army analyzes only one potential remedy for each of the sites at issue in this Proposed Plan – no further action. By failing to even analyze any other alternatives, the Army pre-determined the outcome of its remedy selection process. This approach is a violation of the requirements of the NCP and is also arbitrary and capricious.
3. A Proposed Plan must provide a summary of the remedial alternatives analyzed by the Army in the FS. 40 C.F.R. 300.430(f)(2)(i). A Proposed Plan must also provide the community with a reasonable opportunity to comment on the proposed remedial action, as well as the "alternative plans under consideration" and to participate in the selection of the remedy at the site. *Id.* at 300.430(f)(2). The Proposed Plan for the Track 1 ROD failed to fulfill these requirements. This is so principally because the Army did not include a discussion of a baseline risk assessment and did not performed any alternatives analysis, either in the RI/FS or in the Proposed Plan. These failures have deprived the community of a reasonable opportunity to comment on the proposed remedy (no further action) and to participate in the selection of the remedy for these sites, and has violated the provisions of the NCP and the Army's selection of the Track 1 ROD was arbitrary and capricious.

4. Any remedy selected by the Army must achieve overall protection of human health and the environment. 40 C.F.R. 300.430(f)(i)(A). Without having performed an appropriate baseline risk assessment for the sites and without having established acceptable exposure levels or remediation goals for each of the sites, the Army is unable to support the finding required by section 300.430(f)(i)(A) for any of the sites. In the absence of the required analysis, the selection of a remedy for the sites is therefore arbitrary and capricious and not in accordance with the law.

5. The Army cannot support the finding required by 40 C.F.R. 300.430(f)(i)(A) for any of the sites at issue in the Track 1 ROD. The Army has performed inadequate sampling and clearance of MEC at the sites. The inadequate amount of sampling and clearance performed on these sites makes it highly improbable that the Army has adequately located and/or removed MEC from these sites. The probability that the Army will find MEC remaining on a site is a function of several factors, including: the percentage of acreage on the site that has been "sampled" for MEC, the probability of detecting (PD) MEC using the geophysical sampling device employed during the sampling, and the total number of geophysical "anomalies" detected during the sampling that were excavated to remove any subsurface MEC. Using these factors, the probability that the Army located MEC remaining on a site (Ps) can be calculated as follows:

$$Ps^1 = (\text{Pct. Acreage}^2) \times PD^3 \times (\text{Pct. of anomalies excavated}^4)$$

Attached hereto as Exhibit A is a table summarizing the amount of sampling conducted on each of the sites. The information set forth on this table is taken from the RI/FS. The Ps for each of the sites is very low, ranging from 0 to 0.35. Stated otherwise, the probability that the Army located and removed MEC remaining on each of these sites is very low – ranging from a low of 0 % to a high of a mere 34 %. Furthermore, the RI/FS indicates that the Army's investigation of many of the sites is highly uncertain – site boundaries and the boundaries of sampling grids have been changed on many sites to a point where the Army is not even certain whether some sites have been sampled. Given the extremely low probability that the Army located MEC remaining on these sites, the Army cannot support the finding, required by 40 C.F.R. 300.430(f)(i)(A), that the remedy selected for these sites is protective of human health and the environment. Any such finding is therefore arbitrary and capricious and/or not in accordance with the law.

Please direct any questions regarding this letter to me.

¹Ps is the probability that the Army located MEC that may remain on the property.

²Pct. Acreage is the percentage of the total acreage of a site that was subjected to geophysical sampling. This percentage is calculated as follows: (number of acres actually sampled using geophysical sampling) ÷ (total number of acres at the site).

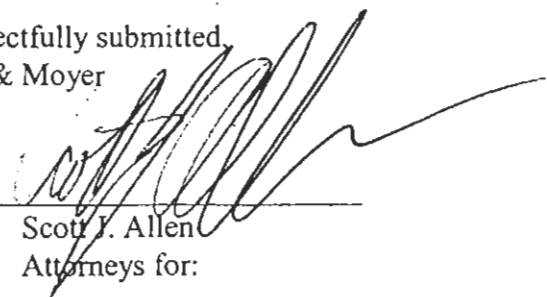
³PD is the probability of detection for the geophysical sampling device used to conduct geophysical sampling on the site. The PD is the mid-range of the values on Table 5-3 of the Army's ODDS study. For example, the Schonstedt GA-52/Cx, the mid-range value listed on Table 5-3 is 97%. This PD is most likely far too high since the GA-52/Cx had a PD of only 48% on the Seeded test site (probably because some of the ordnance items in the seeded test site were located below the depth at which the GA-52/Cx was able to detect). The probability that the Army detected MEC on each of these sites is thus most likely even lower than those listed on Exhibit A.

