

HB

299

Alaska State Legislature
House of Representatives

RECEIVED MAY 2 1991

INTERIM

3111 C Street
Anchorage, Alaska 99503
(907) 561-2032



SESSION

P.O. Box V
Juneau, Alaska 99811
(907) 465-2995

Representative Dave Choquette

May 2, 1991

To: Representative Cliff Davidson
Chair, Natural Resources Committee

From: Representative Dave Choquette *[Signature]*
Vice Chair, Special Committee on Oil and Gas

Re: Municipal Liability for Release of Hazardous Substances
by Another Person

The Municipality of Anchorage has brought to my attention a crucial issue that will affect summer construction projects throughout the state unless promptly resolved. It is addressed in HB299. As AS 46.03.822(a)(1) is now written, municipalities and utilities may be held liable by the mere act of discovery of hazardous substances for the cleanup of these substances generated by or from a facility or vessel owned by another person.

During the summer months the municipalities provide essential services -- from the laying or relaying of water and gas lines to the laying of telephone and television cable -- that require deep excavation. In developed areas it is almost impossible to complete this excavation without discovering contamination caused by petroleum products. When the municipality or utility discovers the contamination in the right-of-way or easement, the municipality is required to halt further construction or repair, which breaches contractual obligations the munis owe to third parties; remove the contaminated soil only within the right-of-way; again begin construction or repair; and finally seek damages against the responsible party who caused the contamination in the first place. In the meanwhile the newly replaced soil is only subject to further recontamination by the surrounding soil.

The proposed legislation would do three things. It would remove strict liability for municipalities and utilities for:

★ ★
★ ★

- a. the costs or damages that result from the release of the hazardous substance into a right of way or easement, when that release is discovered as a result of excavation by the municipality or utility;
- b. the storage of the excavated material in the easement or right of way; and
- c. the reuse or replacement of the excavated material in the easement or right of way in or near the point of excavation.

None of these provisions would apply if the municipality or utility caused the release or threatened release by their negligence, recklessness, or intentional misconduct.

If this bill were to be adopted, the municipality or utility would still be responsible for reporting all suspected discoveries of hazardous substance spills to DEC. DEC would then be able to find the responsible parties who would embark on a complete cleanup of the hazardous substance instead of only a partial cleanup within a municipal, utility, or state right-of-way.

Thank you for your attention to this matter.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

WALTER J. HICKEL, GOVERNOR

April 30, 1991

BILL NUMBER: CSHB 299 (O&G)

TITLE: Relating to municipal and utility liability for releases or threatened releases of hazardous substances.

DEPARTMENT POSITION: DEC does not oppose this bill.

ANALYSIS:

This legislation would exempt from the strict liability statutes municipalities and utilities which discover a release or possible release of hazardous substance in a state, municipal, or utility right-of-way during excavation, providing the release or threatened release was caused by the municipality's or utility's negligence, recklessness or intentional misconduct, and providing the municipality or utility reports the release or threatened release to DEC as required under current law.



John A. Sandor, Commissioner
Alaska Department of Environmental Conservation

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 299

Revision Date: _____
 Title: Municipal and utility liability for
release of hazardous substances
 Sponsor: House Oil & Gas Comm.
 Requestor: House Oil & Gas Comm.

Department Affected: DEC
 BRU: Environmental Quality
 Component: E.Q. Projects

COMPONENT SERIAL NO.

1	10	1	16
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Janice Adair
 Division: Commissioner's Office

Phone: 465-2600
 Date: 4/30/91

Approved by Commissioner: [Signature]
 Agency: Dept. of Environmental Conservation

Date: 4/30/91

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House of Representatives



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3111 C Street
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SESSION

P.O. Box V
Juneau, Alaska 99811
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Representative Dave Choquette

April 19, 1991

To: House Members of the Oil and Gas Committee

From: Representative Dave Choquette *[Signature]*

Re: Municipal Liability for Release of Hazardous Substances
by Another Person

The Municipality of Anchorage has brought to my attention a crucial issue that will affect summer construction projects throughout the state unless promptly resolved. As AS 46.03.822(a)(1) is now written, municipalities and utilities may be held liable by the mere act of discovery of hazardous substances for the cleanup of these substances generated by or from a facility or vessel owned by another person.

