

DECISION DOCUMENT

Hazardous Waste for Special Funded and Jointly Funded Projects

Recommendation: Contaminated hazardous waste as defined in California and Federal law is being categorized (for the purposes of this policy) as HM-1 or HM-2. The handling of hazardous waste will be in accordance with the following guidelines:

Definitions: For the purposes of this policy the following definitions are given:

HM-1: Hazardous material which State or Federal regulatory control agencies having jurisdiction have determined must be remediated regardless of whether disturbed by the project or not.

HM-2: Material which said agencies would have not regulated or would have allowed to remain in place if undisturbed or otherwise protected in place should the project not proceed.

Local funds: Funds that do not include any money from the State Highway Account.

Jointly funded projects: Projects with funds from the State Highway Account in addition to local funds.

Guidelines: Four principles guide the formation of this policy. The Department recognizes the urgency (mandated by a regulatory agency for health and safety reasons) created by the finding of HM-1 and accepts primary responsibility for remediation and manifesting. HM-2, because it does not demonstrate an immediate health or safety risk, can be left in place but for the project, and is a project cost. State Highway Account funds, i.e. both Interregional Improvement Program and Regional Improvement Program, are needed to pay for remediation. Finally, costs incurred by inadequate investigations are the responsibility of the investigator.

Therefore on all 100% locally funded projects on pre-existing State highway right of way where HM-1 has been found either during a pre-construction investigation or during construction the Department will, subject to availability of funding, accept financial and manifesting responsibility. In these cases the Department will remediate, manifest and designate the appropriate landfill for deposition using State funds when available. If the cost to remediate is increased due to construction of the project proceeding while HM-1 remediation is in process, all additional remediation costs are considered the responsibility of the local sponsor. If HM-2 is found on pre-existing State highway right of way either during a pre-construction investigation or during construction for 100% locally funded projects remediation is the responsibility of the local sponsor. The long-term responsibility for the HM-2, as signified by signing the manifest, is the joint responsibility of the local sponsor and the Department.

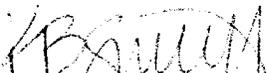
On all jointly funded projects on pre-existing State highway right of way where HM-1 has been found prior to construction and the Department and the local sponsor decide to proceed with the project despite the HM-1, the Department and local sponsor will share the cost to remediate based on their respective funding percentages and the Department will sign the manifest. However, if the Department and the local sponsor have decided to not go forward with the project State Highway Account funds will pay the cost to remediate and the Department will sign the manifest. If the HM-1 is not found until start of construction the investigator shall pay the increase cost, if any, while the Department will sign the manifest. If HM-2 is found on pre-existing State highway right of way either during a pre-construction investigation or during construction for jointly funded projects remediation is a project cost and thus a joint responsibility to be shared based on the percentage of funds contributed. Manifesting is also a joint responsibility.

Whether the project is jointly or 100% locally funded right of way acquired for the project must be cleaned of HM-1 and/or HM-2 before title is transferred to the Department. The partner supplying the property is responsible for assuring that remediation is complete. The property owner, either a private entity or a local public agency, is responsible for manifesting.

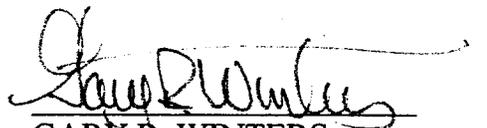
The Department will make every reasonable effort to encumber available funds for any mandated HM remediation for which the Department is responsible. In the event the Department is unable to provide immediate funding, the local agency will have the option of either delaying the ongoing project or proceed with remediation at the agency's expense and without any subsequent assurance of Department reimbursement.

The cooperative agreement standard language formats and pre-approved forms dealing with HM are to be revised within the Cooperative Agreement Manual. All future cooperative agreements shall include clauses dealing with HM conforming to these changes.

