

UNDERGROUND STORAGE TANKS

Over the last twenty years, the fate of aging, unwanted or compromised underground oil storage tanks (“USTs”) has become the subject of increasing scrutiny and concern for participants in real estate transactions on Long Island. A home buyer on Long Island, as a matter of standard due diligence, will look for the presence of USTs, and frequently request their removal or abandonment before committing to the purchase of the property. This is a sensible demand. Many underground storage tanks have been in place for 35 to 50 years, and if not already leaking are in danger of doing so. Such leaks can cause serious environmental damage, especially on Long Island where, uniquely, the drinking water is supplied by an underground aquifer.

Addressed below are the various problems encountered by buyers, sellers, and brokers in the Long Island real estate market with regard to underground oil storage tanks. The statutes and laws governing this environmental issue are described, and essential information for managing the abandonment or removal of these is provided.

A. STORAGE TANKS - GENERALLY

An UST is any fuel storage tank with at least 10% of its storage capacity below ground elevation. *40 Code of Federal Regulations 280*. These tanks may store fuel oil, gasoline, kerosene, diesel or waste oil. Overwhelmingly, residential tanks on Long Island contain fuel oil. Most of the older tanks are built primarily of steel. As such, USTs are susceptible to a number of

corroding factors: internal erosion due to age, water having seeped into the tank and corrosive surrounding soil, to name a few. Once the tank reaches a certain age, it is both financially and environmentally responsible to be proactive about its removal or abandonment

On Long Island, aging USTs are of particular concern given the sheer number of tanks found in the area and the sensitivity of the Long Island ecosystems and water supply. According to the Department of Environmental Conservation, there are approximately 70,000 tanks on Long Island, with 40,000 in Nassau and 30,000 in Suffolk County. The majority of tanks in these counties were installed years ago and are coming to the end of their functional life span.

B. HISTORY

The abundance of old tanks is largely the result of a residential building boom that took place following World War II. Faced with the need to maximize oil storage capacities, builders understandably opted to install underground tanks. These tanks enabled homeowners to buy fuel in bulk, lowering costs. The ability to buy oil when prices were lower (such as in the summer) and store it for future use, was an important economic component in the development of Long Island, the nation's first conventional suburb. Furthermore, this underground storage allowed for more living space and avoided fire hazards that could arise should the storage unit be aboveground.

C. STATUTES

In New York State, the storage of petroleum and hazardous chemicals must meet minimum standards set by the Environmental Protection Agency and the Department of Environmental Conservation. *40 Code of Federal Rules 280; 6 NYCRR Parts 612-614*. While most home heating oil tanks are not regulated by the State - being that they are not over 1100 gallons in capacity - certain delegated counties have regulations that do apply. Nassau and Suffolk Counties are such delegated counties. In Nassau County, the Department of Health regulates. *Article XI Nassau County Health Ordinance*. In Suffolk County, the governing body is the Department of Health Service. *Suffolk County Sanitary Code Article 12*. . However, neither of these bodies mandates residential tanks under 1100 gallon capacity to be registered by the homeowner unless a leak is discovered or it is to be abandoned or removed.

If, however, the tank has a capacity of 1100 gallons or greater, Suffolk County requires the storage facility to be registered. According to Suffolk County Health Services, many of these large tanks were replaced in the 1990s by single or double-walled non-corrodible tanks, and, therefore, do not require testing. *Suffolk County Sanitary Code Article 12*. However, those that were not replaced must be tested. The Suffolk County Sanitary Code requires that initial testing occur on or before the tenth anniversary of its installation, and then once every five years thereafter. *Id.*

In Nassau County, a tank holding a capacity of 1100 gallons or more must also be registered and follow a leak testing schedule. *Article XI Nassau County Health Ordinance*. Corrodible tanks that were installed prior to August 1, 1966 must be tested annually. *Id.* The County further mandates that non-corrodible tanks of this size must be tested for structural

soundness every 5 years. *Id.*

Whether one must register their tank is a primary issue. Most residential tanks are less than 1100 gallons and do not require registration. However, a further conflict may also arise as to removal or abandonment when a homeowner wishes to sell their home. Commonly, the home buyer in a real estate transaction either wants the tank abandoned before sale, or wants the tank tested for leakage. The seller, on the other hand, is usually unwilling to disturb the status quo. It must be noted that any tank treatment company is legally obligated to report evidence of a leak within 2 hours of detection. *6 NYCRR Section 613.8*. In fact, any person with knowledge of a leak must report within 2 hours and failure to report a spill can subject a person to legal penalties under the Environmental Conservation Law. *New York Environmental Conservation Law, Sections 71-1929, 71-1983*. This requirement creates a burdensome disincentive with regard to the seller's willingness to undergo tank testing. Often, in an effort to resolve this conflict, the seller will either credit the purchaser for the cost of abandonment/removal or hire a certified tank servicing company to do it at the seller's expense.

In certain cases, a previous homeowner may be held liable for leaks that occurred prior to sale. Federal Navigation Law provides, "any person who has discharged petroleum shall be strictly liable for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained..." *Navigation Law Section 181 (2007)*. This rule would come to bear in a situation where the previous homeowner abandoned the tank and the new homeowner finds contamination in the soil surrounding the buried tank. In such a case, the buyer would be found to have been a "discharger" under the law, and would be responsible for the costs of clean-up.

