



Department of Energy
Washington, D.C. 20585

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NOTE FOR BILL SNYDER

FROM: STEPHEN H. GREENLEIGH

SUBJ: LEGAL OPINION - AUTHORITY TO DECONTAMINATE
THE MIDDLESEX MUNICIPAL LANDFILL SITE,
MIDDLESEX, NEW JERSEY

I am transmitting a legal memorandum on the authority to decontaminate the Middlesex Municipal Landfill site, Middlesex, New Jersey.

This opinion is based upon an earlier opinion by Lynn Coleman on the authority to decontaminate the Middlesex Sampling Plant and adjacent private properties, issued on June 19, 1978, a copy of which is attached.

I would be pleased to discuss this matter further should you so desire.

Attachment
As stated



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MEMORANDUM FOR BILL SNYDER

FROM:

STEPHEN H. GREENLEIGH

SUBJ:

LEGAL OPINION - AUTHORITY TO DECONTAMINATE
THE MIDDLESEX MUNICIPAL LANDFILL SITE,
MIDDLESEX, NEW JERSEY

I. CONCLUSION

You have asked for an opinion of this Office as to whether the Department of Energy (DOE) has the authority to undertake a remedial action at a former landfill site in Middlesex, New Jersey which site contains low-level residual source material derived from the government-owned former Middlesex Sampling Plant.

It is the opinion of this Office that DOE would have the requisite authority to perform a remedial action at the Middlesex Landfill site to acquire and remove, or stabilize low-level residual source material derived from the Middlesex Sampling Plant if such acquisition and removal, or stabilization is required in order to protect public health and safety.

II. DISCUSSION

In 1942, a sampling plant was built on government-owned land by the Manhattan Engineer District (MED) of the War Department to sample pitchblende ores purchased from foreign sources for use ultimately in the production of atomic weapons. As part of its Middlesex Sampling Plant operations, the MED, beginning in the mid 1940's disposed of low-level residual source material from the plant site, at a vacant dump site in Middlesex (now referred to as the Middlesex Municipal Landfill). In 1946, MED was abolished and its functions were transferred to the Atomic Energy Commission (AEC)¹ which continued to operate the Sampling Plant and to dispose of low-level residual source material at the Landfill (under authority of section 5(b)(5) and 6(a)(2) of the Atomic Energy Act of 1946, as amended, and sections 66 and 91(a)(2) of the Atomic Energy Act of 1954, as amended). The Sampling Plant operations, which ceased in 1967, resulted in extensive radioactive

¹Executive Order 9816 of December 31, 1946 (46 FR 22112) transferred the Middlesex Sampling Plant to AEC.

contamination of the plant site and private properties adjacent to and in the vicinity of that site, including the Middlesex Landfill.

In 1967, the AEC conducted a decontamination effort at the plant site and subsequently excessed the property to the General Services Administration for unlicensed and unrestricted use. It was later transferred to the U.S. Navy and is currently used as a Marine Corps Training Center. The radiological condition existing during the 1967 survey of the Sampling Plant was not documented by the AEC nor is there any record of decontamination efforts on the private property adjacent to the plant site. In 1976, the plant site and surrounding private properties including the Landfill were surveyed by AEC's operational successor--the Energy Research and Development Administration (ERDA)²--and were found to be radioactively contaminated. The DOE assumed the responsibilities of ERDA on October 1, 1977³. In conducting the sampling operations on its property the AEC had the responsibility in accordance with sections (2)(d) and (e) of the Atomic Energy Act of 1954, as amended, to assure that the public health and safety would be adequately protected. This responsibility was recognized by the AEC when it undertook to decontaminate the plant site in connection with its cessation of operations at the Plant and its excessing the property to GSA to be disposed of for unrestricted use.

Consequently, it would follow that the Department of Energy (which had succeeded to all of the responsibilities and functions of the Atomic Energy Commission) has the implied authority under sections 2(d), 2(e), 66 and 91(a)(2) of the Atomic Energy Act of 1954, as amended, to decontaminate the Plant site and surrounding areas including the Landfill and to acquire source material from the Landfill if such actions are needed to protect public health and safety from potentially injurious radioactive contamination caused by its predecessor agency's operation of the sampling facility, and disposal of low-level residual source material at the Landfill.

The Assistant Secretary for Environment has confirmed that the Landfill site contains residual radioactive material derived from the Middlesex Sampling Plant and that remedial action would be required in order to protect public health and safety. Should the low-level source material buried on the site be exposed due to erosion or excavation or migrate off-site, or should buildings or other structures be constructed on the site, Middlesex residents could be subjected to a health risk. The Borough of Middlesex has expressed a desire to develop the property for low income public housing. Remedial action would be required before any such development would take place.

²Section 104 of the Energy Reorganization Act of 1974 abolished the AEC and transferred to ERDA all functions and responsibilities not specifically assigned to the Nuclear Regulatory Commission.

³Section 641 of the Department of Energy Organization Act of 1977 transferred all responsibilities of ERDA to DOE.

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The Assistant Secretary for Nuclear Energy is planning to conduct a survey of the Landfill site to determine the extent of source material that would need to be removed from the Landfill in order to protect public health and safety.

A question has been raised as to whether the Borough of Middlesex might have voluntarily accepted legal responsibility for the material disposed of at the Landfill. A search for all available records has failed to uncover any documentary evidence of such an acceptance.

