



**PRELIMINARY POINTS OF AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
THE PUERTO RICO ENVIRONMENTAL QUALITY BOARD**

**Investigation and Response Activities Related to Contamination Resulting From  
Military Use and Training In Areas On and Around Culebra, Puerto Rico**

**ARTICLE I – PURPOSE**

The U.S. Department of the Army (“Army”) and the Puerto Rico Environmental Quality Board (“PREQB”) (hereinafter the “Parties”) enter into this Preliminary Points of Agreement to foster a cooperative relationship and to facilitate current and future discussions regarding investigations and response activities related to contamination resulting from military use and training in areas on and around Culebra, Puerto Rico.

**ARTICLE II – BACKGROUND**

WHEREAS, Culebra is located 17 miles east of the island of Puerto Rico and is approximately nine miles from the Island of Vieques. In 1901, Culebra’s public lands were placed under Department of the Navy (“Navy”) control. In accordance with current information, the Navy used certain areas of Culebra for training activities from 1903 until 1941, and as a bombing and gunnery range from 1935 until 1975.

WHEREAS, unexploded ordnance and remnants of exploded ordnance and other contaminants resulting from military use and training may be present on Culebra, the keys (cays and small islands) of Culebra, and in the nearby and surrounding water areas. The Commonwealth of Puerto Rico believes that if the presence of these substances is not properly characterized, and response actions taken where appropriate, they may pose an unreasonable risk or threat to human health and the environment.

WHEREAS, in 1974, Congress enacted “Notwithstanding any other provision of law, the present bombardment area on the island of Culebra shall not be utilized for any

purpose that would require decontamination at the expense of the United States. Any lands sold, transferred, or otherwise disposed of by the United States as a result of the relocation of the operations referred to in subsection (a) may be sold, transferred, or otherwise disposed of only for public park or public recreational purposes.” Section 204(c) of the Military Construction Authorization Act of 1974, Pub.L. 93-166.

WHEREAS, in 1980, subsequent to the 1974 Authorization Act, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). CERCLA imposes liability on “the owner and operator of a vessel or a facility” and on “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed off[.]” 42 U.S.C. §9607(a)(1) - (2). The term “person” includes “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State [including the Commonwealth of Puerto Rico], municipality, commission, political subdivision of a State, or any interstate body.” 42 U.S.C. §9601(21) and (27). CERCLA 120(a) requires that each department, agency, and instrumentality of the United States shall be subject to, and comply with, CERCLA. 42 U.S.C. §9620(a).

WHEREAS, in 1992, subsequent to the 1974 Authorization Act, Congress enacted “Each department, agency, and instrumentality ... of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement or solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements[.]” 42 U.S.C. §6961(a).

WHEREAS, in the early 1980s, the Navy transferred certain Culebra parcels to the Secretary of the Interior. In 1982, the Secretary of the Interior deeded some of these parcels to the Commonwealth of Puerto Rico. Section 9 of the Quitclaim Deed from the United States to the Commonwealth states: “In accordance with the provisions of Section 204 of Public Law 93-166, that portion of the subject property which has heretofore been used as a bombardment area by the United States Navy is hereby accepted by Grantee in its present condition and further agrees that the United States shall not in any manner be responsible for decontamination of such area, nor for the costs thereof, but the same is and shall be solely (sic) the responsibility of the Grantee. The Grantee hereby agrees to indemnify and save the Grantor harmless from any and all claims, demands, actions, liabilities, judgments, costs and attorney's fees arising out of, claimed on account of or in any manner predicated upon loss or damage to property or injuries to or the death of any and all persons whatsoever, arising in any way from any person's use of or presence on the subject property.”

WHEREAS, in 1986, CERCLA was amended to state that “there shall be no liability under subsection (a) of this section [42 U.S.C. §9607] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting there from were caused solely by -- ... (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff or acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions ....” 42 U.S.C. §9607(b).