However, although initially responsible, the new homeowner is not precluded from seeking indemnification from the previous homeowner. Subsequently, the seller could be held liable for all clean -up costs. Whether the leak is found before or after sale is thus irrelevant. In either case, the previous homeowner could be accountable for the damage done. Considering this scenario, it seems prudent to abandon the tank before entering into a property sales contract.

When the tank in question is not leaking and is of 1100 gallon capacity or less, the abandonment or removal is quite a simple process. In Nassau County, this process requires:

NASSAU COUNTY:

<p>Tank Abandonment Requirements (See Article XI-Nassau County Public Health Ordinance - Small Petroleum Tank Enforcement Policy)</p>	<ol style="list-style-type: none"> 1. Notify the Nassau County Public Health Ordinance in writing at least seven days prior to abandonment. 2. Upon notifying the town, submit the "Bureau of Environmental Protection Affirmation of Non-Leaking Tank" (see attached form), attesting that, to the best of the owner's knowledge, the tank is not leaking. 3. Pay the \$35.00 fee for the recording and/or witnessing of the abandonment of every 1,100 gallon or less tank. 4. The tank and all ancillary piping and lines must be emptied of all fuel. 5. The vent, direct and remote fill lines must be cut or removed to a point below grade. These lines must be permanently capped or filled with an approved inert material (oftentimes sand or foam are used). 6. The tank must be completely filled with an approved inert material.
<p>Tank Removal Requirements (See same Ordinance as Above)</p>	<ol style="list-style-type: none"> 1. Follow the same steps as above. However, the fee due upon submission of the Non-Leaking Tank Affirmation is \$65.00 for removal. 2. Then, once the tank is properly emptied and filled, the licensed service company completing the job will dispose of it in accordance with the County regulations.

Some Tank Service Providers in Nassau County:

Harbor Environmental Corporation
P.O. Box 467

Locust Valley, NY
(516) 609-9800

Action Remediation Corp.
3010 Burns Avenue
Wantagh, NY
(516) 781-3000

In Suffolk County, the abandonment and/or removal of a tank in place with 1100 gallon capacity or less does not require a report to be made to the County, although the Department of Health Services does prefer to be informed of the abandonment of a tank of any size. In any case, the abandonment must comply with standards set forth by the County:

SUFFOLK COUNTY:

Tank Abandonment Requirements	<ol style="list-style-type: none">1. The tank must be cleaned out very thoroughly.2. All liquids and solids in the tank must be removed by an authorized waste hauler.3. Once the tank is emptied, it must be filled with an inert material, sand or foam being the preferred media.4. If the tank is in a flood zone, sand or cement must be used to ensure that the tank does not drift or float.5. The servicing company will provide a certificate of abandonment to the owner of the home.
Tank Removal Requirements	<ol style="list-style-type: none">1. Hire a certified tank removal company.2. Obtain from the company a certificate attesting that the tank was removed and that no contamination was found.

Some Tank Service Providers in Suffolk County:
(Not a recommendation; for informational purposes only)

Windmill Oil Tank Services
80-14 Lake Avenue
Nesconset, NY 11767
(631) 360-6664; (631) 360-8901

Fenley & Nicol Environmental

445 Brook Avenue
 Deer Park, NY
 (631) 586-4900

A Helpful Resource for Both Counties:

Oil Heat Comfort Corp.
 200 Parkway Drive South, Suite 202
 Hauppauge, NY 11788
 (631) 360-0200

According to Lee at Windmill Oil Tank Services in Nesconset, this whole process should cost between \$700 and \$2,500. Kevin Rooney, at Oil Heat Comfort Corporation stated that, depending on the size of the job, it could cost up to \$4,500 to abandon a tank in place and replace it. This must be performed by a state/county certified oil tank servicing company.

The following table compares Nassau and Suffolk Counties' general requirements as they relate to USTs.

NASSAU COUNTY

SUFFOLK COUNTY

	1100 Gals. or Less	More Than 1100 Gals.		1100 Gals. or Less	More Than 1100 Gals.
Registration Required	No	Yes	Registration Required	No	Yes
Testing Required	No	Yes	Testing Required	No	Yes
Test Schedule	NONE	Annually for corrodible tanks installed <i>before</i> 8/1/66. Every 5 years for non- corrodible tanks.	Test Schedule	NONE	On 10 th anniversary of installation, and every 5 years thereafter.

NEW TANK STANDARD			NEW TANK STANDARD		
New Under-ground Tanks	Single-Walled non-corrodible	Double-Walled or equivalent	New Under-ground Tanks	Single-Walled non-corrodible	Double-Walled or equivalent
Abandonment Allowed	Yes, with an affidavit that tank is not leaking.	Yes, with tightness test within past 90 days, or monitoring well for one year.	Abandonment Allowed	YES	Yes, with a waiver from the County.
Removal or Abandonment Deadline	NONE	All tanks installed prior to 8/1/86 have now been replaced.	Removal or Abandonment Deadline	NONE	None for tank used for on-site space heating.

Helpful Telephone Numbers:

Nassau County Health Department: (516) 571-3410

Suffolk County Department of Health Services: (631) 854-2529

New York State Department of Environmental Conservation: (518) 402-9543
(General Tank Information Help Line)

New York State Department of Environmental Conservation: 1-800-457-7362
(Spills Hotline)

New York State Department of Environmental Conservation: (631) 444-0204
(Regional Office Suffolk and Nassau Counties)