

**SUPREME COURT, STATE OF NEW YORK
SUFFOLK COUNTY
TENTH JUDICIAL DISTRICT**

**JULY 18, 2018 – AUGUST 2, 2019
TERM 8-F**

**GRAND JURY REPORT
CPL § 190.85(1)(c)**

**Dated:
August 2, 2019**

**SUPREME COURT, SUFFOLK COUNTY
TENTH JUDICIAL DISTRICT
AUGUST 2, 2019
TERM 8-F
GRAND JURY REPORT, CPL § 190.85 (1)(c)**

TABLE OF CONTENTS

<u>PRELIMINARY STATEMENT</u>	1
<u>ILLEGAL DUMPING AND THE “OPERATION PAY DIRT” SCHEME</u>	3
<u>SAND MINING ON LONG ISLAND</u>	10
<u>THE AQUIFER</u>	12
<u>THE EFFECT OF ILLEGAL DUMPING ON THE AQUIFER</u>	15
<u>THE EFFECT OF SAND MINING ON THE AQUIFER</u>	17
<u>OTHER DETRIMENTAL EFFECTS OF ILLEGAL DUMPING AND SAND MINING</u>	20
<u>THE CURRENT LAWS RELATING TO ILLEGAL DUMPING</u>	24
<u>THE CURRENT LAWS RELATING TO SAND MINING</u>	29
<u>RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE ACTION TO EFFECTIVELY COMBAT ILLEGAL DUMPING AND SAND MINING</u>	32
<u>REMEDICATION AND VICTIM COMPENSATION</u>	42
<u>RECOMMENDATIONS TO ENHANCE REMEDIATION AND VICTIM COMPENSATION</u>	50
<u>RECOMMENDATIONS FOR DEDICATION OF RESOURCES</u>	51
<u>GRAND JURY CONCLUSIONS</u>	52
<u>EXHIBIT R-1</u>	Appendix A

SUPREME COURT, SUFFOLK COUNTY

TENTH JUDICIAL DISTRICT

August 2, 2019

TERM 8-F

GRAND JURY REPORT, CPL § 190.85 (1)(c)

PRELIMINARY STATEMENT

Pursuant to the authority vested in the Appellate Division, Second Department, and in the Deputy Chief Administrative Judge for the Courts outside the City of New York, the Supreme Court, Suffolk County, Tenth Judicial District, Special Grand Jury, Term 8-F, was empaneled on July 18, 2018, to sit through and including January 18, 2019. Said Special Grand Jury was thereafter extended through and including August 2, 2019.

From July 18, 2018 through March 26, 2019, the Special Grand Jury heard testimony from 48 witnesses and considered 420 exhibits, including audio, photographic and documentary evidence related to an investigation of an illegal dumping scheme known as “Operation Pay Dirt.” As a result of the witnesses and evidence presented in connection with Operation Pay Dirt, the Special Grand Jury issued two separate criminal indictments: a 130-count indictment charging 39 defendants (30 individuals and 9 corporations); and a 5-count indictment charging one additional corporation. The indictments that were generated were docketed under indictment numbers I-2052A through I-2052NN-2018 and are publicly filed with the Clerk of the Court of Suffolk County, New York.

Thereafter, from on or about March 26, 2019 through August 2, 2019, the Special Grand Jury participated in a second phase of the grand jury proceeding during which it considered legislative, executive, and administrative action in the public interest. These considerations were based upon findings made after receiving not only the evidence presented in connection with Operation Pay Dirt, but also evidence presented by 8 additional witnesses, through whom 35 additional exhibits were admitted. This evidence pertained to illegal dumping and sand mining on Long Island more generally, as well as the environmental harm caused by those activities. Specifically, the Special Grand Jury heard evidence regarding the unique geography of Suffolk County; the aquifer that is found below Long Island and that supplies Suffolk County's drinking water; and the substantial risks to the aquifer posed by improper disposal of construction waste and sand mining. The Special Grand Jury also heard evidence regarding financial and other harms caused by environmental crimes; the limited availability of state and local funds to compensate victims for the costs of remediation of property damaged by environmental crime; the limited funds available to train detectives and investigators to identify pollutants and contaminants and to track them to those responsible for their release into the environment; the current laws available to prosecute individuals for environmental crimes; and loopholes through which polluters evade punishment. The witnesses who testified in the second phase of the grand jury presentation included experts and practitioners in the following areas: hydrogeology, land management, environmental science, environmental crime investigations, asset forfeiture, environmental advocacy, and crime victim advocacy.

