

Cooperation Between State Highway and Environmental Agencies in Dealing with Hazardous Waste in the Right-of-Way

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The presence of hazardous waste or leaking underground storage tanks in new or existing highway right-of-way challenges state highway agencies. Because state environmental agencies regulate the cleanup of these sites, the relationship between these agencies can become either confrontational or cooperative. Formal cooperative agreements for dealing with hazardous waste in the highway right-of-way, as well as the less structured approaches being taken, are explored. A survey of state highway agencies in the spring of 1990 indicated that few highway agencies had entered a written memorandum of understanding with their environmental counterparts. Many states have worked out informal arrangements in which the state regulatory agency provides consulting or technical services to the state highway agency. In still others, a poor relationship has developed. These survey results, case studies, and written agreements are described.

When state highway departments acquire land to build and maintain roads, they can encounter hazardous waste, petroleum contamination, and asbestos in buildings to be demolished. They are then confronted with the bewildering legal, regulatory, financial, and technical maze that these sites represent. Every state has one or more agencies where the regulatory responsibility reposes to protect the public health and the environment from the damage caused by these wastes and substances. The purpose of this inquiry is to determine whether state regulatory agencies have taken advantage of the expertise, powers, and wherewithal of their respective regulatory agencies in dealing with the challenges of hazardous waste and, if so, whether they have formalized procedures and techniques through interagency agreements.

An interagency agreement of memorandum of understanding in this context refers to a joint agreement that can encompass one or more of the following arrangements:

1. The regulatory agency agrees to perform or provide a service (e.g., identification of contamination); or facility for the highway agency;
2. The regulatory agency and highway agency are to jointly perform a function (e.g., site cleanup);
3. The highway agency is to act on behalf of the regulatory agency (e.g., the highway agency prepares cleanup notices for the regulatory agency); and
4. The agencies merely make sense of the maze (e.g., the agencies delineate their respective functions and responsibilities).

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Interagency agreements are a potentially valuable tool in negotiating the maze and dealing with a variety of problems of concern to both agencies. They can elevate the concerns of the highway department with meeting project deadlines in the eyes of the regulatory agency. They can lead to organization and coordination when otherwise there could be conflict and unpredictability. They can bring the resources of the regulatory agency to bear on the responsible parties and bring to bear the special cleanup funds controlled by the regulatory agency.

However, it must be recognized that interagency agreements or the working arrangements pursuant to them change. They develop in response to particular needs and circumstances and those are changing in the rapidly evolving area of environmental law. They are also subject to changing administrations and personalities.

In addition, it must be recognized that a cooperation agreement can be perceived as "not worth the trouble." Given a choice between self-reliance and having to cooperate, any agency will choose self-reliance. An informal, as-needed relationship can be preferred to a written understanding. In fact, an interagency agreement with an environmental agency can be less a cooperative arrangement than it is a license for the highway agency to conduct cleanups on its own.

The study of cooperation in addressing environmental problems in highway land acquisition was intended to find out whether highway agencies have viewed the benefits of a cooperative agreement as worth the effort. It was desired to find out who was doing what and whether the results had been favorable. Although each state had its own legal and institutional framework, a question was whether any trends were emerging.

SUMMARY OF SURVEY RESULTS

On February 4, 1990, a questionnaire titled "A Survey on the Interaction of State Transportation Agencies with State Regulatory Agencies" was circulated to the transportation agency of each state, Puerto Rico, and Washington, D.C. As of June 1, 1990, 31 responses had been received.

Question 1 stated, "Does your agency have a formal Memorandum of Agreement or Understanding (MOU) with your state regulatory agency (SRA)?" Seven states indicated they did have formal MOUs with their regulatory agencies, while the remaining 24 states said they did not. However, only three of the states' MOUs broadly and specifically involve hazard-

ous waste in the right-of-way. The MOUs of those states—California, Florida, and New Jersey—are outlined in the case studies that follow. The other four states have MOUs that narrowly (or do not yet) deal with hazardous wastes or substances. Vermont’s MOU concerns only the reuse of petroleum-contaminated soils. Washington’s MOU simply calls for a working agreement, but such an agreement had not been signed to date. Idaho’s MOU only concerns emergency situations. Virginia’s only deals with solid waste disposal.

Questions 2 and 3 were simply attempts to determine what the states’ MOUs dealt with when the respondents did not include copies of their MOUs. Because all respondents included their MOUs, these questions were not needed or answered.

