

## **Attachment 2**

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### Responses to comments received on Draft Summary After-Action Report: Ranges 43-48 prescribed Burn (Comments are shown verbatim)

#### Comments from Claire Trombadore, U.S. Environmental Protection Agency, Region IX, May 25, 2004.

**Comment 1:** It might be a good idea to include an acronym list in this document.

**Response:** An acronym list was added.

**Comment 2:** Attachment 1, page A-1, first paragraph. Please correct the typographical error (missing a “d”) in the Fort Ord web site address.

**Response:** The correction has been made.

**Comment 3:** Attachment 1, page A-5, Response to Comment 11. Please correct typographical error in second to last sentence - “spit fires” should be “spot fires”.

**Response:** The correction has been made.

**Comment 4:** May want to mention in the evaluation section that ATSDR is preparing Public Health Consultation on the burn. It is scheduled to be released to the public in the Summer of 2004.

**Response:** The following paragraph is added to section 4d: “The Army has requested Agency for Toxic Substances and Disease Registry (ATSDR) to evaluate the air monitoring results. It is expected that ATSDR will issue a public health consultation for the Ranges 43-48 prescribed burn in 2004.”

#### Comments from Gary Honcoop, California Air Resources Board, May 27, 2004 via e-mail

**Comment 1:** Page 2, section 2b. We recommend that you delete the reference to ARB presence and support at the Management Center during implementation as we were not consulted on the day of the burn and played no role in the implementation phase.

**Response:** The reference to California Air Resources Board (CARB) presence and support at the Management Center is deleted.

**Comment 2:** Page 3, section 3a, paragraph (vi). We recommend that you revise the first sentence to read: “On October 24, *after the Army meteorologists determined* that the meteorological conditions *were expected to meet* the burn prescription, and after securing...”

**Response:** The referenced sentence is revised to read: “On October 24, the Army’s meteorologists determined that the meteorological conditions were expected to meet the conditions outlined in the burn prescription. Then, after securing the burn perimeter and verifying the readiness of fire operations, the Army made the decision to ignite the prescribed burn.”

**Comment 3:** Page 4, section 3a, paragraph (vi). The word “text” should read “*test*”.

**Response:** The correction was made.

**Comment 4:** Page 4, section 3a, paragraph (vi). We recommend that you add a statement indicating that the Army evaluated the test burn and determined that the prescribed fire should proceed based on testing of the fuel's ignition characteristics.

**Response:** Section 2.2.3.8 of *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California* states: "A test burn was conducted prior to igniting the entire burn site to determine if the burn objectives could be accomplished. During the test burn, the weather, fuel consumption rate, flame lengths, smoke column height, and smoke dispersal pattern were observed and documented. Based on the conditions observed, it was recommended that the burn be conducted over the entire site." This statement is added to section 3b, paragraph iii.2.

**Comment 5:** Page 4, section 3a, paragraph (vi). The timing of events would be better understood if the text read: "The fire jumped the western primary fuelbreak at (*specify the time*) and Ord Military Community (OMC) Fire Chief declared an escape about 11:00 a.m."

**Response:** The referenced sentence is revised to read: "The first spot fire was observed at about 9:30 a.m. along the western primary fuelbreak. Subsequently the fire breached the fuelbreak and Ord Military Community (OMC) Fire Chief declared an escape at about 11:00 a.m."

**Comment 6:** Page 5, section 3b, paragraph (ii), number 1. We understand that active ignition continued even after the escape was declared. If that is the case, we recommend that you state that active ignition continued for some time after the escape was declared.

**Response:** Active ignition did not continue after the escape was declared. This is as reported in section 2.2.3.13 of *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California*.

**Comment 7:** Page 5, section 3b, paragraph (ii), number 2. We recommend that you add a statement that smoke impacts were also caused by the strong winds which bent the column of smoke down toward the ground.

**Response:** The referenced section summarizes what is reported in the contractor's report of the conduct of the Ranges 43-48 prescribed burn. *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California* does not make the observation suggested in this comment. However this concern was documented in Section 4c, paragraph ii of the summary after-action report.

**Comment 8:** Page 5, section 3b, paragraph (ii), number 2. We recommend that you clarify that the Army meteorologists' early morning MM5 model run forecast off-shore conditions throughout the day and did not forecast the afternoon sea breeze.