WHEREAS, in 1986, CERCLA was also amended to state that “the term ‘contractual relationship,’ for the purpose of 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence: (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility .... In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.” 42 U.S.C. §9601(35).

WHEREAS, CERCLA provides that: “(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.” 42 U.S.C. 9607(e)(1).

WHEREAS, the Parties do not necessarily agree with the interpretation, application to the present situation, and/or legal significance of the foregoing legal provisions. Furthermore, the Parties willingly enter into this agreement without

renouncing or disclaiming any legal or factual claims they may have and may invoke them at a later time or action if no agreement can be reached.

WHEREAS, despite their legal differences, the Parties desire to investigate and to take appropriate response actions to respond to threats to public health and the environment resulting from past military activities on Culebra.

WHEREAS, as a former Navy facility "under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination," portions of Culebra have been determined to be eligible for inclusion in the Department of Defense Formerly Used Defense Sites ("FUDS") Program (See 10 U.S.C. § 2701(c)(1)(A-B); 10 U.S.C. §2703). In coordination with the Commonwealth, the Army has been involved since 1991 in performing investigations related to Navy training activities on the island of Culebra and surrounding cays. As described in the Draft Outline Army Plan of Action for Culebra, the Army has already conducted inspections of many Culebra areas previously used by the Navy for training, and has completed an initial report to identify areas for further investigation. The Department of the Army is the Executive Agent for the FUDS Program and, through the U.S. Army Corps of Engineers, executes the FUDS Program in accordance with CERCLA and the National Contingency Plan ("NCP").

WHEREAS, today, several non-Department of Defense entities, including the United States, acting through the U.S. Fish and Wildlife Service; the Culebra Conservation and Development Authority; and private landowners own areas on and around Culebra.

WHEREAS, after discussions with the Commonwealth and U.S. Environmental Protection Agency (EPA) on the appropriateness and necessity of the listing, Army has drafted an "Outline of Army Plan of Action for Culebra," which is attached to this Preliminary Points of Agreement.

WHEREAS the Commonwealth of Puerto Rico and PREQB appreciate and acknowledge the Army's "Outline of Army Plan of Action for Culebra" as a positive first step forward.

WHEREAS, on 13 June 2003, the Governor of Puerto Rico requested that EPA include certain "lands and bodies of water on Vieques and Culebra," which the Commonwealth has identified collectively as the Atlantic Fleet Weapons Training Area ("AFWTA"), as Puerto Rico's single highest priority site for purposes of listing on the National Priorities List (NPL) pursuant to CERCLA §105(a)(8)(B). By letters dated October 21, 2003, May 26, 2004 and July 28, 2004, Puerto Rico provided a more specific description of the lands and waters proposed for listing.

WHEREAS, on August 13, 2004, EPA published a notice of a proposal to add to the NPL certain areas on and around Vieques and Culebra, which the Commonwealth has identified collectively in its listing request as the AFWTA, the Commonwealth's single highest priority site. In the notice, EPA solicited "comment on an approach that

would separate the final listing decision for Culebra from the final listing decision for Vieques. Under such an approach, EPA would go forward with a final rule listing Vieques and postpone the final listing decision of Culebra to allow the completion of a Memorandum of Agreement between Puerto Rico and Army. The Memorandum of Agreement would govern the response actions necessary to protect Culebra's human health and environment. The EPA, Puerto Rico and the Army have agreed to pursue this alternate arrangement. The terms or progress under such agreement may determine the point at which it may be appropriate to withdraw the proposal to list the Culebra areas. EPA's intent would be to allow the Culebra areas to be addressed by the two parties under their agreement." 69 Fed. Reg. 50115, 50119 (August 13, 2004).

WHEREAS Puerto Rico is willing to withdraw or modify its request to include the Culebra area proposed for listing on the NPL at some point in the future if satisfactory progress is being made by other means toward investigating and responding to threats to human health and the environment from past military activities on Culebra on terms and conditions to be negotiated in the Memorandum of Agreement. If an agreement cannot be reached, Puerto Rico intends to request that the Culebra portions of the facility achieve the same NPL status as the Vieques portions.