In order to protect DOE's legal rights in this matter, in the event such records or other evidence indicating responsibility on the part of the Borough are subsequently discovered, we suggest that any agreements between the DOE and the Borough for the undertaking of remedial action at the Landfill include at least the following provisions:

1. A provision whereby the Borough agrees to post security and to indemnify the United States from all claims, including those grounded in nuisance, negligence or strict liability, due to emissions of radiation from the site which are filed against the United States.
2. A provision releasing the United States from all responsibility to the Borough in connection with the remedial action.
3. A provision preserving DOE's rights to seek reimbursement from the Borough for any costs incurred by DOE in undertaking the remedial action.

A question has also been raised as to whether DOE, by undertaking a remedial action at the Landfill, may become responsible for hazardous non-radioactive and other solid waste disposed of there. DOE would have no authority under the Atomic Energy Act of 1954, as amended, to remove such material from the site. To protect DOE's rights in this regard (e.g., from inadvertent representations by Department programmatic personnel) we suggest that any remedial action agreement between DOE and the Borough also include estoppel and disclaimer clauses indicating that DOE's undertaking of remedial action at the Landfill is limited to the removal of residual radioactive material derived from the Sampling Plant, and does not in any way constitute an agreement by DOE to remove other wastes from the site.

Consistent with these recommendations and per the request of the Assistant Secretary for Nuclear Energy, this Office will prepare a draft Agreement between the DOE and the Borough of Middlesex for execution by the parties prior to the undertaking of a remedial action at the Landfill. A copy of this Agreement will be sent to you for your review and comment.

cc: John Gilbert, NE
William E. Mott, E



Department of Energy
Washington, D.C. 20585

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bcc: E. Fygi, GC
H. Yohalem, GC
C. Mathews, GC
B. Brown, GC
S. Miller, GC
B. Faulkner, GC
W. Mott, EV
R. Ramsay, EV
R. Allen, EV

MEMORANDUM

TO: DALE D. MYERS

FROM: LYNN R. COLEMAN / LYNN R. COLEMAN

SUBJECT: LEGAL OPINION - AUTHORITY
TO DECONTAMINATE MIDDLESEX
SAMPLING PLANT SITE AND
ADJACENT PRIVATE PROPERTIES

You have asked for an opinion of this Office as to whether the Department of Energy (DOE) has authority to decontaminate the site of a former government-owned sampling plant at Middlesex, New Jersey, and private properties adjacent to that site--all of which were radioactively contaminated as a result of past government actions at the site.

It is the opinion of this Office that DOE has the requisite authority to decontaminate the plant site and adjacent private properties.

As I understand it, a sampling plant was built in 1942 on government-owned land by the Manhattan Engineer District (MED) of the War Department to sample pitchblende ores purchased from foreign sources as part of the national defense effort. In 1946, MED was abolished and its functions were transferred to the Atomic Energy Commission (AEC)¹ which continued to operate the sampling plant until 1967 under authority of section 5(b)(5) and 6(a)(2) of the Atomic Energy Act of 1946, as amended, and sections 66 and 91(a)(2) of the Atomic Energy Act of 1954, as amended. The sampling plant operations resulted in extensive radioactive contamination of the plant site and private property adjacent to that site.

¹Executive Order 9816 of December 31, 1946 (46 F.R. 22112) transferred the Middlesex sampling plant to AEC.

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In 1967, the AEC conducted a decontamination effort at the plant site and subsequently excessed the property to the General Services Administration for unlicensed and unrestricted use. It was later transferred to the U.S. Navy and is currently used as a Marina Corps Training Center. The radiological condition existing during the 1967 survey of the sampling plant was not documented by the AEC nor is there any record of decontamination efforts on the private property adjacent to the plant site. In 1976, the plant site and surrounding private properties were surveyed by AEC's operational successor--the Energy Research and Development Administration (ERDA)²--and were found to be radioactively contaminated. The DOE assumed the responsibilities of ERDA on October 1, 1977³.

In conducting the sampling operations on its property, the AEC had the responsibility in accordance with sections 2(d) and (c) of the Atomic Energy Act of 1954, as amended, to assure that the public health and safety would be adequately protected. Likewise, when the AEC ceased operations at the plant and excessed the property to GSA to be disposed of for Unrestricted use, the AEC had an obligation to assure that such actions would not endanger the public health and safety. This responsibility was recognized by the AEC when it undertook to decontaminate the plant site prior to its release to GSA. However, the AEC failed to fulfill its responsibility and released the plant in a contaminated condition that has been shown to be potentially injurious to the public health and safety at the plant site as well as at adjacent private property. Consequently, it would appear to follow that DOE has the implied authority under sections 66 and 91(a)(2) of the Atomic Energy Act of 1954, as amended, to decontaminate the plant site and surrounding areas to protect the public health and safety from radioactive contamination caused by its predecessor agency's operation of the sampling facility.

cc: J. L. Liverman, EV

²Section 104 of the Energy Reorganization Act of 1974 abolished the AEC and transferred to ERDA all functions and responsibilities not specifically assigned to the Nuclear Regulatory Commission.

³Section 641 of the Department of Energy Organization Act of 1977 transferred all responsibilities of ERDA to DOE.