**Response:** In response, the Army's meteorologist checked the MM5 and 12km ETA model (used by National Weather Service) for October 24 concerning the sea breeze. The models were consistent showing offshore winds over Fort Ord until 5:00 p.m. when they indicated a very weak sea breeze would develop (less than 5 knots). The sea breeze could have developed earlier, but since the model outputs are for 3 hour-blocks of time, exact timing of sea breeze could not be forecast. Model runs from the previous day (October 23) showed an even weaker sea breeze on the 24<sup>th</sup>, which was the primary model guidance that was available for making the forecast for October 24<sup>th</sup>.

Appendix A of the *Final Ranges 43-48 Prescribed Burn After-Action Report* includes forecasts made by the Army's meteorologists on October 24: at 7:00 a.m. offshore wind was forecast throughout the day,

with a note of a chance of onshore wind after 1:00 p.m.; and at 1:00 p.m. offshore wind was forecast throughout the rest of the day with a note of a chance of onshore wind after 1:00 p.m.

A weather forecast is a necessary element in the current prescription. In the morning of October 24, 2003, the Army determined the burn prescription was met, when the morning forecast, including the MM5 and 12km ETA model, led the meteorologists to expect that weather conditions would meet the prescribed conditions.

However, an escape was declared at about 11:00 a.m. on October 24. At that point the prescribed burn operation switched to a contingency operation under the direction of the Ord Military Community Fire Chief. Should the prescribed burn have continued without an escape, active burning would have stopped when the Marina profiler detected a stable low-lying air mass (sea breeze) as described in the burn prescription. This would have occurred at about 1:00 p.m. Pacific Daylight Time based on the Marina profiler data (shown in Appendix A of the *Final Ranges 43-48 Prescribed Burn After-Action Report*).

The paragraph referenced by the comment summarizes the factors that contributed to greater smoke impacts than initially anticipated. The Army's forecast concerning the afternoon sea breeze did not contribute to greater smoke impacts since an escape was declared before the onset of the sea breeze, and since the burn prescription required discontinuing active ignition when sea breeze was detected.

**Comment 9:** Page 6, section 3b, paragraph (iii), number 2. We recommend that the second sentence be revised to read: "...the Army's meteorological team determined that the burn prescription *was expected to be met*..."

**Response:** The referenced section summarizes what is reported in the contractor's report of the conduct of the Ranges 43-48 prescribed burn. The text in the referenced sentence is consistent with section 2.2.3.2 of *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California*. A weather forecast is a necessary element in the current prescription. In the morning of October 24, 2003, the Army determined the burn prescription was met, when the morning forecast led the meteorologists to expect that weather conditions would meet the prescribed conditions.

**Comment 10:** Page 6, section 3b, paragraph (iii), number 2. The last sentence begins: "After the test burn," The ARB's position is that the Army did not do a test burn in the classic sense and that all inferences to the test burn should be clarified to indicate that the test burn was done to determine the fuel's ignition characteristics.

**Response:** The referenced section summarizes what is reported in the contractor's report of the conduct of the Ranges 43-48 prescribed burn. Section 2.2.3.8 of *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California* states: "A test burn was conducted prior to igniting the entire burn site to determine if the burn objectives could be accomplished. During the test burn, the weather, fuel consumption rate, flame lengths, smoke column height, and smoke dispersal pattern were observed and documented. Based on the conditions observed, it was recommended that the burn be conducted over the entire site." This statement is added to section 3b, paragraph iii.2. This concern was also documented in section 4a, paragraph iii of the summary after-action report.

**Comment 11:** Page 6, section 3b, paragraph (iii), number 3. We suggest that you clarify the time that the two spot fires merged.

**Response:** The time that the two spot fires merged is not reported in *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California*. For clarification purposes, the second sentence in

the referenced paragraph is revised to read: “By 10:18 a.m. PDT two spot fires had merged and burned approximately 30 acres outside the western primary fuelbreak.”

**Comment 12:** Page 14, section 4a, paragraph (iv). The first sentence reads that the overall coordination process used to support mobilization and ignition decision-making between the Army and regulatory agencies was too burdensome. From our perspective, the process was not too burdensome, but was not effective as there were clearly misunderstandings that led to smoke impacts. We recommend that you revise the paragraph to read: “The overall coordination process used to support mobilization and ignition decision-making between the Army and regulatory agencies was not effective as it should have been. While it included frequent meetings and conference calls participated in by management-level personnel from multiple agencies, and frequent and timely feedback of information to them about the status of preparation, there still remained a few significant areas of miscommunication, particularly related to the purpose of the test burn and ignition decision-making.”