The Special Grand Jury found each of the witnesses to be credible and qualified to speak about the matters of which they testified. The Special Grand Jury accepted their testimony as true and agreed with the opinions offered by these experts as consistent with the evidence and

findings made in connection with the criminal investigation of Operation Pay Dirt. The testimony of these 7 witnesses and the exhibits introduced during their testimony, in conjunction with the testimony and evidence received throughout the Operation Pay Dirt grand jury investigation, provide support for the findings of the Special Grand Jury and the legislative and policy recommendations that follow.

The following report has been adopted pursuant to New York State Criminal Procedure Law Section §190.85(1)(c) and is respectfully submitted to the Court.

ILLEGAL DUMPING AND THE “OPERATION PAY DIRT” SCHEME

Solid waste is an inevitable byproduct of an industrial and ever-developing society. Solid waste is defined in Article 6 of the New York Codes, Rules and Regulations (“NYCRR”), 6 NYCRR Part 360. Subject to certain exceptions not relevant to this report, solid waste consists of “discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, municipal, commercial, institutional, mining or agricultural operations or from residential activities including materials that are recycled or that may have value.” 6 NYCRR 360.2(a)(1). Solid waste can include material containing hazardous and acutely hazardous substances, as defined by Part 597 of Article 6, NYCRR. Hazardous substances are those on designated lists or that can cause physical injury or illness to humans, to the environment or to biological lifecycles, while acutely hazardous substances are those that are extremely toxic, such that the substance “causes or is capable of causing death, serious illness or serious physical injury to any person or persons as a consequence of release into the environment.” 6 NYCRR 597.2.

Another inevitable byproduct of commercial activity is a type of waste known as “construction and demolition debris,” also known as “C&D material” or just “C&D.”

Construction and demolition material is defined in the NYCRR as “waste resulting from construction, remodeling, repair and demolition of structures, buildings and roads.” C&D material includes “fill material, demolition wastes, and construction wastes.” 6 NYCRR Part 360.2(b)(61).¹ C&D material is generated as a byproduct of construction, or whenever buildings are partly or completely demolished in order to build new or renovated structures in the place of existing buildings. Materials that are used in construction of buildings, and that are discarded when those buildings are demolished, or waste generated by new construction projects often contain substances that are hazardous or acutely hazardous to the environment. However, even C&D material lacking hazardous or acutely hazardous substances often contain common items that may be dangerous to the public such as nails, screws, bolts, brick, broken wood, tile, batteries, tools, glass, and other miscellaneous household debris.

Because C&D material is generated by all residential and commercial construction and renovation projects, provision must be made for the safe disposal of this material. The need for safe disposal of solid waste material, including C&D material, has led to development of commercial entities that assume responsibility for transporting, processing, and disposing of this material. These commercial entities involved in this process include, but are not limited to: (1) construction and demolition companies, or renovation companies and contractors, which generate the material and thus need to find businesses to accept their waste material and dispose of it; (2) haulers, the trucking companies that transport the material once it is generated; and (3) solid waste management facilities, recycling facilities, and transfer facilities that are required to store and process the material for proper disposal by haulers at an authorized location.

¹ This section also sets forth materials that are not considered C&D debris (even if generated from construction, remodeling, repair and demolition activities), including municipal solid waste, friable asbestos-containing waste, corrugated container board, electrical fixtures containing hazardous liquids such as fluorescent light ballasts or transformers, fluorescent lights, furniture, appliances, tires, drums, fuel tanks, containers greater than 10 gallons in size and any containers having more than one inch of residue remaining on the bottom.

Several regulations found in Article 6 of the NYCRR are designed to govern the conduct of each of the entities described above. Part 360 establishes regulations related to solid waste and construction and demolition material. Part 364 establishes regulations governing the transportation of the materials. Part 597, as noted above, lists substances characterized as hazardous and acutely hazardous.