During the summer months the municipalities provide essential services -- from the laying or relaying of water and gas lines to the laying of telephone and television cable -- that require deep excavation. In developed areas it is almost impossible to complete this excavation without discovering contamination caused by petroleum products. When the municipality or utility discovers the contamination in the right-of-way or easement, the municipality is required to halt further construction or repair, which breaches contractual obligations the munis owe to third parties; remove the contaminated soil only within the right-of-way; again begin construction or repair; and finally seek damages against the responsible party who caused the contamination in the first place. In the meanwhile the newly replaced soil is only subject to further recontamination by the surrounding soil.

The proposed legislation would do three things. It would remove
municipal or utility liability for:



- a. the costs or damages that result from the release of the hazardous substance into a right of way or easement, when that release is discovered or occurs as a result of excavation by the municipality or utility;
- b. the storage of the excavated material in the easement or right of way; and
- c. the reuse or replacement of the excavated material in the easement or right of way in or near the point of excavation.

None of these provisions would apply if the municipality or utility caused the release or threatened release by their negligence, recklessness, or intentional misconduct.

If this bill were to be adopted, the municipality or utility would still be responsible for testing excavated soil. If it is contaminated, they will contact DEC to make them aware of the problem and go on to complete their project or needed repairs. DEC would then be able to find the responsible parties who would embark on a complete cleanup of the hazardous substance instead of only a partial cleanup within a municipal, utility, or state right-of-way.

I welcome your suggestions on this bill, and hope we can come to agreement on it so that it may be introduced by the House Special Committee on Oil and Gas.

Thank you.

Municipality of Anchorage



ENTERPRISE ACTIVITIES

P.O. BOX 198850
ANCHORAGE, ALASKA 99519-8850
(907) 343-4906

Tom Fink,
Mayor

April 16, 1991

Representative Dave Choquette
House of Representatives
P.O. Box X
Juneau, Alaska 99811

Dear Representative Choquette:

We have reviewed your draft House Bill, attached, and find it acceptable. Sec. 2. AS 46.03.822 satisfies the concerns of the Municipality of Anchorage, its utilities and the expectations of private utilities. We would expect support from all other municipalities and utilities throughout the state.

Thank you for your assistance.

Sincerely,

Will Gay
Executive Manager

Attachment

POSITION PAPER
HAZARDOUS MATERIAL CLEANUP
MUNICIPALITY OF ANCHORAGE

Municipality Liability for Release of Hazardous Substances by
Another Person

It is essential that Municipalities receive a waiver of liability for the cleanup of hazardous substances generated by or from a facility or vessel owned by another person. Construction projects, throughout the state and in Anchorage, will grind to a halt if the current statute is not amended.

Contamination by petroleum products is common in developed areas because of leaking underground fuel storage tanks (i.e., gasoline, furnace oil) and surface spills from vehicles, fuel stations, homeowners, etc. It is almost impossible to do extended deep excavation in Anchorage for laying or relaying a water or sewer main, telephone cable, electric cable or gas lines without encountering some evidence of petroleum products.

Unless the contamination was the direct result of negligence or misconduct by the utility, the utility should not be liable for cleanup of contamination, within Municipal rights-of-ways, discovered while either designing or constructing a utility project. The Municipality should report the discovery of any contamination to the Alaska Department of Environmental Conservation and then proceed on with the project.

It is imperative that construction contracts not be halted or delayed. The short Alaskan construction season does not allow time for project delays. The Municipality or utilities will also be liable for substantial damage claims from contractors for delay caused by halting work. In a large project these delay claims could cost more than cleaning up the contamination caused by others solely because Municipalities or utilities are perceived to be a deep pocket.

The provision of essential services such as roads, storm drains, water and sewer mains, gas lines, cable television, telephone cable, and electric cable will be severely delayed and the cost substantially increased if this issue is not promptly resolved. A number of projects in Anchorage and the surrounding area are on hold now because of this issue.

