

STATE ENVIRONMENTAL REGULATION

Expert Analysis

Grand Jury Report Leads to Proposed Environmental Crimes Law

The catchy name—“Operation Pay Dirt”—was in actuality a quite serious multi-agency investigation by the Suffolk County District Attorney’s Office, the New York State Department of Environmental Conservation (NYSDEC), and the Suffolk County Police Department into the disposal of solid waste and construction and demolition materials at various residential and commercial sites on Long Island. On July 18, 2018, a special grand jury was empaneled in Suffolk County in connection with that investigation.

The grand jury heard testimony from 48 witnesses and evaluated 420 exhibits. Its investigation resulted in a 130-count indictment unsealed in November 2018 charging 30 individuals and nine corporations with illegally disposing of solid waste at 24 locations on Long Island. Another five-count indictment was issued against another corporation. See News Release, Suffolk County DA Office, DA Sini, NYS

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DEC and SCPD Announce 130-Count Indictment in “Operation Pay Dirt,” (Nov. 26, 2018).

The grand jury’s work, however, was not finished. In a second phase, the grand jury heard from eight addi-

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tional witnesses and considered 35 additional exhibits. Then, on Aug. 2, 2019, the grand jury issued a 90-page report on illegal dumping on Long Island, as well as the environmental harm it found to be caused by that activity. See Grand Jury Report (Aug. 2, 2019).

The grand jury’s actions also prompted New York State Sen. Todd Kaminsky (D-9th) to introduce a bill in the New York State Senate that would create multiple new environmental crimes to address illegal dumping. See S6758. As of this writing, the bill, which is currently in the Senate Rules Committee, has attracted bipartisan support; among its six cosponsors is Sen. Phil Boyle (R-4th). (There is an Assembly version of the bill. See A8672.)

The Grand Jury Report

The grand jury report pointed out that solid waste is an “inevitable byproduct” of industrial societies. Solid waste is “discarded materials” often associated with “industrial, municipal, commercial, institutional, mining, or agricultural operations or from residential activities” and can include hazardous and acutely hazardous materials. One type of solid waste highlighted in the report, construction and demolition debris (C&D), is often associated with residential and commercial construction, demolition, and renovation projects. According to the report, haulers from demolition projects throughout the

New York metropolitan area transport thousands of cubic yards of C&D and other solid waste materials every day to facilities across New York designated to accept various materials, including C&D debris handling and recovery facilities, solid waste management facilities, and transfer facilities.

The report pointed out that the proper disposal of this material can be expensive and that there is “significant revenue” to be made in the removal, transportation, and disposal of C&D and other forms of solid waste. The report noted that proper disposal of hazardous and acutely hazardous waste is even more costly than C&D disposal, with fees exceeding \$1,000 per truckload (about 30 to 40 cubic yards). This is in addition to the costs to haul the materials off the site. Large construction projects can easily generate thousands of truckloads of materials that need to be disposed of off-site.

In the report, the grand jury recounted “the role of intermediaries, known colloquially as ‘dirt brokers,’ who in exchange for payments will steer C&D material, including material containing hazardous and acutely hazardous substances or other material that is dangerous to health or safety (collectively, the ‘Restricted Substances’) to transfer stations and recycling facilities that are willing to evade the requirements of existing law to increase their profits.” The grand jury explained that, rather than testing and disposing of these substances as required by law, these facilities “dilute the Restricted Substances with dirt and then work with

the dirt brokers to represent fraudulently that the mixture of Restricted Substances and dirt constituted clean fill” usable anywhere that general use fill can be used. Falsified manifests and dump tickets are used as part of the scheme.

According to the report, “these fraudulent representations and activities” duped many home and business owners, as well as at least one school, into agreeing to accept what they thought was clean or general use fill, but that actually contained Restricted Substances.

The grand jury report pointed out that illegal dumping “is of particular concern on Long Island” because its “aquifer is designated as a sole source aquifer by the United States Environmental Protection Agency—one of the few such designated sites across the United States.” The report noted that illegal dumping of solid waste and C&D “has the potential to negatively affect Long Island’s aquifer” because the ground and aquifer are permeable. If materials containing contaminants are deposited on the ground, precipitation can cause contaminants to leach out into the soil and eventually reach and contaminate the aquifer.

The grand jury report also found other detrimental effects of illegal dumping, including exposing residents to contaminants while these materials remain on the surface and detrimental effects to those companies that play by the rules and dispose of these materials as required by law.