States were then asked what arrangements they have for notification of their SRAs instead of, or in addition to, MOUs. The answer to this question revealed that 68 percent of the responding states have formal procedures for notifying their state regulatory agencies of the discovery of hazardous waste (Figure 1). Such notification is done either in a written form, a verbal form, or through a 24-hr hotline maintained by the state regulatory agencies. In some states, notification is only made after the contamination is determined to be above a certain level. Other states follow regulations that require automatic notification upon the discovery of contamination and in some cases, immediately. Finally, other state departments of transportation (DOTs) notify a central office, either in their own or in another agency, which then notifies all other appropriate authorities.

The survey attempted to uncover at what levels further interagency coordination takes place once this notification has taken place. The largest number of responses (40 percent) indicated coordination primarily takes place at a field or staff level (see Figure 2). This group was followed by 25 percent of the states’ indicating primarily middle management involvement and 20 percent indicating coordination of department heads. Only 15 percent of the states indicated they had specific departments or task forces that handled all coordination with state regulatory agencies. There seemed to be a consensus, however, that the level of coordination directly related to the importance of the issue. Although coordination mostly occurs at the staff level, if the issue is either precedent setting or urgent, the level of coordination can rapidly move up the ladder to upper management or department secretaries. Only a few of the states said they had no need for

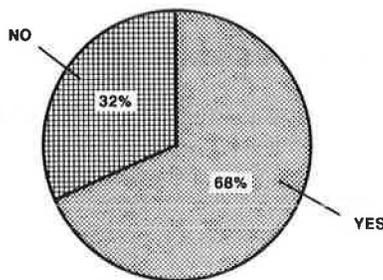


FIGURE 1 Question 4: Does your agency have a procedure to notify the regulatory agency if contamination or a contaminated site has been discovered?

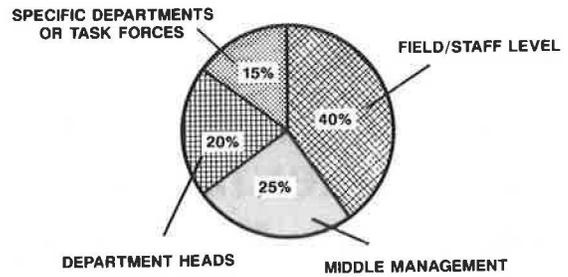


FIGURE 2 Question 5: What administrative level is used by each agency to conduct the coordination on hazardous waste issues?

coordination at any level, indicating either that they had been able to handle this issue in house, or that they had not had the occasion to become involved with hazardous waste.

Question 6 asked how much help state DOTs had received from their companion SRAs. The answers were widely varied (see Figure 3): 28 percent of the states indicated that they had been given access to files, site lists, and hazardous waste reports; 26 percent said that they had only received technical guidance in areas such as sampling, cleanup standards, potentially responsible party (PRP) enforcement, and site inspections; 24 percent of the states said that they had received little or no help from their state regulatory agencies. Some in this latter category either had no hazardous waste dealings at all, or the SRA was strictly reactive in posture. Only 11 percent of the states received consultation as needed or when asked for.

Question 7 generated even more widely varied (yet almost the same) answers as those to question 6. This question asked for examples of past coordination that had taken place between the DOTs and SRAs. The responses ranged from no help at all to as much help as possible. In some cases, the SRAs responded quickly, while in others they did not. The most common encounter was found in planning, discussion, or informational meetings. Help has also been provided in testing and evaluating, reviewing mitigation plans, resolving legal issues, removing leaking underground storage tanks, and disposing of contaminated soils.

Finally, Question 8 asked for a characterization of the cooperation between the two state agencies (see Figure 4). The majority of respondents (60 percent) said cooperation was good; 25 percent said the coordination was good, yet limited

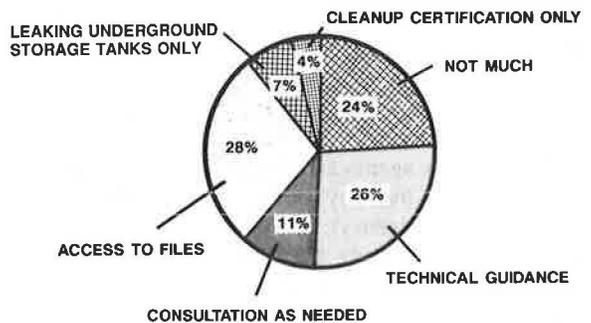


FIGURE 3 Question 6: What assistance has your regulatory agency provided on hazardous waste issues during planning or construction phases?