How

Fairbanks Municipal Utilities System

April 23, 1990

VIA FAX -

The Honorable Steve Frank
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811



Dear Senator Frank:

This letter is to request that you support House Bill 547 or have similar language added to another bill which is likely to pass. This bill provides an exemption from liability created by AS 46.03.822 to municipalities to clean up oil or other hazardous waste discovered by them in rights-of-way owned by municipalities, unless the release of the hazardous waste was caused by actions of the municipality.

Enclosed is a memo from Ron Smith, the Fairbanks Deputy City Attorney, which shows that there is currently a real risk to the City to excavate in City rights-of-way for underground utilities. We just learned that Anchorage currently has a suit pending to require them to pay for clean up of an oil spill. This oil spill was caused by a leaking tank from a gas station. Anchorage discovered and reported the oil while excavating to install a water line in a right-of-way owned by the municipality. The landowner downstream from the gas station and the utility right-of-way is suing the City using the strict liability provisions of this state statute to require Anchorage to clean up the oil from the leaking gas station's underground tanks.

While I am sure that AS 46.03.822 was never intended to be this broadly interpreted, this lawsuit shows that it can be. Even if the courts ultimately resolve this in favor of municipalities the City can expend a tremendous amount of money defending such a law suit. If a legal theory is arguable, then with their deep pockets municipalities make attractive targets to lawyers.


As you are aware the City of Fairbanks, as well as other Alaskan cities, is having serious financial trouble. Granting municipalities this exemption is something the Legislature can do to assist municipalities without costing the State any money.

Municipal Utilities System

The Honorable Steve Frank
April 23, 1990
Page Two

Again, I urge you to support this bill. If I or Ron Smith can assist in any way or answer any questions, please call me at 459-6211 or Ron Smith at 459-6340.

Sincerely,


V.M. Gillespie
Deputy City Manager-
Utilities

Enclosure: Memo of Ron Smith, April 20, 1990

xc: City Council
Public Utilities Board

City of Fairbanks

From the
City Attorney's Office

MEMORANDUM

APR 23 1990

Deputy City Mgr.
UW:mas

TO: Virgil Gillespie, Deputy City Manager - Utilities
FROM: *Ron Smith*
Ron Smith, Deputy City Attorney
SUBJECT: House Bill No. 547 - Liability of MUS for Clean-up of
Spill Discovered by MUS While Installing Underground
Utilities
DATE: April 20, 1990

Yesterday I received a call from Mr. Bill Huffman, the Assistant Enterprise Manager for Anchorage, 343-4906. He asked that the City support House Bill No. 547 and in particular request the support of Senator Steve Frank.

This Bill provides an exemption from liability created by AS 46.01.822 to municipalities to clean up oil or other hazardous waste discovered by them in right-of-ways owned by municipalities unless the release of the hazardous waste was caused by actions of the municipality.

He related that Anchorage currently has a suit pending to require them to pay for clean up of an oil spill. This oil spill was caused by a leaking tank from a gas station. Anchorage discovered and reported the oil while excavating to install a water line in a right-of-way owned by the municipality. The landowner downstream from the gas station and the Anchorage right-of-way is suing Anchorage using the strict liability provisions of this state statute to require Anchorage to clean up the oil from the leaking gas station's underground tanks.

I could not believe that the statute could be interpreted this broadly. However, it imposes strict liability on owners of "a facility, from which there is a release...of a hazardous substance." "Facility" is defined to include "a site or area at which a hazardous substance has been deposited, stored, disposed of, placed, or otherwise located (emphasis added)."

It is not absolutely clear that Anchorage is going to be liable. However, I called Cam Leonard, the Assistant Attorney General who advises DEC here in Fairbanks. He told me that there have not yet been any court decisions interpreting this statute. He also agreed with me that imposition of liability to clean up would not be fair to a utility that has done nothing wrong. However, it was his opinion that the statute was written very broadly and that it could be argued that a municipal utility could be held liable for the cost of clean up of oil discovered when excavating to install an underground utility line.