The grand jury report next reviewed the current Penal Law and other stat-

utes that can be used to prosecute illegal dumping of solid waste, C&D, and hazardous and acutely hazardous substances, and found the state’s criminal law “ill-equipped” to sufficiently deal with illegal dumping. Using the existing law, the grand jury returned indictments under the Penal Law and Environmental Conservation Law (ECL), including for criminal mischief, falsifying business records, endangering the public, health, safety, and environment, and operating a solid waste management facility without a permit. The grand jury, however, felt that the penalties available under the current laws were inadequate to address the severity of the harm being done.

The grand jury recommended several legislative and administrative actions that, it said, would “more effectively deter and prevent environmental crime.” These include:

- Formation of an “Environmental Crimes Team” within district attorney offices to investigate and prosecute environmental crimes as was done in the Suffolk County District Attorney’s Office.
- Implementing protocols to document the handling of solid waste and other material from the point of pick-up to the point of final destination (often referred to as “cradle to grave”) should have to certify the nature and volume of material and where that material was received, transported, and disposed of.
- Creating an alert system that would notify the NYSDEC of any site “that receives greater than a threshold number of truckloads of material within a 30-day period.” This would allow for rapid inspections of suspicious sites.

- Amending New York state law to provide specific provisions in the Penal Law focused on environmental crimes to deter illegal dumping.

The Bill

Senator Kaminsky's bill, S6758, if enacted into law, certainly would increase the criminal consequences for illegal dumping, as the grand jury report recommended.

The first section of the bill would amend the Penal Law by creating new crimes of criminal disposal in the fourth degree (a class A misdemeanor) (disposal of solid waste); criminal disposal in the third degree (a class E felony) (disposal of 10 cubic yards or more or 20,000 pounds or more of solid waste); criminal disposal in the second degree (a class D felony) (disposal of 70 cubic yards or more or 140,000 pounds or more of solid waste); criminal disposal in the first degree (a class C felony) (disposal of hazardous waste or reckless disposal of acutely hazardous waste); and aggravated criminal disposal (a class B felony) (disposal of acutely hazardous waste). The bill defines each of these new crimes. For example, it provides that a person is guilty of what would become the most serious new crime of this group—aggravated criminal disposal—when, with intent to dispose of an acutely hazardous substance (as defined by the NYSDEC) on the property of another, he or she “disposes of an acutely hazardous substance on such property.”

In addition, the bill provides for enhanced penalties where a defendant is convicted of any of the first four new crimes discussed above and

the defendant's conduct resulted in the contamination of groundwater. In that case, the crime must be deemed to be one category higher than the offense the defendant committed.

The bill also would create the crime of scheme to defraud by disposal of solid waste (a class E felony). Under the bill, a defendant would be guilty of this crime when he or she engages in a “systematic ongoing course of conduct with intent to defraud more than one person by disposing of solid waste ... on such person's property under false or fraudulent pretenses, representations, or promises, and, so damages the property of one or more of such persons.”

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In addition, the bill would create the crime of criminal possession of solid waste in the second degree (a class A misdemeanor); criminal possession of solid waste in the first degree (a class D felony); criminal acceptance of solid waste or C&D (a class A misdemeanor); criminal acceptance of a hazardous substance (a class D felony); and criminal acceptance of an acutely hazardous substance (a class C felony).

Finally, the bill reflects another grand jury recommendation by adding a new provision to the ECL that would require that any individual, corporation, or any other public or private entity registered or permitted to remove, transport, accept, store, or dispose of solid waste,

C&D, limited use fill, and restricted use fill must document the movement of such material from the point at which the individual, corporation, or entity receives such material to the point in which the individual, corporation, or entity provides that material to another individual, corporation, or entity or to its point of final disposition. Moreover, the bill would criminalize making or causing a false waste tracking document or making or causing a false entry in a solid waste tracking document.

Conclusion

It is worth noting that all 39 defendants charged in November 2018 by the Suffolk grand jury have pleaded guilty and that the self-proclaimed “dirt broker” charged in that indictment has been sentenced to two to four years in state prison. See News Release, Suffolk County DA Office, “Operation Pay Dirt” Dirt Broker Sentenced to Prison, (Nov. 26, 2018).

With the significant media attention received by the grand jury report, see, e.g., Paul LaRocco, “How NYC's building boom led to illegal dumping on LI,” *Newsday* (Oct. 3, 2019), and the introduction of S6758, one thing is clear: The issue of illegal dumping is not one that is simply going to go away on its own.