

N62604.AR.001799
NCBC GULFPORT
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MEMORANDUM REGARDING THE OPINION OF COUNSEL ON THE STATUS OF THE
INCINERATOR ASH AT THE HERBICIDE ORANGE SITE NCBC GULFPORT MS
4/5/1998
NAVFAC SOUTHERN DIVISION

39501-SITE 8 INCINERATION

19.01.08.0021

MEMORANDUM

From: FAC-41MG
To: FAC-40K/E
Via: FAC-41

19 1.8.21

Subj: HERBICIDE ORANGE SITE AT NCBC GULFPORT, MS

Encl: (1) Memorandum -- Opinion of Counsel

1. Review of all available documentation relevant to the subject site and discussion with staff at the Engineering Field Division led to the conclusion that legal review was necessary. After review, Counsel has provided enclosure (1).

2. Based on all available information and conclusions of enclosure (1), you are advised to immediately pursue a compliance agreement with the State of Mississippi and the Environmental Protection Agency. Since the 6 October 1992 passage of the Federal Facility Compliance Act, the Navy is clearly subject to fines -- approaching \$7 million for a single continuing violation (multiple citations may be possible).

3. While detailed cost estimates are not available, it appears that to bring the site into compliance with RCRA would cost several million dollars. General procedures include development and submission of a site closure plan, followed by site work as necessary to comply with the RCRA permit and/or compliance order when provided. Site work will entail additional soil sampling and groundwater monitoring (\$750K, already provided by the Air Force) and possibly action to secure the hazardous waste (estimates range to \$30M). Long-term options to secure the waste depend on ability to remove all the hazardous constituents to a permitted hazardous waste landfill ("clean closure"), interface with any plans for future use of the site (create a landfill-- "dirty closure"), and results of the delisting petition. The most straight-forward procedure is to cap the waste on-site but this will encumber future use of some portion of the facility (final location for the waste may be negotiable).

4. The activity may become regulated as a RCRA disposal facility until and unless the delisting process is successful. The best possible outcome in a compliance agreement is to defer other work until groundwater and soil sampling data are available; the regulatory agencies will likely ask for generation of a closure plan in advance, with a schedule and stipulated penalties. Expedient gathering of data is recommended.

5. If you need further information, I will assist at your convenience.

FYI

Post-It™ brand fax transmittal memo 7871		3 of pages > 3
To: <i>Dan Owens</i>	From: <i>Mike Green</i>	
Co: <i>South Div-1812</i>	Co: <i>FAC 41</i>	
Dept:	Phone # <i>(703) 325-8175</i>	
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Mike Green
Mike Green, FAC-41MG

MEMORANDUM FOR NAVFAC CODE 41 (M. Green)

Subj: ENVIRONMENTAL COMPLIANCE AT NCBC GULFPORT, MS

1. I have reviewed the background information you provided and the minutes from the latest meeting with the regulators, held on 5 April 1993, and offer the comments below.
2. If, as the IG report indicates, all of the stored Herbicide Orange was removed by 1977, the site could have been exempted from coverage under the RCRA regulatory program, which did not take effect until 1980, and handled exclusively under CERCLA. This did not occur. Instead, the Air Force/Navy applied for and obtained a RCRA permit to treat (by incineration) contaminated soil excavated from a portion of the site. The permit expired in 1989; the generated ash has since been stored on site in waste piles clearly subject to regulation under RCRA. The Air Force/Navy has petitioned EPA to have the waste delisted as a RCRA hazardous waste.
3. There is no indication that the facility has ever applied for a storage permit or that the ash was ever stored in compliance with either the terms of the expired permit or RCRA hazardous waste storage requirements. Accordingly, I agree with the IG's conclusion that NCBC Gulfport is in violation of RCRA and vulnerable to the assessment of civil penalties and that certain knowledgeable government individuals may be subject to criminal prosecution. The facility would also be subject to a RCRA citizens suit.
4. Curiously, both EPA and the state are apparently knowledgeable of the facility's noncompliant status and seem disinclined to force the issue. EPA has given the regulatory lead to the state and the parties seem to be waiting around for the Air Force/Navy to perform additional groundwater sampling and for the ultimate decision on the delisting petition, which is at least a year away. Although this diminishes the likelihood of an enforcement action, this could change if public pressure or the lodging of a citizens suit forces regulators to act. To best protect government officials and the facility, the Air Force/Navy should initiate discussions to result in a consent order for compliance with RCRA.
5. A concurrent problem is the remediation of the remaining contaminated areas. The IG report indicates that the three areas will be cleaned up under the IR program after the ash piles are removed. Here again, delay seems a risky strategy where there have been known releases of hazardous substances. In the minutes from the meeting of 5 April, EPA is quoted as saying that while there have been no "observed" releases and HRS scoring does not

qualify the facility for NPL status, such scoring "did not consider dioxin." The status of this site seems subject to change, and it is not clear to me at this point what strategy the regulators and the facility have in mind for remediation of the site under RCRA and CERCLA.

6. There is little that I can add, from a legal perspective, to the findings of the IG. They seem accurate and place all parties on notice of regulatory noncompliance at the facility. It is only through the grace of regulators and the inattention (so far) of the public and environmental groups that legal action has not been taken against the facility or those involved.



JOHN THOMPSON
Assistant Counsel
(Environment)