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## **AN ENFORCEMENT PROGRAM THAT WORKS: TOXIC AND HAZARDOUS MATERIALS MANAGEMENT IN SUFFOLK COUNTY**

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### **SUMMARY**

This is a success story, not a dry and lengthy theoretical treatise on administration and law. This is the story of how one county at the lowest governmental level succeeded in creating a powerful and effective environmental program that became the model for many communities around the U.S. and contributed to the creation of the federal program to regulate tanks. This is a summary of many of the practical lessons learned along the way.

### **1 THE PROBLEM**

Suffolk County makes up the eastern two thirds of Long Island which protrudes out into the Atlantic Ocean from New York City. The 1.3 million people of the county are totally dependant on the high quality groundwater aquifer beneath their feet which is supplied solely by the precipitation which falls on the island. The sand and gravel geology of the island contributes to the easy contamination of the groundwater resource by the normal activities of the population. This is particularly a problem since many areas are not served by municipal sewers, relying instead on individual septic systems.

Many years ago in the early 1970's, while trying to bring industrial point-source discharges under control, it became increasingly obvious that there was an additional serious pollution problem related to the storage and handling of toxic and hazardous materials that would have to be addressed. Flammable vapors were starting to appear in basements and manholes from leaking fuel tanks. Up to that time, chemicals, solvents and fuels were stored almost exclusively in plain steel tanks with no effective protection against corrosion. Leaks were not considered to be of any great concern since no one realized that groundwater was at risk. The technology to analyze for organic contaminants was unavailable until the late 1970's and therefore, the true extent of the problem was not fully understood until after that time.

When efforts were initiated to try and address the subject, it soon became evident that there were no comprehensive laws anywhere in the country dealing with the problem of storing and handling toxic and hazardous materials except for some fire regulations. A search in Europe disclosed that several countries had been wrestling with the problem for several years. However, it was difficult to obtain accurate and current information on regulations since there were at that time no international organizations concentrating on environmental matters. There were no systems in place for easy exchange of information. It quickly became obvious that this was a new area of law that had never been considered in the United States. Innovation would be necessary if a successful local law was to be created to address the problem.

## **2 DEVELOPING A NEW LAW**

The application of common sense led to the development of several basic principles that guided the creation of the new law. It was decided that all storage facilities should be constructed of non-corrodible materials using the concept of secondary containment. This came after the realization that there is no other simple and near foolproof method of both containing and detecting a leak from a primary container with no release to the environment.

It was also decided that the definitions for toxic or hazardous materials and for storage facilities should be written as broadly as possible to include all types of materials that could contaminate the groundwater and all types of facilities that could leak. This was to hopefully avoid the need for more law on the subject at a later time. It seems to be a common if not universal error that laws are written in a piecemeal fashion leaving enforcers with the problem of trying to deal with several different laws covering one subject. Much legal effort is wasted thereafter defining which category a particular problem falls into. The county law, therefore, as it was finally passed in 1979, covered all types of tanks, piping systems, transfer facilities and portable containers such as drums. The regulated materials included raw materials as well as wastes and even bulk materials such as road salt that could leach into groundwater if exposed to precipitation.

A third principle was that all existing facilities would have to come into compliance with the new standards. There would be no categories of facilities exempted or exceptions made for individuals. The only variation from this rule was the exemption granted for small heating oil tanks from the removal and replacement requirement. All others were given ten years to come into compliance. When the job was considered finished by about 1992, more than 15,000 tanks had been replaced in Suffolk County. This is the only area in the country known to have actually completed such a comprehensive program.

## **3 LESSONS LEARNED IN CREATING NEW LAW**

There were three useful lessons learned in the process of creating this new law. The first is that help should be sought from the affected parties in drafting legislation. They should be given the opportunity to present ideas before the original draft is written. They should then be encouraged to comment on subsequent drafts as they are developed. By answering all questions and complaints and incorporating as many as possible of the suggestions from the affected public, most opposition to a new law will melt away.

Next, the limits of the law should be clearly defined in all respects to minimize argument over where it does and does not apply. Similarly, each required action should be concisely stated so there is no doubt about what constitutes a violation.

Finally, every effort should be made to write the law in a way that minimizes the need for exceptions or exemptions to what is written. Any variation from a uniformly applied statement of law immediately leads to complications in definition, application and enforcement.