APPROVED BY:


KARLA SUTLIFF
Acting Chief
Division of Design

8/13/01
Date


GARY R. WINTERS
Acting Chief
Division Environmental Analysis

8/13/01
Date

GOALS of Policy:

1. CT pays for clean-up and signs manifest for HM-1 since waste is on CT property that must be cleaned regardless of project.
2. Costs incurred by inadequate investigations responsibility of investigator.
3. HM-2 is a project cost since it does not threaten health & safety and can be left in place.
4. SHA funds, that is both IIP & RIP, need to pay for cleanup.

Flowchart for Policy AFTER meeting on 8/10/01 w/ Karla & Bill B

Funding Category	Haz Mtl Present?	Found on existing R/W?	Mandate for Health Reasons?	Found before construction began?	Go Forward w/Proj?	Cleanup cost Higher because of Proj?	Who signs the manifest?
100% locally funded *	Y	Y	Y or N	Y	Y	Y	Locals pay increase. SHA pays base. CT signs
100% locally funded *	Y	Y	Y	Y	Y	N	SHA pays base CT signs
100% locally funded *	Y	Y	Y	Y	N	N/A	SHA pays base CT signs
100% locally funded *	Y	N	Y	N/A	N/A	N/A	If Locals supply property then they assure clean before transfer of title to CT Property Owner (Locals or private) Signs
100% locally funded *	Y	Y	Y	Y	Y	N/A	Locals pay as project cost Joint Sign
100% locally funded *	Y	Y	Y	Y	N	N/A	No cleanup cost N/A
100% locally funded *	Y	N	Y	Y	Y	N/A	Locals pay as project cost Joint Sign
100% locally funded *	Y	N	Y	Y	N/A	N/A	If Locals supply property then they assure clean before transfer of title to CT Property Owner (Locals or private) Signs

Flowchart for Policy AFTER meeting on 8/10/01 w/ Karla & Bill B

Funding Category	Haz Mtl Present?	Found on existing R/W?	Mandate for Health Reasons?	Found before construction began?	Go Forward w/Proj?	Cleanup cost Higher because of Proj?	Who signs the manifest?
Jointly funded **	Y	Y	Y, therefore HM-1	Y	Y	Y or N	Share increase & base per funding percentage CT signs
Jointly funded **	Y	Y	Y, therefore HM-1	Y	N	N/A	SHA pays base CT signs
Jointly funded **	Y	Y	Y, therefore HM-1	N	Y	N/A	Investigator pays increase if any. Base cost is shared per funding percentage. CT signs
Jointly funded **	Y	N	Y, therefore HM-1	Y	N/A	N/A	If Locals supply property then they assure clean before transfer of title to CT Property Owner (Locals or private) Signs
Jointly funded **	Y	Y	N, therefore HM-2	Y	Y	N/A	Share cost per funding percentages. Joint Sign
Jointly funded **	Y	Y	N, therefore HM-2	Y	N	N/A	No cleanup cost N/A
Jointly funded **	Y	Y	N, therefore HM-2	N	Y	N/A	Share cost per funding percentages. Joint Sign
Jointly funded **	Y	N	N, therefore HM-2	Y	N/A	N/A	If Locals supply property then they assure clean before transfer of title to CT Property Owner (Locals or private) Signs

100% locally funded

means that no State Highway Account funds are used on the project

Flowchart for Policy AFTER meeting on 8/10/01 w/ Karla & Bill B

Funding Category	Haz Mtl Present?	Found on existing R/W?	Found on Mandate for Health Reasons?	Found before construction began?	Cleanup cost Higher because of Proj?	Who signs the manifest?

Jointly funded ** means that State Highway Account funds in addition to Measure or other sources are used on the project.

The following is a list of questions received via email from Sara West along with the Department's responses shown in Italics:

From Norm King, San Bernardino Association of Governments

1. The use of the term "100% locally funded" is confusing. Under SB 45 all projects are 100% locally funded whether local measure funds or STIP funds are used.

It is necessary to differentiate between State Highway Account (SHA) funds and those provided by developers or other local sources such as tax measures (or Local Assistance). For the purposes of this policy "local funds" are defined as funds that do not include those from the SHA. A "Definitions" section has been added to the policy to clarify this.