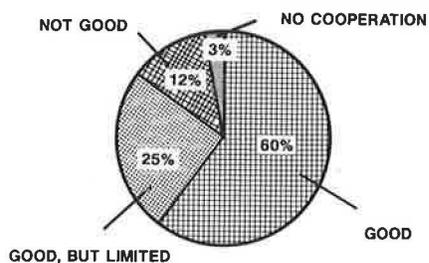


FIGURE 4 Question 8: Characterize the cooperation between your agency and the regulatory agency concerning hazardous waste.

and at times ineffective; finally, 12 percent said it was not good; and 3 percent indicated no cooperation whatsoever. However, these numbers may be deceptive because several states that indicated difficulties with SRAs in Questions 6 and 7 said that their cooperation was good, or even excellent. It seems that respondents were reluctant to criticize their SRAs, despite these difficulties.

CASE STUDIES

States with MOUs

New Jersey

The New Jersey Department of Environmental Protection (NJDEP) and the New Jersey Department of Transportation (NJDOT) have signed an MOU that adopts a detailed, step-by-step "Standard Operating Procedure for Managing Soil/Ground Water Contamination Issues" (SOP). The MOU recognizes that NJDEP is given the responsibility to protect the environment and the public health, safety, and welfare by state law and that NJDOT holds the responsibility for transportation services in New Jersey and has the power to obtain lands by condemnation. The MOU goes on to state that some of these lands acquired by NJDOT trigger the Environmental Cleanup Responsibility Act (ECRA). Because that state law requires an environmental assessment and cleanup, if necessary, at the time NJDOT acquires right-of-way, close cooperation between NJDOT and NJDEP is a necessity. This necessity led to the adoption of the SOP.

The SOP lists an exact 12-step process that details the coordination between NJDEP and NJDOT regarding the assessment and handling of all transportation projects that involve the acquisition of properties with soil or ground water contamination. It seeks the resolution of contamination cases on both an acceptable schedule for NJDOT and in a technically acceptable way for NJDEP. The agreement includes a flow chart to help the reader follow each step.

During the initial assessment stages of a project, there is close cooperation between NJDEP and NJDOT. As NJDOT screens its transportation projects, it uses NJDEP's Preliminary Assessment format, Field Sampling Procedures Manual, a preliminary assessment of the site's applicability to ECRA. Following NJDOT's initial assessment, NJDEP and NJDOT work together to decide what the next step in the process should be. If the NJDOT determines it is possible to avoid a

contaminated property and the PRPs cannot be found, then it may use its own resources to clean up the property in its right-of-way and seek reimbursement through court action. NJDEP will assume responsibility for the non-right-of-way property and seek reimbursement from the PRPs. If, for some reason, NJDOT decides not to spend its own funds for a cleanup, NJDEP will take over the cleanup efforts using its own funds and seek reimbursement from the PRPs at a later date.

This agreement involves a high level of cooperation between NJDEP and NJDOT. The agreement was successfully implemented because of the involvement of the commissioners of both departments.

Each commissioner recognized the need for a mechanism by which NJDOT could become integrated with NJDEP to the extent necessary for speedy site recognition and remediation. Instead of simply giving NJDOT blanket authority to clean up contaminated sites, NJDEP is intricately involved with each step of the cleanup process. NJDEP also has a transportation coordinator who helps enhance the cooperation between the two agencies.

Interestingly enough, NJDEP is apparently willing to not only support NJDOT in its attempt to seek reimbursement, NJDEP will also handle the reimbursement process for NJDOT if circumstances require. In some cases, NJDEP has ordered the PRP to perform a cleanup of a contaminated site ahead of NJDOT's ongoing projects. The only provision for reimbursement under state law is found in a spill fund administered by NJDEP. NJDOT indicated, however, that NJDOT can only receive monies from this fund if the contamination is a direct threat to the public health.

It is also important to note that the MOU merely adopts the SOP, whereas the SOP is the actual working agreement.

Florida

The State of Florida Department of Environmental Regulation (FDER) and the State of Florida Department of Transportation (FDOT) signed an MOU in July of 1989. The purpose of this agreement is to define the role of FDOT in cleaning up contamination sites that accrue to it through right-of-way acquisition and also its fiscal responsibilities for such cleanups. The MOU also reinforces an existing informal agreement between the two agencies. That agreement allowed FDOT to proceed with a cleanup of the necessary right-of-way if the contamination is an immediate threat to public health or the environment. FDOT is also allowed to delay a cleanup if its project will not exacerbate the existing contamination and FDER will have access to the site following the project's completion. However, this informal agreement was not deemed to be truly effective without a formal agreement.