### ARTICLE III – SCOPE OF PRELIMINARY POINTS OF AGREEMENT

NOW, THEREFORE, the Parties have agreed to the following principles:

A. Open Communications. The Parties agree to cooperate with each other through an open and transparent process both with respect to communications with each other and with respect to communication with the public and other stakeholders. The Parties agree to raise and resolve issues at the Program Manager level. The Parties' signatories (or senior representatives) agree to meet as necessary, by telephone or in person, to address issues that cannot be resolved at lower levels. The Parties agree to resolve any conflicts using a consensus building approach to identify practical and effective solutions.

B. Outline of Army Plan of Action for Culebra. The Army has provided the "Outline of Army Plan of Action for Culebra" to the PREQB for review and comment. The Parties agree that the "Outline of Army Plan of Action for Culebra" provides a framework for defining the nature and scope of past, current, and future Army investigation and response activities on and around Culebra. The Parties agree to refine the Action Plan to achieve results that are legally permissible, technically feasible, consistent with explosives safety principles, protective of human health and the environment, and compliant with CERCLA and the NCP. The PREQB further agrees to provide its comments to the Army within 30 days following the signing of this Preliminary Points of Agreement by all Parties. The Parties agree to meet and discuss any issues, including revisions to the "Outline of Army Plan of Action for Culebra" based on ongoing investigations, as needed, thereafter.

C. Document Sharing. Throughout this effort, the Parties agree to share with

each other any non-privileged documentation in their possession pertinent to the investigation and response activities related to contamination resulting from military use and training on or near Culebra. The Parties agree to provide any comments they might have on such documentation within a reasonable timeframe such as not to disrupt or delay unnecessarily the schedule for the work to be performed.

D. Additional Investigation and Response Activities. Pursuant to the revised Outline of Army Plan of Action for Culebra, and in accordance with CERCLA and the NCP, Army shall conduct investigations to determine the presence of contamination resulting from military use and training in Culebra areas that are eligible under the FUDS program. These areas, as well as the associated water areas, include, but are not necessarily limited to, the following:

1. Flamenco Peninsula (Northwest Peninsula);
2. Alcarraza Cay (Fungy Bowl);
3. Los Gemelos (Twin Rocks);
4. Cayo del Agua;
5. Culebrita (northwest section);
6. Cayo Geniqui (Palada Cay);
7. Cayo Tiburon (Shark Cay);
8. Cayo Botella (Ladrone Cay); and
9. Mortar Range Area in Cerro Balcon.

E. Parties Roles and Responsibilities. The Army recognizes the PREQB as the Lead Regulatory Agency and agrees to conduct response activities in accordance with CERCLA, the NCP, and applicable Puerto Rico law in those Culebra areas that are eligible under the FUDS program and to the extent authorized and not otherwise prohibited by law.

Army shall coordinate and perform its investigative and response activities under the oversight of the PREQB. If deemed necessary, the PREQB intends to utilize technical assistance from EPA. Nothing in this agreement may be interpreted as impeding EPA to provide whatever technical assistance is requested by PREQB in this process.

F. Memorandum of Agreement. The Parties contemplate that the PREQB and Army will enter into a Memorandum of Agreement to implement this Preliminary Points of Agreement. Specifically, the Memorandum of Agreement will provide for an open and transparent process; identification of legally permissible, technically feasible, safe, and protective objectives; establishment of realistic timelines and milestones to be negotiated during the final Memorandum of Agreement; formulation of reliable measures of merit; consideration of the Parties' respective roles and responsibilities; public and stakeholder participation; and a process for issue resolution. The Parties agree to use their best efforts to reach an agreement that effectively and efficiently deals with human health and environmental issues arising from contamination resulting from military use and training on Culebra and its surrounding keys and waters, and that

focuses on results, including protecting public health and the environment from unreasonable risks, if any.