House Bill No. 547
April 20, 1990
Page Two

Therefore, I request that MUS take a strong position that there be a statutory exemption for municipalities in this case. House Bill 547 does this and it should be adopted or the language in it attached to a bill that is going to be adopted this year. Bill Huffman mentioned that House Bill 220 on LUST (Leaking Underground Storage Tanks) is likely to be adopted and concerns the same subject matter.

cc: Brian Phillips
Kaye Barthelme
John Miko
Marty Lanum
Jon Paul Stanberg



BETHEL UTILITIES CORPORATION

3380 C Street, Suite 210
Anchorage, Alaska 99503
Phone: (907) 562-2500
FAX: (907) 562-2502

May 4, 1990

The Honorable John Binkley
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

VIA FAX - 4:15 P.M.

Dear Senator Binkley:

Today, we received a call from Mr. Bill Huffman, the Assistant Enterprise Manager for the Municipality of Anchorage. He asked that we contact you regarding a development that places clean-up liability on a Utility or Municipality that discovers petroleum product, or other hazardous waste, even though such waste was not caused by them.

From time to time we are required to dig up the ground in Bethel, Alaska. According to AS 46.03.822, if in the course of performing our work we discover a petroleum waste product, we have the responsibility and liability to clean up that waste. If we caused the waste situation, such as dig up a fuel line or our equipment leaks, then it is our responsibility to clean it up. But, if we simply discover a waste situation, we should not be burdened with anything more than reporting it to the proper authorities.

It is our understanding that HB 220 on LUST (Leaking Underground Storage Tanks) and HB 367 are bills that can provide an exemption from liability created by AS 46.03.822 to utilities or municipalities to clean up hazardous waste discovered by them, unless the release of hazardous waste was caused by the actions of them.

We strongly urge you support any legislation that will limit our liability to clean up a hazardous waste discovery if we did not cause it. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "TSS Sterrett, Jr.".

Thomas S. Sterrett, Jr.
Controller

cc: Mr. Harold Borrego, Pres. of Bethel Utilities Corp.
Mr. Edward Tilbury, V.P. of Bethel Utilities Corp.
Mr. Bill Huffman, Asst. Enterprise Manager, MOA

HAZARDOUS MATERIALS IMPACT
ON
DOT/PF CENTRAL REGION PROJECTS

DRAFT

The following are typical projects which have encountered hazardous materials during design development.

1. Boniface Parkway - Tudor to Debarr
2. Sterling Highway MP79-94
3. Eagle River Highland Drive
4. Raspberry Road
5. Minnesota/International Airport Road Interchange
6. Old Seward Highway Dowling to Huffman
7. Anchor River Intersection
8. AIA Ramp Reconstruction
9. DeArmoun/Rabbit Creek Interchange

Hazardous materials can be expected on almost all major projects which are located within established developed areas.

The consequence of encountering hazardous materials during project development is dependant upon when the identification occurs. If the material is identified during design development, the associated costs and delays can be managed and to some extent controlled. If, however, the material is identified during construction when you have contract obligations, the cost and schedule impacts are more difficult to manage. It is, therefore, essential to adopt a process which assures early identification of potential hazardous materials sites and audits those sites in a systematic manner.

The range of impacts we have experienced include delays of up to several years in project delivery, added costs for material disposal and complicated right-of-way procurement requiring litigation to accomplish resolution.

Attached are outlines and checklists developed by AASHTO for use as a guide for dealing with hazardous waste during project development.

