

Rachel's Environment & Health News

#288 - What We Must Do -- Part 17: New Tools For Citizens: 'Bad Boy' Laws

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We reported last week that a huge hazardous waste incinerator--the largest in the world--is being built nestled among homes and schools on the edge of the Ohio River in East Liverpool, Ohio. The owner of the furnace is an elusive company called WTI. The owner of the land is a public agency, the Columbiana County Port Authority. WTI applied for, and received, an incineration permit from the federal EPA [U.S. Environmental Protection Agency]; issuance of the permit to WTI violated EPA's own rules, which require both the owner of the furnace AND THE OWNER OF THE LAND to apply jointly for a permit. When local activists pointed out this violation to EPA, the agency promptly placed the name of the landowner (the Port Authority) on the permit even though the landowner has never applied to become a party to the permit. EPA has no legal authority to issue an incinerator permit to someone who does not APPLY for a permit and the Port Authority definitely has not applied. In fact the Authority has appealed EPA's action, aggressively trying to stay off the permit.

If the Port Authority is enthusiastic about the WTI incinerator, why does the Authority not want its name on the permit? Hugh Kaufman, an EPA official who has investigated the WTI matter in detail, says he believes it may be because Ohio has a "bad boy law" on the books which requires a background check on anyone seeking a permit to handle wastes in Ohio. (See Ohio Revised Code, Section 3734.44.)

The history of Ohio's bad boy law is typical. In many locations around the U.S., the waste industry is mob controlled. In other locations, the industry is peppered with people who are crooked, incompetent and unreliable, or who lack expertise. To keep such people out of the waste business, the Ohio legislature in 1988 passed a bad boy law requiring a background check on anyone seeking a permit to handle waste in Ohio. The law lists 21 kinds of criminal offenses; anyone convicted of any of the 21 offenses can be denied a waste-handling permit. Furthermore, indications of unreliability, incompetence, or lack of expertise in the waste business are grounds for permit-denial under the law. It is conceivable that the Columbiana County Port Authority, after a background check, might be denied the right to hold an incineration permit in Ohio.

Ohio's bad boy law reportedly prevented Chemical Waste Management (Chem Waste), the largest U.S. hazardous waste hauler, from purchasing the WTI incinerator three years ago. We have documents signed by officials of Ohio state government, and the federal government, indicating that Chem Waste came very close to purchasing WTI in the spring of 1989. Government officials, who asked not to be identified, said Chem Waste backed out of the deal because of Ohio's bad boy law. Citizens were thus spared a fight with a company known for its wily, no-holds-barred style.

These events demonstrate the power of a bad boy law. In many locations around the U.S., such laws are being used by grass-roots activists to punish crooks, to protect the local environment, to build bridges between environmentalists and "good government" advocates, and to strengthen local democracy. Bad boy laws work.

A bad boy law is any ordinance that says companies or individuals convicted of certain crimes cannot get public contracts or licenses to do business in your town (or your county, or your state; there is even a federal bad boy law, described below).

Bad boy laws are being used successfully at the local level to keep convicted criminals from getting contracts to haul garbage. Sometimes this can cut the heart out of a landfill or incinerator proposal.

For example citizens of Palmer, Massachusetts passed a law saying no person or business entity could be awarded a contract or subcontract by the Town of Palmer if that person or business entity:

(a) had been convicted of bribing a public official of Palmer or "any other public entity" in the U.S.

(b) had been convicted of agreement or collusion in restraint of freedom of competition, or of agreement to fix prices; or

(c) had pleaded guilty to these crimes or had pleaded NOLO CONTENDERE [meaning a plea of "no contest," in which a person says, in effect, "I am not admitting guilt but I do not dispute the charges against me."]

The Palmer law contains language that prevents a business entity from doing business with Palmer if any of its affiliated companies are guilty of the prohibited conduct. In the Palmer law, companies are considered to be affiliated if one controls the other, if they share management or board of directors, or if one owns, or partially owns, the other.

The Palmer story reveals the many benefits of a campaign to pass a local bad boy law. Waste Management, Inc., wanted to build a regional landfill in Palmer. A local citizen's group, the Ware River Preservation Society (WRPS) proposed the bad boy law. WRPS leader Elizabeth Hancock says proposing the law generated good publicity for her group, and brought new members, donations, and better attendance at meetings.

Three local decision-makers opposed the law but that put them in the position of having to explain why they favored doing business with convicted criminals. Discussions surrounding the proposal brought out the dark side of Waste Management's history--a corporate record so outstanding that Greenpeace in late 1991 published the 285-page third edition of WASTE MANAGEMENT, INC.: AN ENCYCLOPEDIA OF ENVIRONMENTAL CRIMES & OTHER MISDEEDS.[1] After the Palmer bad boy law was proposed, newspapers felt more secure discussing the seamier side of Waste Management's history.