#### ARTICLE IV – ACCESS TO PROPERTIES

Activities pursuant to this Preliminary Points of Agreement will be carried out on property that is no longer under the jurisdiction of the Secretary of the Defense and is neither owned, leased to, nor otherwise possessed by the Department of Defense. This property is currently under the jurisdiction of the U.S. Fish and Wildlife Service, the Commonwealth, the Municipality of Culebra, or private landowners. In order to ensure the efficient progress of activities, the Parties agree to use their best efforts and available authorities to obtain access for Army to all applicable Culebra properties. The PREQB agrees to coordinate access to properties owned by the Commonwealth and/or the Municipality of Culebra. In the event that Army is unable to obtain access required for investigative or response activities, Army shall promptly notify the PREQB.

#### ARTICLE V – QUALIFICATIONS AND LIMITATIONS

This Preliminary Points of Agreement is neither a fiscal nor a funds obligation document.

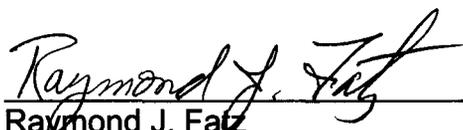
Nothing in this Agreement is intended to alter the specific statutory or regulatory authorities or responsibilities possessed by any of the signatories, or of other non-signatory agencies or parties, including the inherent authority of the Parties and their successors, to exercise their prerogatives, including enforcement and regulatory authority.

The activities contemplated in this Preliminary Points of Agreement will be carried out in accordance with existing statutory authorities, obligations, and restrictions.

#### ARTICLE VI – EFFECTIVE DATE

This Preliminary Points of Agreement will be effective when approved by all of the indicated signatories. The Parties will continue to discuss and contemplate a final memorandum of agreement, which when final will supercede this document.

APPROVED: October 28, 2004



Raymond J. Falz  
Deputy Assistant Secretary of the Army  
(Environment, Safety and Occupational Health)



Esteban Mujica-Cotto  
President, Environmental Quality Board  
Commonwealth of Puerto Rico

**Attachment**

**Outline of Army Plan of Action for Culebra**

## Outline of Army Plan of Action for Culebra

### 1. Background

a. Work accomplished under Department of Defense (DoD) Formerly Used Defense Sites (FUDS) program that supports future work in Puerto Rico's Areas of Concern:

(1) 1991 - Started looking at possible FUDS eligibility on Culebra.

(2) 1995 - Completed initial Archives Search Report used to identify areas for further investigations in an Engineering Evaluation/Cost Analysis (EE/CA) to identify contaminated areas.

(3) 1997 - Completed EE/CA. Representative areas were surveyed and sampled to obtain a statistical determination of the probable location and probable density of surface and subsurface unexploded ordnance. Areas examined were Flamenco Peninsula, Mortar Range, Isla de Culebrita (northwest section), and seven surrounding cays (Cay Botella, Cay Geniqui, Cay Tiburon, Cay del Agua, Cay Lobo, Cay Alcarraza, and Cay Los Gemelos). Evidence of unexploded ordnance or ordnance-related scrap was found.

b. Deeds, property transfer-related documents, land management agreements are being re-examined in 2004 in light of Section 204, Military Construction Authorization (MILCON) Act of 1974.

(1) Our research establishes that the area of the Flamenco Peninsula demarcated on the accompanying map is included in the bombardment area referred to in Section 204, MILCON Act of 1974, and therefore subject to the prohibition of decontamination using federal funds. Research is continuing to determine if any cays are also included in that bombardment area. This research should be complete in September 2004.

(2) Our research also establishes that the Mortar Range impact area in Cerro Balcon is not included within the bombardment area referenced in Section 204, the MILCON Act of 1974.