There is significant revenue to be made in the removal, transportation, and disposal of C&D material and solid waste more generally. The proper disposal of this material can be expensive. The more hazardous and regulated the material, the more costly it is to properly dispose of it. Facilities authorized to receive the material charge a fee to dispose of the material. The fee is based on the type of material and the volume or weight of the material that needs to be disposed. This fee often reaches amounts over \$1,000 per 30-40 cubic yard truck load, amounting to tens or even hundreds of thousands of dollars for a large demolition and construction project. For example, as evidence related to Operation Pay Dirt demonstrated, multiple trucks made multiple trips to a particular demolition site and removed numerous loads of C&D over the course of several days from that site. For just this one particular site over the course of two to three days, the fees related to the disposal of that material would minimally reach into the tens of thousands of dollars.

Another type of material important to the construction industry is what is referred to as “fill material.” Generally, fill material is dirt that is used in various projects to fill in holes, such as the filling in of a pool on a residential property, or the leveling or grading of a parcel. It also includes material that is used for road or embankment construction, among other purposes. The use of fill material is regulated under Article 6 of the NYCRR, Part 360.13(f), which categorizes fill material into three types: General-Use; Restricted-Use; and Limited-Use.

General-Use Fill is defined as fill that contains soil, sand, gravel, or rock and does not contain any non-soil constituents. It can be used in any setting where the fill material meets the engineering criteria for use, except undeveloped land and agricultural crop land.

Restricted-Use Fill may consist of up to 40 percent by volume inert, non-putrescible, non-soil constituents (acceptable inert, non-putrescible material excludes plastic, gypsum, wallboard, paper, or other material that may readily degrade or produce odors). Restricted-Use Fill may be used for embankments or subgrade in transportation corridors, or on sites where the material that is already present exceeds the criteria for Restricted-Use Fill or Limited-Use Fill. It must be placed above the seasonal high water table.²

Limited-Use Fill consists of fill that has more than 40 percent by volume inert, non-putrescible, non-soil constituents. Limited-Use Fill may be used under foundations and pavements above the seasonal high water table. Pursuant to the regulations, Limited-Use Fill may not be placed in Nassau or Suffolk counties.

Use of Restricted-Use or Limited-Use fill material may only occur at a project in accordance with an approved local building permit or other municipal authorization that includes the need for the certain fill material. Additionally, the fill material must be used within 30 days of arriving at the project site.

Each day, haulers from demolition projects throughout the New York metropolitan area transport thousands of cubic yards of C&D and other solid waste materials to facilities that are designated to accept certain materials.³ These facilities are located across New York, including in Queens County. These corporations charge to accept tons of debris from construction sites and then resell whatever material is salvageable and allowed to be used in accordance with the

² The water table will be described in more detail *infra*.

³ These facilities include C&D debris handling and recovery facilities, solid waste management facilities, and transfer facilities, which are defined by 6 NYCRR 360.2(b), (62), (251), and (276), respectively.

regulations promulgated by the New York State Department of Environmental Conservation (“DEC”). The unsalvageable materials are generally to be treated as solid waste and are therefore required by the New York Environment Conservation Law (“ECL”) to be properly disposed of at select DEC approved or regulated landfills, which is a costly process. Facilities that are authorized to accept these types of materials charge a disposal fee which increases when the material contains hazardous and acutely hazardous substances, such as lead, pesticides, polychlorinated biphenyls (“PCBs”) and asbestos.

In addition to disposal fees, lawful disposal of solid waste requires payment of truck-hauling fees. Authorized facilities are limited in number and may be located far from the construction site. The further the distance, the higher the hauling fees, and therefore, the lower the profits to a developer seeking to minimize the expense of a demolition and construction project. Certain materials that are generated in New York City are required to be disposed of at specialized facilities that may not be located in the State of New York, which further increases costs associated with the disposal. Certain materials that are generated in New York City and Long Island are also prohibited from being disposed of on Long Island. All of this adds to the costs for the companies involved.

Over the course of the Special Grand Jury’s investigation, which included hearing from dozens of witnesses and reviewing hundreds of exhibits, including business records, public filings and several hours of court-authorized wiretaps, the Special Grand Jury learned about the ways in which various participants in the solid waste disposal industry can violate the law in order to reduce costs, jeopardizing public health and safety and damaging property in the process.

