Coping with Hazardous Waste in the Right of Way Acquisition Process

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A look at how we can avoid the problems and dangers associated with hazardous waste and right of way.

History and Background

As history, property ownership is constitutionally guaranteed. Initially, owners used their properties as they saw fit with little regard to others. This often included the dumping or draining of waste materials into open fields, meadows, streams, deserts, and the ocean. Until relatively recently, there were few, if any, zoning or police power property controls applicable to this circumstance.

New Jersey is one of the original Colonial States. Thus, in effect, dumping can be said to have begun virtually concurrent with the "Boston Tea Party."

Historically, there was little or no concern given to the effects and dangers of Toxic and Hazardous Wastes. Routinely, airports, parks, building lots, etc., were created out of swamps and meadows by utilization of "clean fill." Frequently, this fill consisted of cinders, garbage, and other components which retrospectively would be considered "hazardous" and unacceptable by today's environmental standards.

Even for highways and other public works and utility projects, up to the 1960's era prior to the National Environmental Policy Act, little thought or concern was given to toxic waste. I can remember projects from my youth in the 1940's where during construction, we dug out 12 to 16 feet of garbage fill from within the right of way. After reading the old World War I newspapers which were deeply buried and were still intact, the garbage, being unsuitable for highway subsurface purposes, was moved outside of the right of way and was then used to create a local athletic field and playground. No one gave the slightest thought that this garbage may have contained toxic or hazardous contaminants.

If my memory is correct, on still another project of that early era, we may have actually acquired and built a major highway through the middle of a plant which was rumored to allegedly have processed radioactive thorium. The storage piles looked like good black top soil and that is what it was used for. New Jersey was at that time a "smokestack" state, and waste was dumped seemingly virtually everywhere.

Today, any one of these circumstances—coal cinders with possible mercury residues, garbage with potentially unknown toxics, old factories and refineries, much less radioactive thorium-type situations—would be considered so serious a problem as to probably preclude entirely any use of the concerned polluted areas for right of way purposes.

Early Actions

Over more recent years, in right of way, we gradually became aware of the emerging problems relating to toxic and hazardous waste. Our initial New Jersey actions were in two areas of operations. The first was to design and coordinate with our attorneys and the State Department of Environmental Protection and successfully recommend (as in a recent Interstate Route 287 situation) a plan revision of a ramp configuration so as to delete the acquisition of a property containing a dumping ground of barrels which apparently contained hazardous waste. The second, where a property known to involve hazardous waste had to be acquired, was to measure the value impact effect of the polluted area on the fair market value of that property.

For example, the New Jersey Transit Corp's shops and repair yards are temporarily located across the Hudson River in Long Island, New York. It was urgent to find a New Jersey location so as to improve train maintenance and repair operations. The only available site of adequate large size with proper rail connections unfortunately was the site of a former Pennsylvania Railroad diesel locomotive refueling station.

The Right of Way Appraisal methodology adopted to address this environmental problem uniquely involved special environmental studies which showed that approximately 10 acres to a depth of about 6 feet was saturated with various types of fuel oil and petroleum residuals. The environmental and engineering specialists employed by the Right of Way Division estimated the cost of excavating, transporting, and depositing this polluted soil into approved deep mine repositories located in the mid-west, and in turn, of back-filling the excavation with clean material, as costing roughly $1,200,000. Since this clean-up cost was judged to be the market position that would be taken by a prudent buyer, the Right of Way Division then deducted these clean-up costs from the appraised fair market value, and in turn, from the property purchase price agreement amount. The New Jersey Transit Corporation in turn used the deducted money amount to contract to have the problem resolved in accordance with the environmental study recommendations.

Happily today, the subject New Jersey Transit Corporation rail facility is well on the way towards final completion and will soon become a very important New Jersey Transit operating facility. We like to think the "cost-to-cure" methdology was a viable approach which successfully resolved a very sensitive toxic and hazardous waste environmental problem.

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Current Status

As to more current actions, the question arises as to why the Right of Way Division cannot follow the price deduct methodology in all instances. The answer is that hazardous waste pollution is not always readily evident until after a property has been purchased and may even be actually under construction.

Equally significant, the scope and source of known pollutants is growing by leaps and bounds. The published State of New Jersey and Federal Environmental Protection lists contain literally thousands of materials currently classified either "toxic" or "hazardous."

The New York Sunday Times dated October 17, 1985, contained an article which is partially quoted as follows:

> "The pinpointing of organic discharges from, say, a treatment plant or sulfurous discharges from a thermal electric plant is relatively simple. The problem of toxic wastes is different. Tens of thousands of chemical compounds are produced in the United States and some six thousand new compounds are discovered each year.
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> "After ten years of an expensive Federal effort to control toxic wastes, we lack even a list of potentially harmful chemicals, nor is there any prospect that such a list can be compiled."

If governmental agencies cannot always identify all of the hazardous and toxic wastes, how can we as Right of Way practitioners always identify and classify these wastes, much less pinpoint their exact locations on various properties which we are acquiring?

Additionally, there are so-called "natural" toxic and hazardous waste conditions such as the alleged underground radon gas in parts of the rock strata under parts of Pennsylvania, New Jersey, and New York, not to mention the man-made radioactive conditions from filling in properties with radioactive waste materials. At the time, it was probably considered good topsoil or fill. No one even gave a thought that it may have contained radioactive residuals.

Last, but not least nationwide, there are literally millions of underground tanks in both rural as well as urban areas for homes and service stations. Many are becoming of substantial age and are subject to leakage. Even minor seepage could become an environmental disaster, particularly in sandy soil areas where potable water source aquafiers are nearby. Every home and every service station we acquire that may have such tanks are therefore a matter of serious concern.

The conclusion that is objectively reached is that, without doubt, we in the various Transportation Departments, Utility Corporations, and pipelines, whether we are representatives of Environmental Analysis, Design, Right of Way, or Construction, are currently facing a serious dilemma as relates to toxic and hazardous wastes. For the immediate moment, our best bet seems to be via joint team efforts.