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Jacksonville, Arkansas: Superfund Clean-up Site

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M E M O R A N D U M

DATE: 7-10-90

TO: Carol, Leon, Rick

FROM: Aaron

SUBJECT: Vertac Chemical Superfund Clean-up in Jacksonville, AR

Mark Grobmyer of Little Rock sent the attached letter and memorandum to Al recently regarding the Vertac Chemical clean-up site in Jacksonville, Arkansas. Evidently, the production of Agent Orange for the Defense Department during the Vietnam War left dioxin-contaminated waste that was improperly disposed of at the site and is creating significant environmental problems in the area today.

Grobmyer has suggested that Al should look into the matter (investigation, hearings, etc.) to help determine the Defense Department's liability in the contamination of the site. It is evidently a hot issue in that area of Arkansas (and understandably so). However, I am unsure of Grobmyer's relationship to any of the parties involved.

If you feel that we should get involved after reading the attached letter and memo, then I think we should contact Bumpers' and Pryor's office to determine what they have done and/or what they think should be done. Al obviously shouldn't be thrusting himself blindly into the middle of a politically sensitive issue in another colleague's state. I'm not sure which (if any) of Al's committee or subcommittee assignments could provide a vehicle for his involvement. I'm not sure that it makes any sense for Al to become involved in the first place.

Grobmyer is a friend of Al's and of Al's parents. He will be hosting a fundraising event for Al in Little Rock on Friday, July 20th. If you feel that Al should not get involved, I think that we should be able to provide Grobmyer with a plausible excuse as to why he can not.

Please advise me as to how we should proceed ASAP. Thank you.

ARNOLD, GROBMYER & HALEY

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June 11, 1990

Senator Albert Gore
c/o Aaron Taylor
393 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Gore:

As you may know, Lee Thalheimer, Esq. was appointed the Federal Court Receiver in the matter of the Vertac Chemical SuperFund Clean-up Project in Jacksonville, Arkansas. Enclosed you will find a brief memorandum outlining the situation related to Vertac.

It is the position of the Receiver that a large part of the pollution problems at the Vertac site were the result of the production of Agent Orange which resulted in dioxin contaminated waste. It is the belief of counsel for the Receiver that the production of Agent Orange was done on behalf of the Department of Defense pursuant to instructions of the Department of Defense and that under appropriate legal theories argued successfully by the Justice Department in other cases, the Department of Defense is liable for clean-up costs to the Jacksonville site.

It is the Receiver's belief that this situation and the Department of Defense's role in this situation should be of interest to the United States Congress. Proper investigation and hearings could insure that proper liability can be assessed and that such problems can be eliminated in the future. The Receiver is willing to cooperate in every respect with any Congressional inquiry into these matters.

Please let me know how you wish to proceed.

Yours very truly,

ARNOLD GROBMYER & HALEY



Mark W. Grobmyer

MWG/dm

**BRIEFING PAPER ON THE DEFENSE DEPARTMENT'S
REFUSAL TO ACCEPT ITS RESPONSIBILITY FOR
THE DIOXIN CONTAMINATION AT THE JACKSONVILLE,
ARKANSAS SUPERFUND SITE**

The Jacksonville, Arkansas Superfund Site is a former herbicide production facility which has been shut down and placed in federal receivership. There are approximately 28,000 barrels of dioxin-contaminated wastes stored above-ground at the Site. There are an unknown number of barrels of dioxin-contaminated waste buried at the Site. The plant buildings and grounds are contaminated with dioxin. There have been four toxic tort suits involving the dioxin contamination at the Site.

The current owner of the Site is the Vertac Corporation. The former owner -- Hercules, Inc. -- made Agent Orange for the Defense Department during the Vietnam War. Hercules' production of Agent Orange contributed heavily to the dioxin contamination at the Site.

Documents which the Vertac Receiver discovered in the recently unsealed Agent Orange Product Liability litigation show that the Defense Department knew Hercules' production of Agent Orange would result in dioxin-contaminated wastes. The Defense Department made no effort to ensure safe disposal of the Agent Orange waste.

Hercules produced Agent Orange pursuant to "rated orders" and "directives" issued by the Defense Department under the Defense Production Act. Hercules could not refuse these rated orders and directives. Failure to comply with them would result in stiff money penalties and even imprisonment. Under the Defense Production Act, the Defense Department had the authority to control every aspect of Hercules' production of Agent Orange.

A recent decision by the United States Court of Appeals for the Eighth Circuit holds that anyone with the authority to control the generation, treatment, storage, or disposal of hazardous substances is liable for the cost of cleaning up those hazardous substances. In the Eighth Circuit case, the Justice Department successfully argued this legal liability theory in an enforcement action against private company defendants. The Eighth Circuit encompasses Arkansas.

Under this Eighth Circuit decision, the Defense Department is liable for the cleanup costs at the Jacksonville Site because it had authority under the Defense Production Act to control every aspect of Hercules' production of Agent Orange there, including Hercules' generation, treatment, storage, or disposal of hazardous substances. Several private companies are

also liable for the cleanup costs at the Site. They too had authority to control the work done for them at the Site given their contractual relationship with the Site owners, Hercules and Vertac.

Over a year ago, the court-appointed Receiver for the Jacksonville Site has informed the Justice Department of the Defense Department's liability for the dioxin contamination there. The Receiver also informed the Justice Department of the other private companies' liability at the Site. The Justice Department has so far refused to take any action against either the Defense Department or the other private companies to make them pay their fair share to clean up the Site. The Receiver has had to sue the Defense Department and the other private companies.

The Justice Department apparently does not want the Defense Department to be held liable at the Site, even though the Defense Department is legally and morally responsible for the dioxin contamination there. The Justice Department is now afraid that the liability standard it successfully advocated in the Eighth Circuit will result in Defense Department liability. The Justice Department's position in this case constitutes a double standard and is the product of an inherent conflict of interest. The Justice Department does not want to force another part of the Federal Government to abide by the same standards it has applied to private companies.

The Justice Department has not sued the other private companies who are liable at the Site under the Eighth Circuit decision because the Justice Department would have to argue that they are liable under the same legal theory that makes the Defense Department liable. The Justice Department has, however, sued the past and present owners of the Site, Hercules and Vertac. Vertac alone has already spent or agreed to spend over \$15,000,000 cleaning up the Site.

This is still another example of the Federal Government's contaminating the environment and refusing to accept its responsibility for that contamination. As Senator Glenn recently pointed out:

"We pass laws requiring that businesses and farms across the nation comply with pollution abatement. The federal government -- the largest business

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of our nation -- must do at least as well, and it appears that this is not happening."

This case is especially outrageous because the dioxin contamination would never have occurred if the Defense Department had acted responsibly over twenty years ago, when it knew that this facility's production of Agent Orange would generate dioxin-contaminated wastes.