2. The term "pre-existing State highway right of way" is confusing. Does the policy mean that the state highway was pre-existing or that the right of way was pre-existing? In the case of Rt. 30, for instance, significant right of way was pre-existing, but there was no pre-existing highway. Does this reference apply to Rt. 30?

This term refers to right-of-way already owned by the Department on which a highway may or may not exist. The policy needs to differentiate between right of way which the State currently owns and new right of way purchased solely for the project in question.

3. The state agrees to fund remediation of HM-1 if it is identified in a pre-construction investigation. This goes part of the way toward the solution. The words, "subject to the availability of Department funds" are, however, problematic.

SHA funds must be used to pay for the clean up. These funds need to be programmed and using them may require that a previously programmed project be removed.

4. Another problem is that Caltrans would not pay for anything, even HM-1, if found during construction instead of during pre-construction investigation. It is the same waste found at a different time.

The policy has been modified such that the Department will pay for HM-1 despite when found however ever effort must be made to thoroughly identify the existence and extent of the hazardous waste prior to construction.

5. The language, "the Department will make "every reasonable effort" to encumber its share of mandated HM remediation" is not reasonable. It offers only three choices, the Department comes up with its share of costs, the project is delayed, or the local agency picks up the full tab with no reimbursement. There are plenty of mechanisms for the project to move forward with the local agency loaning the funds to the Department.

SHA funds must be used to pay for the clean up. These funds need to be programmed and using them may require that a previously programmed project be removed. The Department is exploring the logistics of borrowing funds from local agencies.

6. If HM-1 or HM-2 is found on "newly acquired right of way," the treatment or remediation will be treated as a project cost -- i.e., locals pay for it, even though, again, it is the same waste that Caltrans would otherwise remediate as a Caltrans cost.

The Department's position is that the current property owner is responsible for manifesting and remediation. The property must be conveyed to the Department clear of hazardous materials.

7. It makes no sense that the same waste discovered during rather than before construction would require locals to sign the manifest, or that a cost increase would cause the manifest signing responsibility to change. Again, it's the same waste.

The policy has been modified such that the Department will sign the manifest for HM-1 despite when found, however ever effort must be made to thoroughly identify the existence and extent of the hazardous waste prior to construction.

8. Local sponsors are highly averse to ever assuming manifest responsibility for any project within the state right of way. In fact, we do not believe any local government will sign these manifests, stopping all such work. We believe we would have difficulty finding contractors to remove the waste when the manifest will be signed by an agency that will go out of existence. The act of helping the state to pay for projects should not result in having to take permanent responsibility for the state's waste.

The policy has been modified such that the Department will sign the manifest for HM-1 and jointly sign for HM-2. Since HM-2 does not demonstrate an immediate health or safety risk, and could have been left in place but for the project, this is considered a project component and is shared jointly by the sponsors of the project.

From San Mateo County Transportation Authority (SMCTA)

9. We feel that it is appropriate for the State to encumber funds to clean the HM-1 material and take responsibility for the manifest. If the cost to remediate is increased due to the fact that the local project is started before the State completes clean up, we can understand that any "incremental" clean up costs due to the project should be the responsibility of the project. "Incremental" costs refer to the added clean-up costs that are due to the project. The base level costs of addressing the materials should remain the State's responsibility, since that liability pre-existed the project. This would also apply to "manifest responsibility." We see no justification for requiring LPA's to assume a perpetual obligation regarding material that was present on State property prior to the initiation of the local project.

The Department is encouraged that SMCTA agrees with the Department's position on incremental costs to cleanup HM-1 material. As noted in questions eight and nine, the Department has revised the policy such that the Department is responsible for manifesting HM-1 waste found before or during construction of the project.