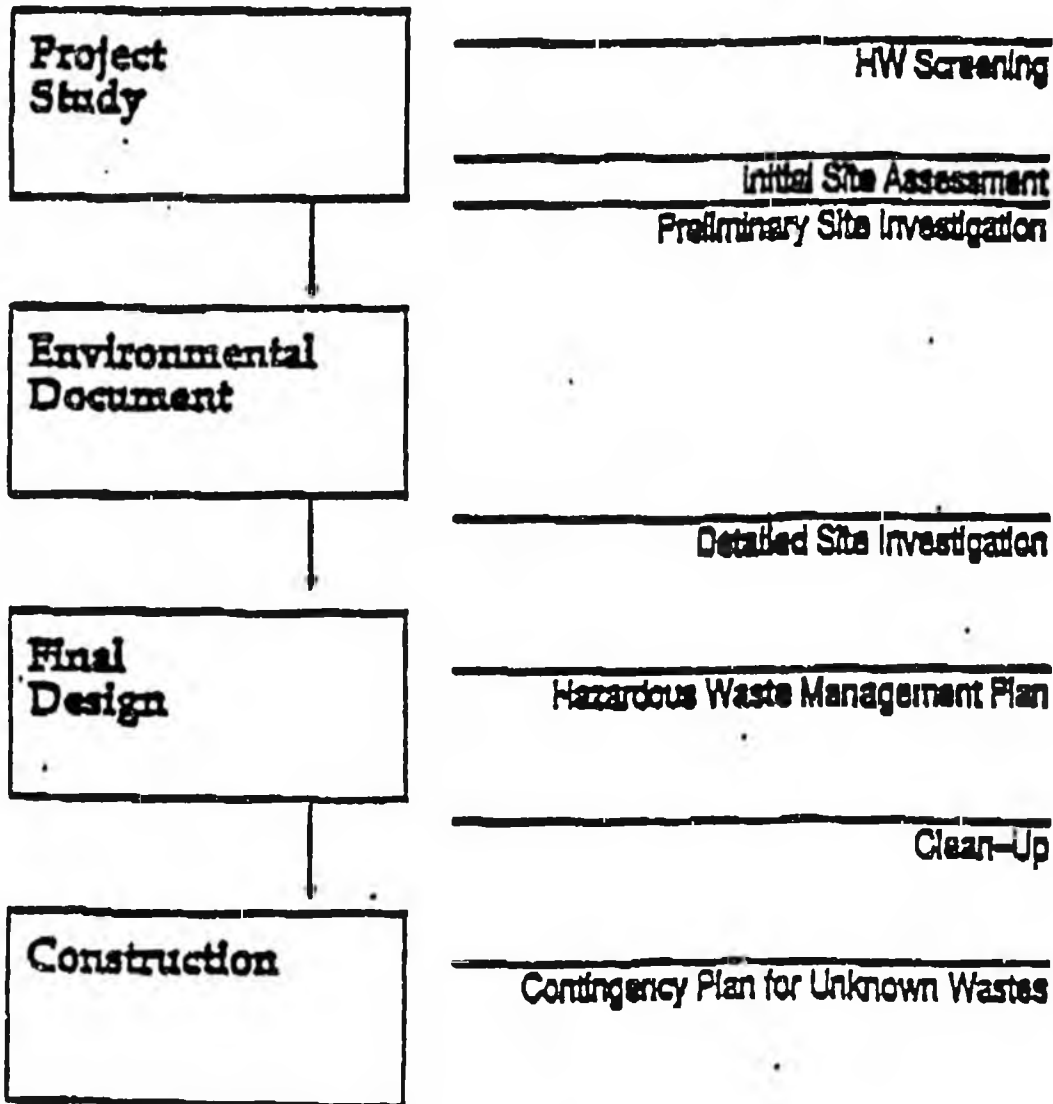
Attachments

DRAFT

M-2.2B

FIGURE 1

PROJECT DEVELOPMENT/HAZARDOUS WASTE STEPS



H-2.23
FIGURE 2

STEPS IN HAZARDOUS WASTE PROCESS

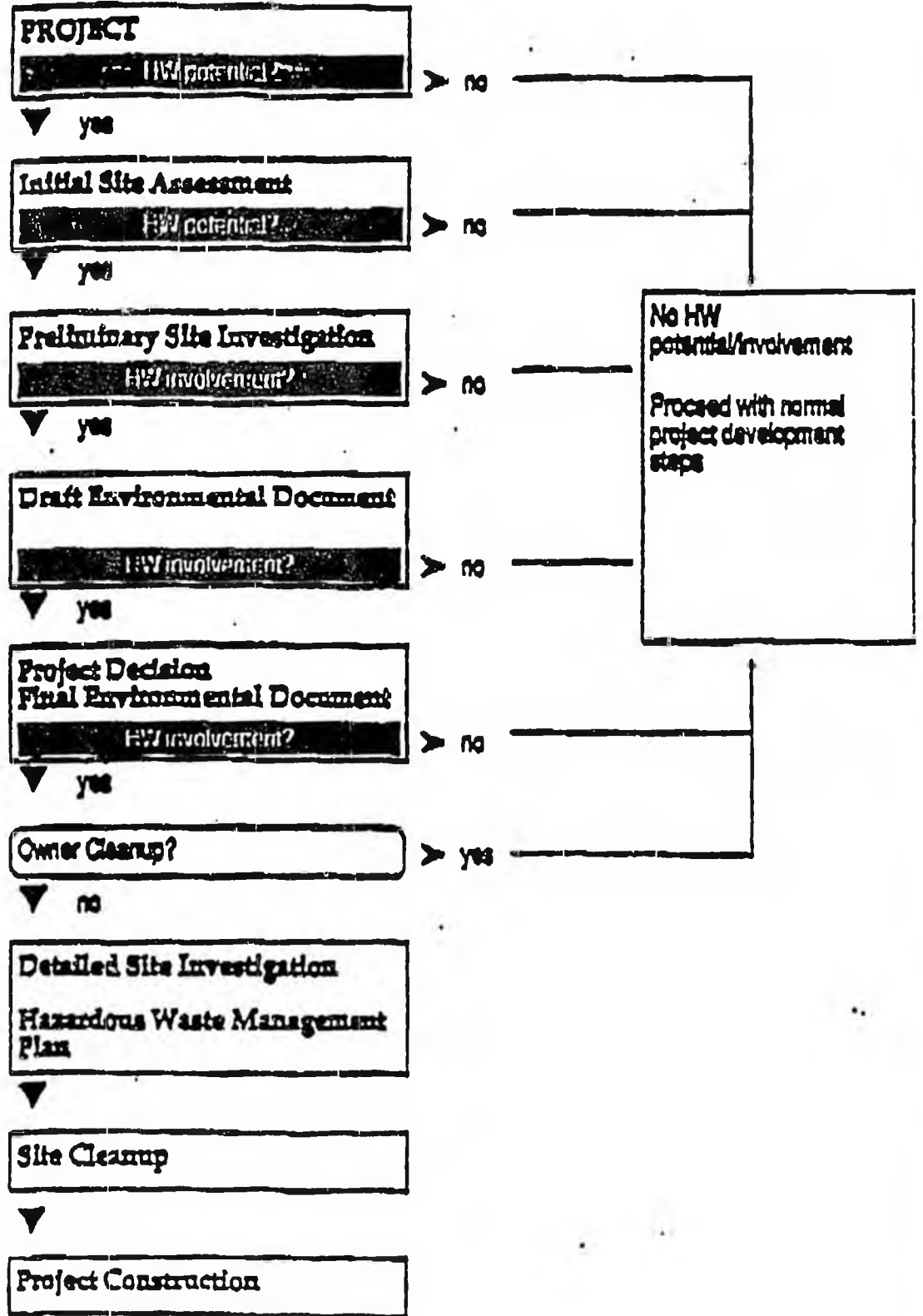


FIGURE 3

INITIAL SITE ASSESSMENT (ISA) CHECKLIST

Project information
District _____ County _____ Route _____ Postmile _____
Description _____

Does the project have potential hazardous waste involvement?

Screening Criteria

- 1. Project features: New R/W? _____ Excavation? _____ Relocate utilities? _____
2. Land Use History and Development Setting _____ (rural/urban)
Current land uses _____
Previous land uses _____
Adjacent land uses _____

(Industrial, Light Industry, Commercial, Agriculture, Housing, Other --- UST)

- 3. In-house records review _____
4. Any known hazardous waste sites in vicinity? _____ (If yes, identify & explain)

(If no HW potential determined, sign form screening information)

otherwise survey project as necessary to supplement

Optional Records

County Assessor _____ Fire Dept. _____ Sanborn Ins. _____ Other _____

(Take photos of sites or sketch on back of ISA)

Visual Inspection

date _____

Storage Structures

Contaminations

Potential asbestos-containing materials

- Underground tanks _____
Surface tanks _____
Sumps _____ Ponds _____
Drums _____ Basins _____
Transformers _____
Ladders _____
Other _____

- Surface staining _____
Oil sheen _____
Colors _____
Vegetation damage _____
Other _____

- Buildings _____
Sprayed-on fireproofing _____
Pipe wraps _____
Friable tile _____
Acoustical plaster _____

Site(s) _____

Site(s) _____

Site(s) _____

Comments _____

Conducted by: _____