⁴At many of the sites at issue in this Proposed Plan, only a fraction of the total number of "anomalies" detected by the geophysical device were excavated. The Pct of anomalies excavated is calculated as follows: (number of anomalies excavated) ÷ (total number of anomalies detected with the geophysical instrument). This factor corrects for the fact that the PD assumes that all anomalies are excavated.

Secretary, United States Department of the Army
Re: Notice of Intent to Sue, Fort Ord California
October 6, 2005
Page 5

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Respectfully submitted,
Cox & Moyer

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Secretary, United States Department of the Army
Re: Notice of Intent to Sue, Fort Ord California
October 6, 2005
Page 6

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cc (Via Certified Mail, Return Receipt Requested):

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Regional Administrator
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The Honorable William Lockyer
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Donald Rumsfeld
Secretary, United State Department of Defense
The Pentagon
Washington, DC 20301-1155

EXHIBIT A

SITE SUMMARIES - PROBABILITY OF DETECTING MEC ON EACH SITE

Site Number	Total Site Acreage	Acreage Sampled	Pct. Acreage Sampled	Sampling Device Used	Device Prob. Of Detection (PD)	Total Number of Anomalies Detected	Number of Anomalies Excavated	Overall Probability of Detecting MEC On Site
OE-1	25	3.25	0.13	Sch. GA-52/C and GA-52/Cx	0.8	approx 80,000 sq. ft. (1994 and Apr. 1998) all anomalies, 60,000 sq. ft. 32% of anomalies	approx 80,000 sq. ft. (1994 and Apr. 1998) all anomalies, 60,000 sq. ft. 32% of anomalies	0.078 (assumes 75% of anomalies excavated site-wide)
OE-5	30	1.61	0.05	Sch. GA-52/C	0.8	Unknown	Unknown	Unknown
OE-6	2	Unknown	unknown	Sch. GA-52/C or GA-72/Cv	0.8	all	all	Unknown
OE-13A	61	2.3	0.04	Sch. GA-52/C or GA-72/Cv	0.8	all	all	0.03
OE-20	7	0	0	NA	NA	NA	NA	0
OE-22	952	32.9	0.03	Sch. GA-52/C or GA-72/Cv and Sch. GA-52/Cx	0.89 (avg)	13.8 Acres - all anomalies, 19.1 acres - 51.7 %	13.8 Acres - all anomalies, 19.1 acres - 51.7 %	0.023 (assumes 75% of all anomalies excavated)
OE-24B	14.2	1.29	0.09	Sch. GA-52/Cx	0.97	1,600	225	0.01
OE-24D	1.8	Unknown	Unknown	Sch. GA-52/Cx	0.97	331	120	Unknown
OE-24E	2.7	0.232	0.09	Sch. GA-52/Cx	0.97	434	160	0.03
OE-27X	79.5	9	0.11	Sch. GA-52/Cx	0.97	all	all	0.11
OE-27Y	25	9	0.36	Sch. GA-52/Cx	0.97	all	all	0.35
OE-32A	38	4	0.11	Sch. GA-52/C or GA-72/Cv	0.8	all	all	0.08

EXHIBIT A (cont'd)

Site Number	Total Site Acreage	Acreage Sampled	Pct. Acreage Sampled	Sampling Device Used	Device Prob. Of Detection (PD)	Total Number of Anomalies Detected	Number of Anomalies Excavated	Overall Probability of Detecting MEC On Site
OE-32B	47	4.5	0.10	Sch. GA-52/Cx	0.97	all	all	0.09
OE-39	12.1	1.8	0.15	Sch. GA-52/Cx	0.97	2,997	304	0.01
OE-49	28	0	0	NA	NA	NA	NA	0
OE-59A	41	1.8	0.04	Sch. GA-52/C or GA-72/Cv	0.8	all	all	0.04
OE-62	247	0	0	NA	NA	0	0	0
OE-63	28	0	0	NA	NA	0	0	0
OE-66	41	0	0	NA	NA	0	0	0
OE-69	37	0	0	NA	NA	0	0	0
OE-70	Uncertain	0	0	NA	NA	0	0	0