Waste Management mounted a campaign attacking the proposed law. They hired a prominent local attorney and took out full-page newspaper ads denouncing the proposal. They extolled the virtues of their recycling programs, even though they were aiming to establish a large dump. But in the end, the ordinance passed. If Waste Management and its hundreds of subsidiaries can keep their noses clean for three years (something they have never done before), then they will become eligible to do business with the Town of Palmer.

There are four key points to consider when drafting your own local bad boy ordinance.

1. Mandatory action for defined violations; for example, the Minnesota Department of Transportation has regulations saying "a business MUST BE DEBARRED when one or more of the grounds set forth [in a different section of the regulations] are established at a hearing or opportunity for hearing..."

Debarment means disqualifying someone from receiving a contract with a public agency, or from serving as a subcontractor under such a contract.

The federal government has debarment regulations (see FEDERAL REGISTER Vol. 52, May 29, 1987, pgs. 20363-20369) which basically give government officials the right to debar people and companies that have been convicted of "any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant." The regulations then list various contract crimes.

Contract crimes generally include violations of state or federal antitrust laws, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or other criminal offense in connection with

obtaining, attempting to obtain, or performing a public or private contract or subcontract.

The federal regulations give government officials some leeway in debarring convicted criminals. We favor giving government officials less discretion, since history shows that they tend to wink at contract crimes.

2) It is important that your ordinance require debarment of one business entity for crimes committed by all affiliated business entities. Otherwise, criminals will simply set up create new organizations when existing ones are convicted of crimes.

3) Your bad boy law should punish crimes during the recent past (3 to 7 years) not the distant past, to make the law more defensible and easier to enact.

4) At a minimum, your bad boy law should hold criminals responsible for "no contest" pleas as well as "guilty" pleas and convictions. It is even possible to write a law that debars companies and individuals when there is evidence of a crime, even if no one has been indicted or convicted.[2]

Bad boy laws can be used for debarment, but they can also be used to deny permits to companies trying to operate incinerators, landfills and transfer stations. The Ohio law, mentioned above, works this way. The federal Surface Mining and Control Act of 1977 [Section 510(c)] contains some of the strongest language:

WHERE... INFORMATION AVAILABLE TO THE REGULATORY AUTHORITY INDICATES THAT ANY SURFACE COAL MINING OPERATION OWNED OR CONTROLLED BY THE APPLICANT IS CURRENTLY IN VIOLATION OF THIS ACT THE PERMIT SHALL NOT BE ISSUED UNTIL THE APPLICANT SUBMITS PROOF THAT SUCH VIOLATION HAS BEEN CORRECTED OR IS IN THE PROCESS OF BEING CORRECTED... AND NO PERMIT SHALL BE ISSUED TO AN APPLICANT AFTER A FINDING BY THE REGULATORY AUTHORITY... THAT THE APPLICANT, OR THE OPERATED SPECIFIED IN THE APPLICATION, CONTROLS OR HAS CONTROLLED MINING OPERATIONS WITH A DEMONSTRATED PATTERN OF WILLFUL VIOLATIONS OF THE ACT

In New Jersey last year a company called National Waste Disposal was permanently barred from the waste business; in this instance the concept of the bad boy law bled over into a related concept--taking away a convicted felon's right to do business at all, effectively canceling a company's corporate charter. [See RHWN #259.] We will write more about this tactic in future

The Citizens Clearinghouse for Hazardous Waste (CCHW) in Falls Church, Virginia, has been leading the campaign to help local groups pass (or enforce existing) bad boy laws.[2] For an excellent "fact pack" on bad boy laws for \$3.50, contact them at (703) 237-2249.

--Peter Montague

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[1] Charlie Cray and others, WASTE MANAGEMENT, INC.: AN ENCYCLOPEDIA OF ENVIRONMENTAL CRIMES AND OTHER MISDEEDS (Washington, D.C.: Greenpeace, December, 1991.) \$20.00 for citizen groups, \$50.00 for for-profit companies, from: Greenpeace, 1436 U St., NW, Washington, DC 20009; phone (202) [462-1177.]462-1177.

[2] Ron Simon, "Legal Corner," EVERYONE'S BACKYARD (June, [1990],) pg. 6. EVERYONE'S BACKYARD is published by

Citizens' Clearinghouse for Hazardous Waste (CCHW), P.O. Box 6806, Falls Church, VA 22040; telephone (703) 237-2249.

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