The MOU's definition of contamination encompasses any substance that poses a serious danger to the public health, safety, or welfare that is released into the environment in quantities or concentrations sufficient to cause harm to the public health or the environment. This includes all hazardous wastes (HW) and substances, as well as petroleum and its by-products. There appears to be a strong statutory basis for this agreement. FDOT is protected by the Florida legislature from state-imposed liability that FDOT might incur when it ac-

quires land for transportation purposes that is already contaminated. Florida is unique in that this state law gives FDOT more leverage when dealing with landowners.

The state legislature had also created two trust funds that provide money for cleanup and restoration of contaminated sites. FDER is able to seek reimbursement from these trust funds, and FDOT in turn gains reimbursement for FDER. The MOU details the rights and responsibilities that FDOT will assume as a result of this agreement. Once FDOT discovers some unsuspected contamination, it notifies the FDER, which in turn allows FDOT to examine any and all relevant records pertaining to the contaminated land. The FDOT can then proceed to clean a sufficient amount of the contamination to allow it to advance its project according to schedule.

All of this will be completed by FDOT using its own funds. As long as FDOT receives written approval from FDER to proceed with the cleanup, FDOT can seek reimbursement from the legislatively established trust funds. FDER agrees to fully support FDOT in its quest for reimbursement. FDOT will also assign its own staff to independently oversee and manage cleanups, and the FDER will assist FDOT as much as possible with the cleanup of contamination. Each district of FDOT has an HW coordinator who makes decisions regarding cleanups and acts as a project manager who oversees the mitigation process.

The end result of this agreement is that the FDOT is allowed to clean up any and all contamination sites it encounters in the course of transportation-related projects. Although FDOT has to pay for the cleanup with its own funds, it can receive reimbursement from established state trust funds with the backing of the FDER.

California

The California Department of Transportation (CALTRANS) and the California Department of Health Services (DHS) signed an MOU on July 14, 1989. DHS is given the general responsibility by the California Health and Safety Code to either oversee cleanups of contaminated sites or to perform the actual cleanups itself. In this MOU, contamination refers only to hazardous wastes, and the level of contamination is determined by the federal EPA Hazard Ranking System (HRS). It does not include underground tanks or asbestos as those are regulated by other state agencies. The purpose of this agreement is to stipulate how contaminated sites on CALTRANS right-of-way will be dealt with by these two agencies.

If CALTRANS becomes the owner of a property before abatement, CALTRANS may choose to expend transportation dollars to identify and clean up the hazardous waste contamination if the PRP does not take timely abatement action to meet CALTRANS' construction schedule. It is noteworthy that while the agreement provides that CALTRANS may spend its own funds for a cleanup, there is no mention of any possible reimbursement to CALTRANS for performing the cleanup. Minimal-threat sites, those scoring under 15 on the HRS, can be directly abated by CALTRANS without any DHS involvement. Non-minimal-threat sites, those scoring 15 or over on the HRS, have the option to be listed as California Superfund sites. They will not be listed if the PRP completely funds the site cleanup, and DHS

is not asked for formal certification of the site's cleanliness. Under this MOU, however, DHS will still provide a written confirmation of the adequacy of the mitigation action.

If the site is to be listed on the California Superfund list, the DHS takes a much larger role in the site's mitigation. Regardless of whether or not it is Superfund listed, CALTRANS has the option of cleaning up any contaminated site itself. However, CALTRANS' cleanup liability of property acquired by eminent domain only extends to areas directly affected in the right-of-way of a construction project. It does not necessarily have to initiate a cleanup of areas in the right-of-way that are not directly affected, unless there are compelling public health or environmental issues. In the case of a partial cleanup, CALTRANS is required to prevent any increased threat to the public or environment because of the partial abatement.

This MOU outlines the parameters within which CALTRANS will conduct a cleanup of a contaminated site, either minimal or nonminimal, which directly affects its construction project. DHS requires notification of any such cleanups and reserves the right of approval for mitigation projects. Two aspects of this MOU are especially noteworthy. There is no mention of any form of reimbursement for CALTRANS when they undertake a cleanup of lands acquired through eminent domain. Also, although DHS in some cases will not provide a formal certification of a successful cleanup, they will provide a "written confirmation as to the adequacy of the mitigation action."

