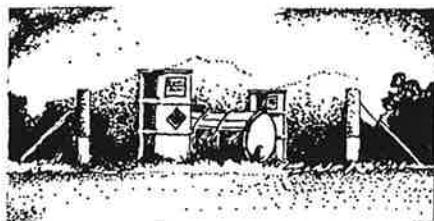


What Do You Do When You Find Hazardous Waste on Your Right of Way?

Thomas H. Edwards



Ten recommendations which provide a checklist of steps to take.

One of the most unexpected and disturbing things that can happen to a right of way division is to discover that there is hazardous waste on land that they have condemned or are about to condemn. This situation can delay projects, cost large amounts of money to correct, and cause highways to be rerouted. But why is this situation so devastating, and what leads to this result?

In the 1970's, the United States Congress was faced with citizen concern over the hazardous waste problem. Over 250 million tons of hazardous waste were being generated each year. There were at least 750,000 generators, but only 10% of the generators produced 90% of the hazardous waste. There were 10,000 storage facilities for hazardous waste and 1,500 land disposal facilities. There was no "good" technology for land disposal, as all landfill liners eventually leak and allow leachate from the waste to percolate into the groundwater below. The public was concerned about contamination of the groundwater and surface waters from hazardous waste. There were no state programs in place, and the public was demanding action over the problem of Love Canal and similar sites.

The Congressional response was the Resource Conservation and Recovery Act of 1976 (RCRA). This act imposes "cradle-to-grave" regulation of hazardous waste by requiring manifests to accompany shipments of hazardous waste until the waste is finally laid to rest. The Act authorizes the United States Environmental Protection Agency (EPA) to promulgate regulations "to protect human health and the environment." These regulations now define hazardous waste by source, composition, or characteristic (ignitability, corrosivity, reactivity, and toxicity). The Act requires persons to get a permit to treat, store, or dispose of hazardous waste. It authorizes "equivalent and consistent" state programs. It imposed civil and criminal penalties of up to \$25,000 per day for violations of the Act or the regulations, and it imposed strict liability for civil violations without regard to fault, intent, or negligence.

By 1984, the Congress perceived a need to improve the hazardous waste program and passed the RCRA Hazardous and Solid Waste Amendments of 1984. Whereas the previous program had been funded at \$1 to \$3 billion a year, the new program is authorized \$20 billion a year. The Congress imposed 50 statutory deadlines in the first 2½ years, with many automatic requirements if EPA failed to promulgate regulations. The Act also strengthens technologi-

cal requirements for landfills: double liners, leachate collection systems, leak detection, and groundwater monitoring. The Congress set schedules for the implementation of various programs: state programs, EPA waste minimization programs, and EPA listing of new hazardous wastes. The Act also establishes the Leaking Underground Storage Tank (LUST) program. The Act makes land disposal the least favored practice for the disposal of waste, after minimization, recycling, and other treatment. Finally, the Act expands civil and criminal liability for violations, with criminal penalties for placing a person in imminent danger of death or serious bodily injury of not more than \$250,000 or imprisonment for not more than 15 years or both, and for an organization a fine of not more than \$1 million.

Although RCRA and the RCRA amendments of 1984 were intended to be very strong federal statutes to combat the hazardous waste problem, it became apparent that RCRA could not handle every situation. In many cases, it was found that hazardous waste sites had been abandoned by individuals or companies that had died, disappeared, or gone into bankruptcy. The remedy for these "orphan" sites was the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980. This Act, which is also known as the "Superfund" statute, authorizes a \$1.6 billion fund to clean up the orphan sites. It mandates that the government bring an action against responsible parties to recover the cost of cleanup of such sites. The sites are to be picked in accordance with a National Priority List of hazardous waste sites. The Act also gives the government authority to require private parties to clean up the sites if they can be located and enjoined to do so. States are given authority to take action and seek cost recovery. The Act imposes strict liability on generators, transporters, and disposers of hazardous waste. The Congress provided for retroactive application of the Act upon those who disposed of hazardous waste in the past if those past acts contribute to present endangerment of human health or the environment. There is no provision for right to trial by jury.