(3) Deeds, land management agreements, and other documents for specific properties owned by the U.S. Department of Interior and the Puerto Rico Department of Natural and Environmental Resources contain conforming language to the prohibition of decontamination using federal funds.

## **2. Path Forward under the FUDS Program**

a. Conduct a Supplemental Archives Search Report as part of an assessment phase under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to determine if there are additional areas that are eligible for FUDS investigation and/or cleanup on Culebra and surrounding islands and cays (start May 2004 and continue as required; interim report September 2004).

b. Conduct site inspections and remedial investigations of any additional FUDS-eligible areas that are identified above.

c. Conduct remedial investigations of all Puerto Rico's identified Areas of Concern including certain water areas within a 100 yards seaward of the mean high-tide point, such as Flamenco Peninsula, Mortar Range, Culebrita (northwest section) and seven Cays (initiate in Fiscal Year (FY) 2004, weather dependent).

d. Cleanup of areas not subject to Section 204, MILCON Act of 1974 (initiate in FY 2005). These areas include the mortar range impact area in Cerro Balcon, and may also include many cays and surrounding islands. A full list of these areas should be complete in September 2004.

e. Assist landowners in areas subject to Section 204, MILCON Act 1974 through institutional controls, and public education (initiate in FY04, as requested).

## **3. Effects of National Priorities List on Puerto Rico**

a. Will not result in additional funds provided for Army cleanup. The funding source for FUDS is the Defense Environmental Restoration Program (DERP). There is no other source of Army funds, even if Culebra is included on the National Priorities List (NPL).

b. Puerto Rico, as a landowner who accepted transfer of the property with knowledge of the existing contamination and who acknowledged its responsibility for performing cleanup, will be subject to cost recovery actions arising from its Potentially Responsible Parties (PRP) status. On a site listed on the NPL, Puerto Rico becomes subject to cleanup schedules and requirements as determined by U.S. Environmental Protection Agency (EPA).

c. Private landowners on Culebra may need to potentially confront allegations that their knowledge of contamination at the time of property transfer makes them liable as PRPs on a site listed on the NPL and subject to cleanup schedules and requirements determined by EPA. Note that the former Mortar Range impact area on Cerro Balcon is privately owned.

d. NPL designation carries a stigma impairing Puerto Rico's ability to market Culebra as a tourist destination.

e. The legal peculiarities and complexities of Culebra will delay NPL cleanup of Vieques if the two islands are part of the same listing. This is already happening.

f. Puerto Rico Environmental Quality Board will lose its role as lead regulatory agency for cleanup. EPA will become the lead regulatory agency.

g. The Army is already prepared to conduct investigation and cleanup work on Culebra. If this becomes an NPL site, the Army will have to delay work in order to avoid redundancy and additional costs until EPA decides the path ahead.

#### **4. NPL Listing Issues for the Federal Agencies**

a. The proposed combined Culebra/Vieques listing is contrary to Federal case law, several Federal statutes, and EPA policy and guidance. This is an issue of concern for the Office of Management and Budget and the DoD. If Culebra were to be removed from Puerto Rico's proposal, this issue would go away. The Vieques portion of the proposal could be approved and cleanup could proceed on both islands (with Vieques on the NPL and Culebra off the NPL).

b. Without clarification from a public affairs standpoint, the listing may create expectations of Federally-funded cleanup on Culebra that cannot be met due to Section 204 MILCON Act 1974, conforming deeds and agreements, and the Endangered Species Act.

c. Agreements (Federal Facility Agreement or Interagency Agreement) required under the NPL are complicated on Culebra because of the many landowners involved. The Army is not a landowner on Culebra and is not required to sign landowner cleanup agreements.

d. The Army is already prepared to conduct investigation and cleanup work on Culebra. The Army will have to delay its work in order to avoid redundancy and additional costs until EPA decides the path ahead.

e. The listing creates additional oversight and document review by EPA, resulting in later completion dates for each action taken.

f. A joint NPL listing will needlessly complicate the Vieques situation.