**Response:** The referenced paragraph is revised to read: “The overall coordination process used to support mobilization and ignition decision-making between the Army and regulatory agencies was burdensome to remedial project managers, yet not as effective as it should have been. While it included frequent meetings and conference calls participated by management-level personnel from multiple agencies, and frequent and timely feedback of information to them about the status of preparation, there still remained a few significant areas of miscommunication, particularly related to the purpose of the test burn and ignition decision-making.”

**Comment 13:** Page 14, section 4b, paragraph (iii). The prescription, as it is written now, does allow burning with an on-shore flow. These days do not necessarily coincide with high fire risk and strong stable conditions. The Army chose to focus on off-shore flow days, which are also written into the prescription, in order to transport smoke off-shore. Therefore, we suggest that you revise the paragraph to read: “Any burn prescription should focus on reducing smoke impacts. The options available include both on-shore and off-shore flows. The current preferred prescription is based on an off-shore flow, which has a higher tendency to correspond with high fire risk days.”

**Response:** The prescription allowed for both offshore and light onshore scenarios. The October 24 prescribed burn was conducted under an offshore event since an onshore scenario did not develop before then. The referenced paragraph is corrected to read: “Current burn prescription focuses more on reducing smoke impacts. Under the current prescription the options available include both on-shore and offshore flows. However the off-shore scenario has a higher tendency to correspond with high fire risk days.”

**Comment 14:** Page 14, section 4c, paragraph (i). We recommend you revise the first sentence to read: Under the current off-shore burn prescription, .....” based on the comment above.

**Response:** The statement regarding the low number of periods that meet the current burn prescription each year, and the difficulty in reliably forecasting those periods, is applicable to both offshore and onshore scenarios allowed under the current burn prescription, based on an evaluation by Naval Postgraduate School.

**Comment 15:** Page 15, section 4c, paragraph (ii). One tool that was missed by all groups was a persistence forecast. Under the extended stable high pressure conditions that existed last October, it would have been very instructive to look at the day before (to see if the sea breeze had kicked in) in determining the Go/No Go decision. In the case of last year’s burn, the sea breeze did kick in on the day before so persistence would have indicated a No Go for October 24th.

**Response:** This comment is noted.

**Comment 16:** Page 15, section 4c, paragraph (iii). We generally agree with the paragraph, but recommend that you revise to read: “The Army meteorologists coordinated with meteorologists with the California Air Resources Board prior to the actual day of the burn. However, there were professional disagreements over data interpretation based on the use of different meteorological data and models. In addition, the role of the ARB meteorologist that was on-site on the day of the burn was unclear, as was the purpose of the test burn in supporting the meteorological forecast.

**Response:** The referenced paragraph is revised to read: “The Army’s meteorologists coordinated with meteorologists with the California Air Resources Board prior to the actual day of the burn. However, there were professional disagreements over data interpretation based on the use of different meteorological data and models. In addition, the role of the CARB meteorologist who was on-site on the day of the burn was unclear. The Army and CARB interpreted the purpose of the test burn differently.”

**Comment 17:** Page 19, section 5c, paragraph (ii). We agree that you need to clarify the purpose of the test burn but we disagree with the implication that a test burn would not be conducted (i.e. reference to the phrase “if one is planned.) The Army needs to follow the plan that was written for these operations, which includes a test burn. In addition, test burns are a common and critical part of prescribed burns in general. Therefore, we recommend that you delete the phrase “if one is planned as part of future prescribed burn operations.”

**Response:** There will be a site-specific plan for each prescribed burn. For the Ranges 43-48 prescribed burn, the Army’s contractor chose to include the test burn in its procedures. The Army and regulatory oversight agencies are in the process of learning from the Ranges 43-48 experience and planning for the next prescribed burn, and intend to consider the widest range of options possible. Since a test burn is not required by any regulation or by the Interim Action Record of Decision under which this action is authorized, the Army is not requiring that a test burn be a part of the next prescribed burn. The Army recognizes, however, that test burn is commonly used in prescribed burns.

Comments from Michael E. Boyd, CALifornians for Renewable Energy, Inc, May 26, 2004 via e-mail

**Comment 1:** CARE has received several phone calls from our membership in the Fort Ord community concerning the Fort Ord Prescribed Burns and Voluntary Relocation Program. Fort Ord Prescribed Burns. In October 2002 acting in behalf of the LeVonne and Donald Stone as members of CALifornians for Renewable Energy, Inc. (CARE), I wrote a letter to the Monterey Bay Unified Air Pollution Control District (MBUAPCD or the District) requesting “completion of a CEQA/NEPA compliant environmental review of the Settlement Agreement between the Monterey Bay Unified Air Pollution Control District and the United States Department of the Army and United Sates Department of Defense” over the Fort Ord Prescribed Burns.

