

# DEAL WITH IT!

WHEN IT COMES TO POTENTIALLY HAZARDOUS MATERIALS ON A JOBSITE, THE CONSEQUENCES OF IGNORANCE ARE CERTAINLY NOT BLISS.

Federal and state law regulates hazardous waste from “cradle to grave,” with stringent storage, transportation, and disposal requirements. However, in many cases, contractors don’t know the contents of containers or drums found on their jobsites, and so don’t know whether hazardous waste laws apply. But here, ignorance isn’t bliss, and ignorance certainly doesn’t afford much legal protection, as amply demonstrated by the case of *United States v. Sims Brothers Construction, Inc.* (277 F. 3d 734 [2001]). In *Sims Brothers*, two contractor companies, as well as an officer and site manager—none of whom knew they were dealing with hazardous waste—pled guilty to criminal felony charges of illegal storage of hazardous waste. So, what went wrong?



subject to hazardous waste laws as soon as the farm owner abandoned it in the late 70s. The fact that Sims Brothers and Amtek didn’t have this information didn’t matter to the court, which found the defendants guilty of illegally storing hazardous waste.

According to the court, the defendants knew “at a minimum, that [the canisters] were potentially hazardous because they had ‘poison’ and ‘fumigant’ stamped on them.” The court faulted the companies for not notifying appropriate state and federal agencies or the owner that they had found potentially hazardous materials on the site and, further, did nothing to remove or dispose of it properly.

## THE MORAL OF THE STORY....

What can contractors do to avoid Sims Brothers’ situation? Know what the general contract—or any subcontract—requires for the discovery of hazardous or unknown conditions. Contracts should require the contractor to notify the owner of the discovery and allow the work to stop until the owner decides what to do. So, upon discovering potentially hazardous waste, you should

- ☐ Leave the material, as is,
- ☐ Immediately notify the owner in writing of the condition, and
- ☐ (If the contract allows) stop work, wait for the owner to take appropriate action.

Had Sims Brothers simply contacted Albertson’s and shifted the responsibility to the owner, the contractors might have avoided the prosecution. It appears that Albertson’s wasn’t prosecuted because the owner was never notified and given a chance to take appropriate action.

## IF YOU DO TAKE ON RESPONSIBILITY, PROTECT YOURSELF

A general contractor or site preparation contractor should think long and hard if the owner asks it to take responsibility for dealing with potentially hazardous waste. The costs of testing, transporting,

and disposing of hazardous waste can be handled appropriately through a change order. However, the substantial environmental liability that such work carries should give one pause. If the general contractor and/or site subcontractor does decide to take on the responsibility, it should immediately seek legal assistance and a qualified consultant to evaluate, and, if necessary, properly dispose of the suspicious materials. As the Sims Brothers case illustrates, three weeks to accomplish these tasks can be too long.

## TIPS FOR HIRING AN ENVIRONMENTAL CONSULTANT

The environmental consultant’s contract should require it to indemnify the general contractor and the owner for any liability arising out of the consultant’s work; beware of standard contracts with “limitation of liability” clauses. Further, get written assurances from the environmental subcontractor and/or its insurance carrier that it has coverage for the activity being performed.

In summary, contractors must be concerned with the discovery of suspicious materials at a jobsite and be familiar with how their contract addresses such conditions. They should shift the responsibility and decision-making to the owner for handling such materials. If that’s not possible and they decide to take on the responsibility, they should obtain appropriate technical and legal assistance to determine how to handle the materials and to ensure the work is carried out properly.

—By **Kristopher M. Huelsman**, a member of SZD’s Environmental Practice Group’s Environmental and Construction Law Practice Groups. SZD can help contractors to evaluate how hazardous waste laws apply to specific situations; to determine how to be in compliance; and to screen and contract with qualified environmental consultants.

## FOR MORE INFORMATION

Contact Kristopher M. Huelsman.

**Call:** (614) 462-5023

**Online:** [khuelsman@szd.com](mailto:khuelsman@szd.com)

## SETTING THE SCENE FOR TRAGEDY

For a project on a property that had just been purchased by Albertson’s grocery chain in Baton Rouge, La., Sims Brothers Construction served as the general contractor, and Amtek was a demolition and site preparation subcontractor hired by Sims. In one building to be demolished, an Amtek employee discovered two yellow, corroded canisters marked with a skull and crossbones and the word “poison” and designed to hold gas under pressure. The employee reported the canisters to Amtek’s president and to the site superintendent for Sims Brothers. The canisters were removed from the building and placed outside on the ground where they remained for about three weeks, until an Amtek employee stole them and gave them to his cousin, Edith Rome. Rome hooked up the canisters to her propane stove and later died of methyl bromide poisoning, which had leaked from the canisters.

Originally, the material had been used by a prior owner of the property as a fumigant for crops. A later owner who used the building for storage claimed no knowledge of the canisters. The court found that the material was a waste—