States Without MOUs

Many of the responding states indicated that the cooperation they had with their state regulatory agencies was less than satisfactory. They would not be expected to have an MOU. For instance, Georgia's Department of Transportation (GDOT) has had problems getting contaminated sites cleaned up because of the slowness of their SRA. Because of this delay, Georgia has proceeded to perform a cleanup of the needed right-of-way. At least 65 percent of the sites that GDOT tested were found to be contaminated. Because of the SRA's lack of personnel, it may become necessary for GDOT to perform more cleanups. Georgian officials indicated that they had attempted to get an MOU signed, but alleged unwillingness on the part of the SRA has halted the process. Georgia would like to have a memorandum of agreement both to expedite the process and to clarify GDOT's legal position.

Connecticut's Department of Transportation also would like to implement an MOU. The Connecticut respondent indicated that "staffing constraints faced by the [Department of Environmental Protection (DEP)] are the greatest impediments to effective coordination." Apparently, it is Connecticut DOT's feeling that an interagency MOU would greatly improve the cooperation between the two agencies. It would expedite the discovery and cleanup process by encouraging the Connecticut DEP to give the Connecticut DOT projects and needs a top priority. As of June 11, 1990, the process of signing an MOU had stalled, but the Connecticut DOT is still pushing to get an agreement signed between the two agencies.

There appears to be a trend among the responses that indicates that primarily urbanized and industrial states see the need for MOUs. States that already have MOUs, such as New

Jersey and California, are highly industrialized and urbanized and are much more likely to encounter hazardous waste problems. States that are more rural, such as New Hampshire or North Dakota, are less likely to encounter hazardous waste contamination and its resulting problems.

North Dakota's respondent indicated that his agency does not have any established procedures for dealing with hazardous waste issues and does not have any experience dealing with such problems. Thus, the agency has neither the need nor the desire for an MOU.

New Hampshire is another example of a rural state that sees no need for an agreement. It is just beginning to experience the problems associated with hazardous waste contamination because of the recent growth in the southern part of the state. Interestingly, this agency handles any necessary discovery and remediation processes itself. The biggest problem NHDOT has encountered is in the structural mechanism of their SRA. NHDOT has had problems finding the proper people to notify in the SRA. The respondent indicated that while they had considered signing an MOU in the past, the efforts to do so had fallen by the wayside, because NHDOT has only experienced delays caused primarily by consultants and not their SRA.

CONCLUSION

The survey results indicated the following:

1. Far and away, the most frequent impediment to cooperation is a lack of staff in SRAs. Even if staff is available, SRAs complain that that staff is unqualified, incapable, or uncaring.

2. Given that barrier, highway agencies are generally cleaning up hazardous waste themselves and seeking reimbursement from the prior owner of the property or some state fund. These agencies are willing to assume the risk that reimbursement will be forthcoming.

3. SRAs have little formal or informal involvement with requiring right-of-way property owners to clean up their property before the highway agencies acquire their property.

4. Cooperation between state highway agencies and regulatory agencies is generally limited to the following ad hoc arrangements: (a) record searches for environmental problems (e.g., superfund or leaking underground storage tank list); (b) review of environmental assessments prepared by consultants; and (c) "certification" that the property is cleaned up.

5. Cooperation with regulatory agencies on a case-by-case basis appears to be satisfactory to highway agencies.

6. There is little evidence of teamwork in these surveys. The DOTs and SRAs do not function as a team in solving problems with contamination in the right-of-way.

In a perfect world, highway agencies would build and maintain highways and regulatory agencies would clean up the environment. In that world, highway agencies would be able to contract with regulatory agencies to perform timely environmental assessments in the right-of-way, to oversee the cleanup by the property owner, and to certify that the property is all clear. In the perfect world, highway agencies would not have to have their own hazardous waste expertise, would not have to hire their own hazardous waste consultants and cleanup contractors, and would not have to pursue reimbursement for cleanups from property owners either in eminent domain or cost recovery proceedings.

We do not live in a perfect world. The survey results indicate that highway agencies, with few exceptions, are handling all of these functions related to hazardous waste on their own, with minor assistance from their SRAs. Not surprisingly, the few MOUs that exist are found in states such as California and New Jersey with strong environmental agencies. It is also not surprising that New Jersey has an MOU because its ECRA law requires an environmental assessment and cleanup at the time of sale of property.

There will soon be more formal agreements and more cooperation for the following reasons:

1. State regulatory agencies will grow in size and gain larger staffs,
2. State highway agencies are playing with fire in performing their own cleanups and are going to get burned, and finally
3. What are now informal relationships will become formalized.

Copies of the MOUs from Florida and California and a list of contacts for states that responded to this survey are available from the author.

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