10. HM-2 is defined in the document as “materials which said agency has allowed to remain in place if encapsulated or otherwise protected in place should the project not proceed”. It is our position that prudent project practice should be to negotiate with the overseeing agency to develop a reuse plan for the HM-2 materials. Quite often the oversight agency will allow the reuse of these types of materials on site, particularly when the use will remain as a highway. Thus, if the project sponsor works with the oversight agency to receive such exception, the project could save the cost of off-hauling the low-level contaminated material.

With regard to the material addressed in paragraph 4 that must eventually be off-hauled, it is our position that the State should take manifest responsibility for these materials. Once again, these are materials that were present on State property prior to the initiation of the local project.

The Department is not averse to reusing HM-2 waste within the project limits. However, because the disposition of HM-2 is a negotiated item and therefore a project cost it is appropriate for the manifesting responsibility to be shared.

11. We note that, with regard to costs, the existence of the project could actually reduce the expenses associated with the clean up. Since, the typical project involves excavation and hauling of materials, if a project discovers materials that need to be off-hauled, the incremental cost of addressing these materials could be lower when done in conjunction with a project than if they were addressed in a separate action. Thus we suggest that the State allow the project to continue, assume manifest responsibility and attempt to encumber funds to reimburse the local agency for the incremental costs of addressing the hazardous materials. Of course, it would be understood that the LPA would be assuming some risk, as there would be no guarantee that funds could be reimbursed.

There are many remedial options for waste cleanup in addition to excavation and disposal. In-situ or on-site remediation can be less expensive than excavation and hauling of waste. However, it can take longer and often does not match project schedules. In addition excavation and removal in conjunction with the contract may not be a cost savings if the contamination was not found prior to construction and removal must be done on an emergency basis. When not identified in the original construction contract, removal of waste must be done separately from construction to comply with Health and Safety Code Section 25914. Regulatory approval, design of remediation and contracting will be time-consuming. The necessary time may not match the highway project time-

line. The Department is assuming manifesting responsibilities for HM-1. Also see item 5.

12. The fifth (sic) paragraph of the draft Decision Document addresses HM-1 and HM-2 found on newly acquired right of way. The paragraph states that the HM will be treated and remediated as necessary as a project cost. It also States that the "Department reserves the right to recover its costs against the party delivering title." . . . The reference to the "party delivering title" is somewhat confusing as it could either refer to the LPA, who will eventually deliver the property to the Department, or to the third party grantor. The statement is appropriate if refers to the third party grantor, but not if it refers to the LPA. Disagree as need LPA to be responsible for ensuring "cleanliness" of new r/w.

This section of the policy has been rewritten to clarify the intent. As stated in question six, the Department's position is that the current property owner is responsible for manifesting and remediation. The property must be conveyed to the Department clear of hazardous materials.

13. The sixth paragraph . . . seems to imply that the State will discontinue its efforts to encumber clean up funds if the project proceeds before the clean up is scheduled to commence. We would suggest that this paragraph be re-written to state that the State will continue to attempt to encumber funds to reimburse the LPA even if a project is commenced. However, we agree that the LPA would be moving forward with the risk that such funds could not be encumbered and, therefor, the LPA might not be reimbursed.

Please see items 3 and 11.

From Robert K McCleary, Contra Costa Transportation Authority

14. *The policy was re-written and the comments shown on the text were included as appropriate.*

From Don Demers, Fresno County Transportation Authority

15. He has problems with the language "manifest responsibility".

Please see items 6 and 9.

16. The phrase "for 100% locally funded" makes the policy uncomfortable.

Please see items 1 and 8.

From Andrew Chesley, San Joaquin County Council of Governments

17. Hazardous waste removal is a legitimate project cost and should be shared between the Department and the local agency as per the agreed upon project cost sharing.

The Department agrees with this statement.

18. The State of California must accept the legal responsibilities that go with the removal of hazardous waste that any property owner would have to accept. While the local agency should bear its share of the costs, it is not responsible for taking on the responsibilities of the property owner.

Please see items 9, 10 and 12.