## **4 ENFORCEMENT**

Once the new law was passed and took effect, attention turned to the creation of an efficient and effective enforcement program. The goal was to achieve 100% county-wide compliance. Conscientious business people would have to spend significant amounts of money to bring their storage facilities into compliance with the law. It would be unfair to them for their competitors not to be required to make the same improvements. New construction had to be

in conformance with the double-walled standards, but existing facilities had ten years to comply as long as periodic tightness testing proved the tanks leak-free. The first step in the enforcement process was to create a tank registration system and computerized data base to locate, track and manage all tanks in the county. A computerized system is essential for an effective enforcement program. Total compliance requires that every tank be located and brought under control. This can only be accomplished with flawless tracking of thousands of items.

Any similar enforcement program must have society-wide compliance as the ultimate goal. This can only be achieved by voluntary action by the general public. People must believe that the required action is necessary for the general good and be willing to conform without the use of regulatory force. Therefore, there must be a way to educate and inform the affected public about what is required of them in fair time for them to react before they become violators. In the case of the tank law, the key was to get all tanks registered and into the data base. From then on owners could be notified by mail of requirements or due dates. Ideally every affected individual must be reached and informed in a documentable manner. Then when enforcement time comes they cannot use lack of knowledge as a defense.

All available forms of support and encouragement should be provided by the regulating agency to assist the public during the compliance period in an attempt to absolutely minimize the number of individuals that become violators. An essential key to a successful enforcement program is to keep the number of cases to a minimum. Any enforcement program, to be effective, must be able to deal with offenders in an efficient and timely manner. This cannot be done if the system is swamped with too many cases. Therefore, voluntary compliance by nearly all of the regulated community is essential.

Another requirement of effective enforcement is that the vast bulk of all enforcement activity must be handled at the lowest possible regulatory level in the simplest possible way. In most cases this means a multi-layered administrative system, managed by local authority in a routine dependable manner. For such a system to work, however, it must be backed up by a criminal enforcement program that is organized to swiftly investigate and prosecute any willful violation of the law using all the resources of the criminal system. Environmental crimes should be treated just as seriously as other crimes. If the administrative system is working smoothly and handling most of the work, the number of criminal cases will be kept to a manageable minimum. But, people will only be convinced to yield to and cooperate with the administrative enforcement process if they are convinced that the "heavy stick" of criminal enforcement is readily available to wield against willful violators.

In Suffolk County, the administrative enforcement of the hazardous materials law is handled by the Health Department. The criminal aspect is the responsibility of the Environmental Crimes Unit of the District Attorney's office. Whenever a willful intent to violate is discovered or suspected, the case is referred to the Environmental Crimes Unit and from then on they have the lead and the Health Department acts in a support role providing technical services.

## **5 THE ADMINISTRATIVE ENFORCEMENT SYSTEM**

The administrative enforcement program of the Health Department comprises several layers. The first and lowest level involves the use of a simple field violation notice. This is in many respects similar to a traffic ticket except that it is mailed to the responsible party instead of being handed out at the scene of the violation. Passing out environmental violation tickets in the field was found to be a problem. It was hard to get them reliably into the hands of the responsible party of record. Many facilities have absentee owners who cannot be reached at the site.

The mailed ticket is used for simple, unequivocal violations that are easily identified and easily corrected. The respondent can admit the violation, pay the fine by mail, correct the offense before the next inspection and go on about his business with a minimum of inconvenience. This system takes care of the majority of the routine, minor offenses and the public willingly responds with very few objections.

The second layer of enforcement is also handled through the mail but is just a little more complex. It consists of the use of consent orders sent out by mail. This program developed when the Health Department was faced with the problem of how to manage the cases of about two thousand facilities that suddenly were in violation the day the compliance period ran out for replacing underground tanks. They had to be handled quickly and simultaneously making the normal hearing process impossible. Since the violations were all similar, a standard consent order was developed that could be signed and returned like a ticket. It provided a fine for each tank for missing the compliance date and one year without a further penalty to allow the facility to come into compliance. Any tank still not meeting the standards after the expiration of the extra year would be fined on a daily basis until compliance was achieved.

The enforcement problem was solved and most people complied within the year, but there was a group that did not and began, therefore, to accumulate a daily fine. It was necessary to keep these people informed to prevent anyone from inadvertently accumulating an insurmountably large fine. To do this, a system was devised to use the computer to generate monthly statements, like utility bills, to remind each respondent regularly that the fine was growing rapidly and could only be stopped by correcting the violation. The system worked perfectly. People began paying the fines on a monthly basis and quickly replaced their tanks. Though the tanks are now all replaced, the method of using consent orders by mail has been retained as a permanent and very effective enforcement tool.