CARE respectfully request that such environmental review include a determination of potential emission levels of all criteria pollutants under the federal Clean Air Act from the project (including use of US EPA air modeling protocols), as well as Toxic Air Contaminants from the project as defined by the California Air Resources board. CARE requests the analysis examine the effects of the project on biological resources including threatened and endangered species under the federal Endangered Species Act, in consultation with the US Fish and Wildlife Service. CARE respectfully request such analysis include an analysis of potential public health effects including the performance of a health risk assessment on the project to insure compliance with California Health and Safety Code, § 41700.

**Response:** The comment does not pertain to the prescribed burn summary after-action report.

**Comment 2:** Despite raising my previous attempts to raise concerns for the prescribed burn, on October 24, 2003 the Army, and MBUAPCD conducted a prescribed burn, that went out of control, which allowed FORA, in my professional opinion, to inflict disparate air quality impacts on the surrounding community. For example a TV news report by TV station KSBY on October 24, 2003 reported,

The fire from the former Fort Ord's control burn is causing some smoky problems for area residents.

The U.S. Army had predicted the smoke would all be pushed out to sea, but, instead, it headed straight for the Monterey and Carmel areas, covering cars and houses, and making it hard to breathe for area residents.

"My eyes are burning, having a problem breathing. As a matter of fact, I can see it on everybody as I'm passing by," said Pacific Grove resident Bob Adermach. Ash fell like snow in Carmel all day. The white stuff came down in chunks, piling up in local shops.

"It's not a good thing for a tourist town to be covered with ash," said Carmel resident Charles Benore.

Visitors were miffed by the smoke and ash.

"I'm not too happy with it. It's getting in my eyes," said visitor Michael Cisneros. "We have New York City air, so we don't really need to come to California for this," said visitor Krista Wergeland.

Again on October 27, 2003 KSBY reported,

A prescribed burn that got out of control at the former Fort Ord continued to generate a lot of smoke Monday.

The fire was ignited about 8:30 a.m. Friday and was supposed to be controlled to burn about 500 acres. It quickly got out of control and has charred nearly 1,500 acres. Ash from the fire fell on Peninsula cities -- some as far south as Carmel.

Many area residents have expressed anger over the Army's handling of the burn from the beginning. "Just not a good thing for a tourist town to be covered with ash," Peninsula resident Sandy Dabrante said.

Army officials said a controlled burn is the safest option for clearing thick brush so that cleanup crews can then remove thousands of rounds of dangerous unexploded ordnance. But just two hours after this burn started, it jumped two containment lines and came within a quarter-mile of homes along Jim Moore Boulevard.

"It's scary ... we live one block down ... it's scaring us because we have kids ... we don't think it should be that close to us ... we feel that it's out of control now," Seaside resident Tammy Suarez said.

On Friday afternoon, a spokesman for the company that started the fire confirmed that the fire was out of control. But how that happened is still under investigation.

**Response:** The Ranges 43-48 prescribed burn was conducted by the Army on October 24, 2003. Other comments are noted.

**Comment 3:** After the burn I prepared the attached petitions that stated as follows,

We the undersigned petitioners are residents who have experienced adverse health impacts from the prescribed burn at Fort Ord California beginning on October 24, 2003. We the undersigned have reason to believe that as the result of concerted action between the Monterey Bay Unified Air Pollution Control District (“MBUAPCD”) and the US Army a prescribed burn, (“the burn”), was implemented on October 24, 2003, in violation of provisions of federal, state and local environmental laws including, but not limited to, the Clean Air Act, 42 U.S.C. §§ 7603 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 et seq.; the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 et seq.; California Health and Safety Code sections 41700 and 41800; and District Rules 402, 432.3.4, and 432.3.3.5., as the result of a Settlement Agreement between the MBUAPCD and U.S. Army over the Fort Ord Prescribed Burns, in that neither agency has performed an environmental analysis or risk assessment as required under the above statutes, the California Environmental Quality Act (CEQA), and the National Environmental Policy Act (NEPA) on such Settlement in order to determine the burn’s potential impacts on the environment and public health and safety, prior to the burn. Their Agreement is in settlement of Monterey Bay Unified Air Pollution Control District v. United States Department of the Army and United States Department of Defense, No. CV 99- 20485 (RMW) (N.D. Cal.)