19. The language regarding the Department will make "every reasonable effort" to encumber its share of mandated HM remediation is not reasonable. It offers only three choices, the Department comes up with its share of costs, the project is delayed, or the local agency picks up the full tab with no reimbursement. There are plenty of mechanisms for the project to move forward with the local agency loaning the funds to the Department.

Please see item 5.

From Craig Scott, San Diego Association of Governments

20. In general, for right-of-way purchased by Caltrans, Caltrans should be fully responsible for cleaning up any hazardous waste like any other property owner. The Self-Help Counties should never have to accept long-term responsibility for hazardous waste on Caltrans right-of-way.

Please see items 6, 12 and 17.

21. The document provides that Caltrans will pay for HM-1 remediation "subject to the availability of Department funds that can be encumbered for that purpose." Who will be determining if Caltrans has the funds available or not and where would the funds come from? To what extent is it a priority call for Caltrans, or will they just be coming to the RTPA to ask for regional STIP funds to pay for the additional cost?

Please see items 3 and 5.

22. The document also specifies that, if pre-construction investigation identifies the presence of HM-1, Caltrans will accept responsibility, but if it is discovered during construction the costs would be the responsibility of the local sponsor. What is to prevent Caltrans from doing an inadequate job on the pre-construction investigation work and simply let the hazardous waste be discovered later and let the local sponsor pick up the tab?

Please see item 4.



June 5, 2001

Mr. Tony Harris
Chief Deputy Director, Caltrans
1120 N Street
Sacramento, Ca 95814

Dear Mr. Harris:

The Self-Help Counties Coalition has become aware that Caltrans has changed its policy, as delineated in cooperative agreements, regarding division of responsibility for pre-existing hazardous waste removal. We object to two new policies. The first requires that local agencies remove hazardous waste under conditions that had previously made it a state responsibility to do so. Second, we object to a policy applied to some of our members, requiring them to use their own generator numbers for the state's pre-existing waste.

Previously, Caltrans' policy was that if state and federal regulations did not require mitigation of contaminated material in its present condition within the existing state highway right-of-way, the local agency was responsible for any remedial action as a result of the project. If the state and federal regulations indicated contaminated material presented a threat to public health or the environment, regardless of the whether it is disturbed, the state was responsible for the clean up, at state expense.

The argument had been that if it presents no threat if undisturbed, Caltrans would have no remediation costs if it were not for the project.

The new policy eliminates this distinction and requires the local agency to do the cleanup whether or not the material presents a threat in the undisturbed state. This puts a clear state responsibility onto another party.

We further argue that even the previous policy was objectionable. As owner of the property, the state should always be responsible for environmental cleanup. The argument that if the waste were left undisturbed the state would have no cost overlooks the fact that the

Alameda County Transportation Authority

Contra Costa Transportation Authority

Fresno County Transportation Authority

Imperial County Dept. of Public Works

L.A. County Metro. Trans. Authority

Madera County Transportation Authority

Orange County Transportation Authority

Riverside Co. Transportation Commission

Sacramento Transportation Authority

Council of San Benito County Governments

San Bernardino Association of Governments

San Diego Association of Governments

San Francisco Co. Transportation Authority

San Joaquin Council of Governments

San Mateo County Transportation Authority

Santa Barbara Co. Association of Governments

Santa Clara Valley Transportations

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The next issue further skews the division of responsibility from the state to the local agency. We understand that some Self-Help counties are being asked to sign cooperative agreements, which not only require them to haul off the state's waste, but also requires them to use their own generator number, taking permanent ownership of that waste. We fail to see any justification for this policy change.

These cooperative agreements are now pending, therefore this issue must be settled immediately. We ask that you change these new policies. Members of the Self-Help Counties Coalition are available to meet with you and your staff on this issue. We look forward to hearing from you soon.

Sincerely,

A handwritten signature in cursive script that reads "Norman R. King". The signature is written in black ink and is positioned above the typed name.

Norman R. King
Executive Director, San Bernardino Associated Governments
Moderator, Self-Help Counties Coalition