Since this Act is of such importance to state highway departments, I wish to quote a section of it. CERCLA section 9607 says that:

"(2) any person who . . . owned or oper-

Thomas H. Edwards is Assistant Attorney General, Environmental Protection Division, Texas Attorney General's Office, Austin, TX.

ated any facility at which . . . hazardous substances were disposed of,

(3) any person who . . . arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . at any facility . . . ,

(4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government . . .

(B) any other necessary costs of response incurred by any other person . . . ; and

(C) damages for injury to, destruction of, or loss of natural resources . . . resulting from such a release."

In other words, any "person" (including a state agency) who allows hazardous waste to be disposed of on his property, or who arranges for disposal of hazardous substances, is liable for the costs of cleaning up the hazardous substance if it leaks from the disposal site at any time in the future. This potential liability is of great concern to corporations, which take a long view of things, and should be of great concern to the states.

To bring the statutory history up to date, the Congress has just reauthorized Superfund by amendments passed in October, 1986. The program has now been expanded to \$8.5 billion over a 5-year period, with revenues raised by new tax on petroleum;

petrochemical feedstocks, and motor fuels, and a corporate alternative minimum tax. Five hundred million dollars is authorized for the leaking underground storage tank program. Cleanup schedules are required and a community right-to-know provision is included, to provide more information for the public.

I would also like to mention the Texas law and regulations on hazardous waste because they may be typical of the statutes found in other states. Texas has received delegation from the federal government to conduct its own hazardous waste program. Chapter 26 of the Texas Water Code makes it a violation to "discharge . . . waste into or adjacent to any water in the state" and to "commit any other act which . . . causes, continues to cause, or will cause pollution of any water in the state." The Texas Solid Waste Disposal Act imposes penalties upon those who "cause, suffer, allow, or permit" violations of the Act or the regulations promulgated thereunder. Civil penalties of up to \$25,000 per act of violation are imposed, along with criminal penalties of up to \$250,000 for knowing endangerment (\$1 million for corporations). In order to be consistent with EPA regulations, the Texas regulations follow EPA language precisely in many sections: for instance, the definition of hazardous waste in the Texas act refers to the EPA definition of hazardous waste. The Texas waste program is divided among three agencies: the Texas Water Commission, which promulgates hazardous and industrial waste regulations; the Texas Department of Health, which promulgates "municipal" waste regulations;

and the Texas Railroad Commission, which regulates oilfield waste.

Having shared with you something of the history of the hazardous waste problem in this country and the Congressional and state response to it, I would now like to answer the question raised by the title to this speech. What should you do when you find hazardous waste on your right of way? I have 10 recommendations, which will provide you with a checklist that I hope you will find helpful:

1. *Identify the potential hazardous waste sites in the proposed right-of-way.* You will need trained personnel for this job. The fact that you have an environmental division that checks on endangered species, archeological sites, etc., may not be enough. It takes special expertise to know what kind of sampling and testing is required when a spot of suspected contamination is found. If you do not wish to create such a pool of expertise in your agency, you may wish to hire one of the consulting firms specializing in this line of work.
2. *Avoid the hazardous waste site, if possible.* A famous book on yachting contains a chapter entitled "What To Do If You Find Yourself Blown Down by a Stiff Breeze on a Lee Shore." The chapter contains one sentence, which reads: "Never, never, never find yourself in this position." If you find yourself with hazardous waste on your right-of-way,



**Right-of-Way Services Since 1971
for**

**Pipeline Co.'s, Electric & Gas Utilities
Telecommunications D.O.T.'s, Municipalities**

- Full R/W and Land Acquisition Service
- Appraisals, Reviews and Agency Permits
- Photogrammetric Survey and Mapping
- Recreation Areas Employee Payroll Service
- Complete Pre-job Cost Evaluations
- Leasing for Exploration, Production or Storage

**Service Resources Corporation
404-261-5811**

2970 Peachtree Rd., N.W., Suite 310 • Atlanta, Georgia 30305
Branch Offices: St. Petersburg, Florida • Charlotte, North Carolina

Inquiries Welcome From Qualified, Available Agents. Send Resume or Call (404) 261-5811

unable to get a responsible party to clean it up, unable to walk away from it without incurring liability, and unable to complete your project on time, you may wish that you had never, never, never found yourself in this position. The federal government has moved towns to resolve problems of acutely hazardous waste and would close a highway if it had to.