Because of the ongoing struggle with FORA FOEJN did not have adequate time to collect many signatures but several collected where provided by Ms. Stone. It is my professional opinion that FORA’s timing of its eviction proceedings against FOEJN on February 17, 2004 was to minimize opposition to their ill planned and unsafe Prescribed Burn, where homeless persons where hired to start the blaze. It also is corroborative of my opinion that that the FOEJN is being denied due process and its civil rights based on race, religion, and income.

**Response:** Consistency of the interim action (including the prescribed burn) with applicable environmental laws and regulations was evaluated and documented in *Record of Decision, Interim Action for Ordnance and Explosives at Ranges 43-48, Range 30A and Site OE-16, Former Fort Ord, California*, dated September 20, 2002.

All personnel hired by Fire Stop were required to meet or exceed the prescribed burn training requirements for their respective classifications set forth by the qualification documents of the National Wildfire Coordinating Group (NWCG 310-1).

Other statements do not pertain to the prescribed burn summary after-action report.

**Comment 4:** As a result I have researched the agendas and minutes of recent meetings of the Monterey Bay Unified Air Pollution Control District. The agenda for the September 19, 2002 meeting listed under item number twenty a closed session regarding a conference with legal counsel regarding existing litigation in the MBUAPCD vs. U.S. Army. Further research disclosed the existence of a Settlement Agreement between the MBUAPCD and U.S. Army over the Fort Ord Prescribed Burns apparently executed following this meeting.

1. This Settlement Agreement (“Agreement”) is made and executed by and between Plaintiff Monterey Bay Unified Air Pollution Control District (“District”) and Defendants United States Department of the Army and United States Department of Defense (“United States”), collectively known as “the Parties.”

2. This Agreement is in settlement of Monterey Bay Unified Air Pollution Control District v. United States Department of the Army and United States Department of Defense, No. CV 99- 20485 (RMW) (N.D. Cal.) (“the suit”), an action in which the District alleges that burning conducted by the Army in September 1998 violated a Settlement Agreement dated June 1, 1998 (“June 1998 Settlement Agreement”), and provisions of federal, state and local environmental laws including the Clean Air Act, 42 U.S.C. §§ 7603 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 et seq.; the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 et seq.; California Health and Safety Code sections 41700 and 41800; and District Rules 402, 432.3.4, and 432.3.3.5. On March 13, 2001, the Court granted summary judgment in part, and denied it in part, on several issues in this case. However, there remain unresolved claims in this litigation.

3. As used in this Agreement, the term “smoke,” whether used as a noun or an adjective, shall include, without limitation, the following:

A. A mixture of ambient air and carbon particulates that is produced by combustion.

B. Any byproduct or result of the combustion of vegetative matter or ordnance that is mixed with ambient air. C. Any criteria or hazardous air pollutant regulated by California or Federal law, only to the extent that these are produced by B., above.

4. Without admitting any issue of fact or law, the District and the United States have agreed to compromise and resolve their differences, and thereby avoid further litigation regarding the District’s claims, and in so doing, to settle, discontinue and end the present action pending between them on the terms and conditions set forth below.

The evidence of the US Army’s execution of the Settlement Agreement is evinced by the September 2002 record of decision listed on the Fort Ord Environmental Cleanup web site as “Available Now! Record of Decision, Interim Action For Ordnance and Explosives at Ranges 43-48, Range 30A, and Site OE-16 (September 2002)”.

**Response:** These statements do not pertain to the prescribed burn summary after-action report.

**Comment 5:** CARE contacted our CEQA /NEPA consultant, John Gabrielli, Esquire, (530) 753-0869 to confirm the duties of the District and other state agencies involved including DTSC, US EPA, and the US Army. Mr. Gabrielli confirmed that their duties under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) to perform an environmental review under this state and federal law on the Settlement Agreement which is a “discretionary project” of which the District is the “lead agency” in the environmental review of such. The District maintains jurisdictional authority over any off-base environmental impacts of the prescribed burns in any case.

"Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.

"Lead Agency" under CEQA means the public agency, which has the principal responsibility for carrying out or approving a project.<sup>1</sup> The Lead Agency will decide whether an EIR or Negative Declaration will be

required for the project and will cause the document to be prepared. The fundamental point is that CEQA gives the Lead Agency the tasks of determining whether an EIR or a Negative Declaration will be required for the project and preparing the document.