Among other things, the Special Grand Jury heard about 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 (*e.g.*, nails, broken glass, wood beams, metal fragments, and other construction debris) (collectively, the “Restricted Substances”) to transfer stations and recycling facilities that are willing to evade the requirements of existing law in order to increase their profits. Instead of testing and disposing of these potentially dangerous substances according to the rules established by law and DEC regulations, these facilities will dilute the Restricted Substances with dirt, and then work with the dirt broker to represent fraudulently that the mixture of Restricted Substances and dirt constituted “clean fill,” available for pickup or placement in any location that General-Use Fill can be used. Haulers who are participants in the scheme may produce travel manifests or dump tickets (records concerning the material being hauled) that contain false entries concerning the type of material that is being transported, as well as the intended location at which the material is being disposed, to evade detection of the scheme.

As a result of these fraudulent representations and activities, many home and business owners, as well as at least one school, agreed to accept material containing Restricted Substances, which they believed to be clean fill, in locations where only clean or General-Use Fill would be appropriate.

Such a scheme is extremely profitable to its participants. Construction and demolition companies can obtain reduced costs for disposing of C&D material, including material containing hazardous and acutely hazardous substances, by using the services of a dirt broker who is willing to avoid the costly requirements imposed by the law governing disposal of C&D

material, and who has the network necessary to accomplish that objective. Waste transfer and recycling facilities that dilute C&D material with dirt rather than dispose of it pursuant to legal requirements are central to the scheme. This is because they enable the dangerous and hazardous substances that may be contained within the C&D material to be offered as clean or General-Use Fill rather than disposed of properly or offered only as Restricted-Use or Limited-Use Fill. They also enable participants in the scheme to avoid the substantial costs of testing and disposing of the material pursuant to legal requirements – as noted, sometimes in faraway locations and with special precautions in the event that the material contains hazardous or acutely hazardous substances.

Haulers also can profit where they are willing to haul diluted C&D material and other solid waste to unwitting customers at nearby sites rather than having to drive it far greater distances for proper disposal.

Finally, dirt brokers can obtain substantial profits by obtaining a supply of C&D material from contractors, connecting them with facilities that are willing to dilute the material rather than properly dispose of it, and identifying and defrauding customers into receiving and using the diluted material as clean fill.

While participants in the scheme profit through violating laws and regulations governing disposal of C&D material and other types of solid waste, the scheme victimizes individuals whose health and safety are jeopardized by their receipt of fill containing Restricted Substances and their placement of that fill in locations where only clean, or General-Use, fill would be safe to use – backyards, schoolyards, and the like. The disposal of these materials on unwitting victims' properties not only placed health and safety at risk; it caused substantial financial

damage, with many such properties requiring remediation costing in excess of \$20,000 in order to remove the diluted C&D material once it was discovered.

After learning about the existence of this scheme, the Special Grand Jury reviewed the criminal penalties applicable to illegal dumping of solid waste, C&D material, and hazardous and acutely hazardous substances. After a review of those applicable laws, the Special Grand Jury finds that there is a need for additional criminal laws, and enhanced penalties, to address aspects of illegal dumping activities that currently avoid criminal sanction or punishment sufficient to deter participation in such a profitable and dangerous scheme.

The Special Grand Jury also finds it necessary to modify existing laws to better protect the environment by closing loopholes in the law and by enhancing punishment and sentencing so that bad actors' illegal profits are disgorged and they are deterred from committing future environmental crimes.

Specifically, the new proposals seek to target misconduct by haulers, recycling and transfer facilities, and those who act as dirt brokers connecting various participants in illegal dumping activities. The legislative and policy proposals of the Special Grand Jury are outlined below.

SAND MINING ON LONG ISLAND

Long Island sand is an incredibly valuable commodity. Certain crystals found within Long Island sand, resulting from the creation of Long Island by glaciers thousands of years ago, have resulted in Long Island sand being shipped as far as Egypt to be used to make cement. Long Island sand is used to make cement to build local and remote infrastructure, and is harvested from Suffolk County by way of mining.