3. If, however, you find hazardous waste on your right-of-way despite your best efforts, the next thing to do quickly is to *know all the players*. Become familiar with the state agency with responsibility for enforcing the environmental statutes: the environmental protection division of the attorney general's office; the EPA offices, both regional and national, dealing with this particular kind of waste; the consulting engineers who can prepare the sampling and testing plans and closure plans for the site; the landowners and other potentially responsible parties; and the local governments that may become concerned with this problem.

4. *Be aware of communication problems.* As you can tell from this speech, the legal definitions are tricky, technical jargon abounds, state and federal regulations in this field are Byzantine, and there are large bureaucratic programs at stake. Each of these factors leads to communication problems, which leads to my next recommendation.

5. *Employ an environmental lawyer.* I modestly submit that you should look to the environmental protection division of your state attorney general's office or the equivalent agency. You need a lawyer who is familiar with the statutes interpreted by the courts as well as the regulations enforced by the agencies. The lawyer should be able to negotiate with the disparate parties that are likely to become involved, or to litigate to enforce or defend against the statutes, as the situation demands.

6. *Appraise the tract as a hazardous waste site, not as an ongoing business, if your local statutes allow this.* There is no question but that hazardous waste sites are huge white elephants. The cleanup costs in most

cases will far exceed the commercial or development value of the property. In such a situation, an appraised value of zero is reasonable.

7. *Try to avoid CERCLA liability as a potentially responsible party.* This may be extremely difficult to do, if you have anything at all to do with the site. The best solution is probably to make the landowner clean up the site completely before you take possession. If this is not feasible, consider taking an easement rather than fee simple title. Require the landowner to make arrangements for transporting and signing the manifests for the waste.

8. *Look for other potentially responsible parties.* These include generators, transporters, and disposers of the waste. Document their responsibility for future reference. If you have to contribute to a CERCLA cost recovery action, it will help to have company.

9. *Reduce your costs as much as possible.* Get a realistic appraisal. Require the landowner to do the

cleanup. Make sure that the elements of your cleanup plan work together. For example, many cleanup plans call for the placement of a layer of impermeable clay over the contamination to prevent surface water from infiltrating into the landfill and leaching waste material into the groundwater. This clay layer can be very expensive. But if you have a groundwater recovery system, that is, wells that remove and clean the contaminated groundwater, you do not need the clay cover. In fact, your groundwater restoration system will be more efficient the more quickly surface water does leach out the waste. Also, a lot of money can be saved by careful categorization of the waste. With hazardous waste disposal costs running \$100-\$300 per cubic yard, every yard saved adds up.

10. And finally, just for emphasis, **AVOID THE SITE.** (IRWA)

This paper was presented at the American Association of State Highway and Transportation Officials, Baltimore, MD, November, 1986.



Continental Field Service Corporation

SERVING UTILITIES, PIPELINES, GOVERNMENT AND INDUSTRY...

- Minerals Leasing
- Telephone Engineering
- Land and right of way acquisition
- Field engineering
- Route survey and Design
- Environmental impact studies
- Comparable sales and appraisals
- Urban renewal, public housing and rapid transit acquisitions and relocations

CONTINENTAL FIELD SERVICE CORP.

Home Office:
90 East Main St./Elmsford, N.Y. 10523
(914) 592-7240

Southern Office:
101 Burning Bush Lane, Rte. 6
Greenville, So. Carolina 29607
(803) 297-1717

Southwestern Office:
900 South College Road
Lafayette, Louisiana 70506
(318) 233-7463