CEQA achieves its purpose of long-term protection of the environment by functioning as "an environmental full disclosure statute, and the EIR is the method . . . [of] disclosure . . ." *Rural Landowners Assn. v. City* (1983) 143 Cal.App.3d 1013, 1020. An EIR's purpose is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment . . ." (PRC § 21061; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 804) and acts as "an environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return" *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

CEQA requires mitigation measures to be formulated in an Environmental Impact Report, to reduce significant adverse project effects to a level of insignificance (Guideline §15126(c)). The mitigation measures are not just informational; if a project has significant environmental impacts identified in an EIR, feasible mitigations must be implemented or the project must be denied. PRC§21081. As noted CEQA commentators, Remy, Thomas, Moose and Manley observed, "[i]n contrast to [the National Environmental Protection Act], CEQA requires agencies to implement . . . feasible alternatives identified in EIRs for projects that will otherwise cause significant adverse impacts." *Guide to the California Environmental Quality Act (CEQA)* (9th ed. 1996), p. 9, citing PRC § 21002, 21081, Guidelines §§ 15002(a)(3), 15021(a)(2), 15091(a); *Sierra Club v. Gilroy* (1990) 222 Cal.App.3d 30, 41; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 730-731. Thus, "an agency cannot satisfy the statute simply by 'considering' the environmental impacts of a proposed project." *Guide to CEQA*, supra, pp. 9-10, citing *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322.

Agencies must deny approval of a project with significant adverse effects when feasible alternatives can substantially lessen the effects. *Sierra Club v. Gilroy* (1990) 222 Cal.App.3d 30, 44, 41 citing *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 440-441; Guidelines §§ 15002(a)(3), 15021(a)(2),(c), 15041(c), 15364, 15370.

The US Army and the District must adopt findings, supported by substantial evidence in the record, in order to approve a project with significant impacts when it fails to adopt mitigation measures identified in the EIR and review process. Guideline §15091.

CEQA requires an EIR to "be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design . . ." Guideline § 15004(b).

A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved, as is the case here with the Settlement Agreement. If post-approval environmental review were allowed, the final decision would likely become nothing more than post hoc rationalizations to support action already taken. CARE expressly condemns and objects to this use of environmental documents.

In the recent case *Citizens for Responsible Government v. City of Albany* (1997) 97 Daily Journal DAR 10014, the Court held that the City's approval of a development agreement unlawfully "contracted away its power to consider the full range of alternatives and mitigation measures required by CEQA" (Id. at 10020). Even though the development agreement anticipated environmental review, its very existence precluded effective analysis. While the facts of the Albany case involved submission of a development agreement to public vote, the reasoning of the Court is relevant:

The appropriate time to introduce environmental considerations into the decision-making process was during the negotiation of the development agreement. Decisions reflecting environmental considerations could most easily be made when other basic decisions were being made, that is, during the early stage of project conceptualization, design, and planning. At this early stage, environmental review would be an integral part of the decision-making process. Any later environmental review might call for a burdensome reconsideration of decisions already made and would risk becoming the sort of "post hoc rationalization to support action already taken," which our high court disapproved in [Laurel Heights I] (Id. at 10020).

The US Army under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.; 40 CFR Parts 300–311 and the District under CEQA is mandated to complete environmental review prior to commitment of public funds to the project and approving Business Terms. The Business Terms themselves is already the subjected to judicial review before the Federal Court, over the Monterey Bay Unified Air Pollution Control District v. United States Department of the Army and United States Department of Defense, No. CV 99- 20485 (RMW) (N.D. Cal.). In executing the Settlement Agreement between the MBUAPCD and U.S. Army over the Fort Ord Prescribed Burns, the District "approved" steps in implementation of the project, which committed it to a definite course of action. This is evinced by the settlement agreement itself, which commits the District to a “modeling investigation for several theoretical burn scenarios on Ranges 43-48 of the former Fort Ord”, in return for the US Army’s commitment to “provide the District with the funds to pay for the modeling effort, up to the amount of \$50,000”. CARE respectfully requests the Settlement Agreement be set aside until such time as the US Army’s and the District’s independent review of the project is complete.

Further research disclosed relevant CEQA code sections responsive to CARE’s concerns for the need for the District to carry out its duties to prepare and environmental review on the Settlement Agreement between the MBUAPCD and U.S. Army over the Fort Ord Prescribed Burns.