The third level of enforcement is the compliance conference. A violator with a problem more complex than that which can be solved with a standard consent order, may be called in for a compliance conference. At the conference, a consent order will be developed that fits the particular situation.

If voluntary compliance is not possible, then the fourth level of enforcement is used and the respondent is ordered to attend a formal administrative hearing. This is similar in many respects to a court proceeding but it is held by the Health Department. It results in the issuance of a Commissioner's Order which does not require the consent of the respondent. Not obeying such an order is a criminal offense and would result in the case being referred to the court.

## **6 CRIMINAL ENFORCEMENT**

The last level of enforcement, as previously mentioned, is criminal prosecution through the District Attorney's Office and the Environmental Crimes Unit. It is the knowledge of the availability and ready use of the services of this unit that makes the rest of the system work effectively.

## **7 INNOVATIVE SOLUTIONS AND NEW LEGISLATION**

At the end of the tank replacement program there were still a few tank owners who simply ignored all efforts to bring them into compliance. They could have been referred for criminal action but that is a cumbersome and expensive enforcement task. It was decided to try something more direct first. The violators were all gasoline station owners who had refused

to replace their tanks. It was decided the most effective way of getting their attention was to put them temporarily out of business. To do this through the courts again was a lengthy process, however, the Health Department had another tool to use.

As with most Health codes, the Suffolk County Sanitary Code grants embargo powers to the Health Department to correct health threatening situations. It was decided to use this power to embargo the offending tanks to prevent their use. A crew was sent to each station with a truck of concrete. The fill ports of all the tanks were sealed over with concrete. An embargo notice was embedded in the surface of the wet cement stating that it was against the law to unseal the tanks. The stations were allowed to continue to sell gas until the tanks were empty but they could not be refilled. Within days all the owners had signed consent orders and begun the process of replacing their tanks.

The lesson learned by this experience was that ingenuity and boldness can often solve an enforcement problem without the need for complicated procedures or new legislation. Innovation and creative thought should be applied. Often there is a simple and direct solution available if regulators are willing to look beyond the traditional or well-used approach.

At times, however, this is not enough and new legislation is necessary. As with the county tank law, if higher level law does not exist to accomplish the task at hand it may be necessary to take the initiative and pass local law tailored to fit the situation. Local law often is the best solution because it provides local power to control conditions in the manner most acceptable to the affected citizens. It is less frustrating because the persuasive power lies close to the regulated population and there is no one else to blame.

## **8 LESSONS LEARNED ABOUT ENFORCEMENT**

Through the years of development of the tank law several principles of good practice came to light. First, it became clear that to be effective, enforcement must be applied absolutely uniformly. Everyone should be treated the same with no exceptions made and no favors granted. This sounds obvious but in fact is very hard to hold to in practice. The effort produces a rapid return, however, because the public learns very quickly whether or not to trust the system to be fair. With most people, their willingness to comply depends mostly on their perception of how fairly they are being treated.

Another point of success deals with the same concept of fairness. When compliance deadlines are created in the law, it is the obligation of the enforcement system to see to it that they are kept. Extension of a deadline is not an acceptable means of relief for an overburdened or unprepared enforcement program. When law-abiding citizens have spent money to bring their businesses into compliance within the deadline, an unfair advantage is given to their competitors who have not complied if the deadline is extended without a penalty.

Finally, high quality cannot be achieved in compliance work without thorough review and regulatory approval beforehand of plans and reports to insure conformance with standards and requirements. Likewise, high quality field work; whether it is construction, investigation, remediation or demolition; cannot be achieved without high quality inspection to ensure that regulations, standards, plans and legal agreements are being adhered to. The success of any enforcement program depends on the quality of the inspectors in the field more than anything else.

In order to complete the task of upgrading and replacing all the tanks and storage facilities in the county in a timely manner, it was decided to divert personnel from other programs temporarily, thus suspending progress on most other projects. An intense concentration of effort

was necessary to drive the project through to completion and prevent it from dragging out interminably. This too, became a lesson learned, that to complete a difficult task it is sometimes necessary to concentrate available resources at the expense of other work until the job is done.

## **9 CONCLUSION**

The toxic and hazardous materials management program of Suffolk County has proven itself to be an outstanding success. The law it was based on was used as a guide in developing the New York State Petroleum Bulk Storage Code and was studied by the team developing the federal underground tank regulations. Many communities across the nation have referred to the law in creating their own local codes. It survived all legal challenges and proved to be sufficient to support and enforce the program that accomplished the replacement of all the tanks in Suffolk County. It demonstrated the power, effectiveness and versatility of local law.