PRC§ 21083.8.1. (b)(2) For purposes of this division, all public and private activities taken pursuant to, or in furtherance of, a reuse plan shall be deemed to be a single project. However, further environmental review of any such public or private activity shall be conducted if any of the events specified in Section 21166 have occurred. [Emphasis added]

(c) Prior to preparing an environmental impact report for which a lead agency chooses to utilize the provisions of this section, the lead agency shall do all of the following:

(A) Hold a public hearing at which is discussed the federal environmental impact statement prepared for, or in the process of being prepared for, the closure of the military base or reservation. The discussion shall include the significant effects on the environment examined in the environmental impact statement, potential methods of mitigating those effects, including feasible alternatives, and the mitigative effects of federal, state, and local laws applicable to future nonmilitary activities. Prior to the close of the hearing, the lead agency may specify the baseline conditions for the reuse plan environmental impact report prepared, or in the process of being prepared, for the closure of the base or reservation. The lead agency may specify particular physical conditions which it will examine in greater detail than were examined in the environmental impact statement. Notice of the hearing shall be given as provided in Section 21092. The hearing may be continued from time to time.

(B) Identify pertinent responsible agencies and trustee agencies and consult with those agencies prior to the public hearing as to the application of their regulatory policies and permitting standards to the proposed baseline for environmental analysis, as well as to the reuse plan and planned future nonmilitary land uses of the base or reservation. The

affected agencies shall have not less than 30 days prior to the public hearing to review the proposed reuse plan and to submit their comments to the lead agency.

(C) At the close of the hearing, the lead agency shall state in writing how the lead agency intends to integrate the baseline for analysis with the reuse planning and environmental review process, taking into account the adopted environmental standards of the community, including, but not limited to, the applicable general plan, specific plan, and redevelopment plan, and including other applicable provisions of adopted congestion management plans, habitat conservation or natural communities conservation plans, integrated waste management plans, and county hazardous waste management plans.

(D) At the close of the hearing, the lead agency shall state, in writing, the specific economic or social reasons, including, but not limited to, new job creation, opportunities for employment of skilled workers, availability of low and moderate income housing, and economic continuity, which support the selection of the baseline.

(d)(1) Nothing in this section shall in any way limit the scope of a review or determination of significance of the presence of hazardous or toxic wastes, substances, or materials including, but not limited to, contaminated soils and groundwater, nor shall the regulation of hazardous or toxic wastes, substances, or materials be constrained by prior levels of activity that existed at the time that the federal agency decision to close the military base or reservation became final.

CARE respectfully requests that such environmental review include a determination of potential emission levels of all criteria pollutants under the federal Clean Air Act from the project (including use of US EPA air modeling protocols), as well as Toxic Air Contaminants from the project as defined by the California Air Resources board. CARE requests the analysis examine the effects of the project on biological resources including threatened and endangered species under the federal Endangered Species Act, in consultation with the US Fish and Wildlife Service. CARE respectfully request such analysis include an analysis of potential public health effects including the performance of a health risk assessment on the project to insure compliance with California Health and Safety Code, § 41700.

California Health and Safety Code, § 41700, requires that “no person shall discharge from any source whatsoever such quantities of air contaminants or other material which causes injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause injury or damage to business or property.”

**Response:** These comments do not pertain to the prescribed burn summary after-action report.

**Comment 6:** For the following reasons, CARE respectfully requests (1) the Settlement Agreement be set aside until such time as the US Army’s and the District’s independent review of the project is complete (2) the US Army and the District perform its duties under CEQA/NEPA, and (3) issue a Notice of Intent to prepare an environmental review on the Settlement Agreement which is a “discretionary project” of which the District is the “lead agency” under CEQA and the US Army under NEPA. CARE additionally requests the US Army and the District call a “Public Hearing” on such review, and that written notice of such hearing be provided to all persons seeking to participate in the “Voluntary Relocation Program” for the Fort Ord Prescribed Burns and other interested parties, including CARE.

**Response:** These comments do not pertain to the prescribed burn summary after-action report.

Comments from Mike Weaver, May 27, 2004 via e-mail

**Comment 1:** Thank you for the opportunity to comment. As a 52 year resident adjacent to former Fort Ord, I can honestly say, I told you so. I told the Army and I told the regulatory agencies that it is NOT a good idea to torch dry California hillsides. The Army's history of having fires getting out of control on former Fort Ord would lead one to believe that they might learn something. I continually pointed out that for many years we had the entire 7th Division to assist in times of dangerous fire on the base. I continually advised that the 30 or so members of FireStop were wholly insufficient, even with back up, to prevent a calamity. You are extremely lucky, damn lucky, that houses in the City of Seaside did not go up in flames.

**Response:** This comment is noted.

**Comment 2:** The public was led to believe it would be a one day "prescription" burn, i.e., good medicine. The report accurately tells us it was eight days, from October 24, 2003 to October 31, 2003. The report reveals, under chronology, that "CARB designated October 24th as a no-burn day". It also states that "FireStops FWM had a conference call with CARB who stated October 25 was a no-burn day." Note; The OMC Fire Chief cited on the checklist it was a no-burn day.

**Response:** The Army followed the pre-established procedures for making the decision to burn on October 24, 2003.

**Comment 3:** I received a call from a friend the morning of October 24th. My friend advised me that he heard the Army "was going to burn today". "Couldn't be true.", I answered, "It is breezy, not a good day for a fire."

**Response:** This comment is noted.

**Comment 4:** I think it was about this time that FireStop was igniting the brush with alumagel. Note: Please explain exactly what "alumagel" is. What other names is it known by?

**Response:** Fire Stop used alumagel, gelled gasoline, to ignite the vegetation at Ranges 43-48. This is consistent with procedures described in *Final Ranges 43-48 Prescribed Burn Plan*.

**Comment 5:** Surely the fire crews had anticipated explosive hazards from the fire. When these occurred, it was determined that the fire would only be fought from the air. The wind had come up blowing the fire west. Because of unexploded ordnance, bullets and such, going off, fire fighting planes were required to keep above 1701 feet.

**Response:** A response to similar comments (Comment 9) is included in Attachment 1 of the prescribed burn summary after-action report.

**Comment 6:** The conclusion one draws from this is that the fire was an intentional unexploded ordnance removal action. It was not the remedial action being portrayed in the press as the reason for the fire, to remove the brush cover. Further evidence of this are the activities on October 25 and 26, when "It was decided that all pockets and islands of vegetation needed to be burnt out..." This was ostensibly to "mimimize smoke impacts".

**Response:** The prescribed burn at Ranges 43-48 was intended to facilitate the cleanup of unexploded ordnance by removing the vegetation and exposing the ground surface so that the ordnance cleanup workers could see the ground and work safely. A response to similar comments (Comment 5) is included in Attachment 1 of the prescribed burn summary after-action report.

**Comment 7:** With the fire area nearly three times larger than planned and the smoke impacts immense in all areas surrounding former Fort Ord, it was a fiasco. Yet incredibly, in this report, under lessons learned, it states "Loosening the burn prescription should also be considered so that there are more possible burn days."

**Response:** The referenced statement is included in *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California*. Days that would meet the current burn prescription occur infrequently and are difficult to forecast. From the perspective of planning and executing the burn operations, a prescription that would provide a greater number of potential burn days would reduce the chance of false alarms. The statement was not intended to imply that the Army would burn more than current limitation (of 800 acres per year).

**Comment 8:** A major goal of the so-called prescribed burn was to minimize smoke impacts. Please note: THE GOAL FAILED! The smoke was so bad in Corral de Tierra, south of the fire that we were choking on the night of the 24th, even with all doors and windows closed. We had to abandon our house and head for fresh air. Elderly area residents who do not drive were stuck. Under smoke progression, in the report, it refers to smoke in the neighboring communities as being "residual drift smoke". Indeed, what it was was very dark, very dense, choking smoke. Also, please note, from my neighbors and my observations, the maps of the smoke progression are wrong. The areas of smoke overlay should be larger. Re-torching islands of brush only sent forth new plumes of smoke on days after the 24th.

**Response:** The measurement of particulate matter, a primary constituent of smoke, in the air during the prescribed burn is detailed in *Draft Final Ranges 43-48 Prescribed Burn Air Monitoring Report, Former Fort Ord, California* and summarized in this prescribed burn summary after-action report. The maps provided in the Smoke Management section of *Final MRS-Ranges 43-48 Prescribed Burn After-Action Report, Former Fort Ord, California* are based on the Army's observations, wind directions recorded by the weather stations at the former Fort Ord, and where smoke complaints originated. Please note, these maps were meant to demonstrate the general progression of the smoke during the prescribed burn and contingency operations and how the diurnal winds rotated the smoke throughout each day of the contingency operations.

**Comment 9:** Hiring a middleman, or middlemen, in this case, FireStop, may be a clever way to let them take the blame. However, it does not remove the Army's responsibility. Nor does it absolve the regulatory agencies from their duties of protecting the public. For shame!

**Response:** This comment is noted.