Sand mining is the extraction of sand from beneath the ground's surface. On Long Island, the topography of sites differ, as does the size of the mines. Sand can be excavated from the bottom of bodies of water using industrial dredging equipment. However, often times, land has to be cleared of trees and other vegetative matter prior to mining. After land clearing, layers of earth need to be extracted in order to reach the sand. This type of mining is often referred to as open-pit mining, where in order to remove the sand, topsoil, clay, loam and other layers of earth are first removed using heavy machinery like bulldozers and excavators. Large screening machines, tractor trailers, and dump trucks are also used in the mining operation.

The mining industry in Long Island is responsible for millions of tons of sand being removed and sold. The acreage and depths for permitted mines vary by site. Some mines excavate to the aquifer, dredge sand, and create recharge basins. Others mine to sizeable depths below sea level and operate waste management facilities on location. Either form of permitted mining, albeit legal, poses certain risks to the environment, especially in designated Special Groundwater Protection Areas, as there is great potential for contamination of the aquifer and Long Island's groundwater.

The New York State Legislature delegated to the DEC the responsibility to oversee the regulation of the sand mining industry. Currently, the DEC is the only regulatory body that oversees sand mining, *i.e.*, those sites that are designated as sand mines via the issuance of permits/registrations from the DEC. According to the DEC's website, as of 2016, there were 25 permitted sand mines in Suffolk County spanning 1,176.9 acres.

Historically, sand mining has been supported by the DEC throughout the State, and the goal of the State mining law is both to mine and to reclaim mines. Reclamation in this context refers to the return of mined land to productive use. One such potential productive use may be as

a waste transfer or sorting facility, as land clearing throughout Suffolk County results in vegetative waste that could be processed in spaces created by sand mines as part of a mine reclamation plan.

The Special Grand Jury heard evidence showing that as sand mining operations exhaust the available sand in an approved mining site, the DEC often renews permits and extends mining areas. In some instances, this has been done over the objections of local municipalities. In addition, continued mining to significant depths brings increasing concerns about the potential effect on the aquifer and the quality of Long Island's groundwater.

THE AQUIFER

The issue of environmental crimes in general, and illegal dumping and sand mining specifically, is of particular concern on Long Island. Long Island's 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. An aquifer refers to water that is below the ground (“groundwater”) in sand or other material that is totally saturated and that can be accessed as a drinking water supply. A sole source aquifer means that groundwater is the only source of drinking water for a particular location. In contrast to Suffolk County, other areas in New York State, including New York City, have access to alternate sources of drinking water such as rivers, lakes, streams and reservoirs.

In Suffolk County, there are three separate groundwater aquifers. The three aquifers are the Upper Glacial Aquifer, the Magothy Aquifer, and the Lloyd Aquifer. Each aquifer consists of sand that is saturated by water. The aquifers are generally recharged, or refilled, by precipitation. The aquifers are divided by layers of clay. Clay can act as a barrier to the

aquifers, though it is not an absolute barrier because water and contaminants can travel into the aquifer through the clay. The Gardiners Clay separates the Upper Glacial and the Magothy aquifers and the Raritan Clay separates the Magothy and the Lloyd Aquifers. There are certain areas on Long Island, such as the south shore, where no layer of clay protects the aquifer. In addition, the Gardiners Clay does not extend all the way up to the north shore of Long Island, and in many locations there is no clay separating the Upper Glacial Aquifer from the Magothy Aquifer. An illustration of the various components of Long Island's aquifer, introduced into evidence as Exhibit R-1, is attached below.

The distance between the surface of the ground and the beginning of the water table is referred to as the "depth-to-water." This "depth to water" can vary depending on location. In certain areas where there is shallow depth-to-water, the water table may only be a few feet below the top of the ground. There are many shallow depth-to-water areas along the shorelines of Long Island, including the land around the Peconic River, the Carmans River, the Connetquot River and the Nissequogue River, as well as other areas near surface water and rivers. The deepest depth-to-water area in Suffolk County is near the Town of Huntington, where depths to water can reach greater than 200 feet.

The aquifers are accessed through private and public wells, which are used as the sole source of drinking water in Suffolk County. Approximately 40,000 homes throughout Suffolk County obtain their drinking water through a private well. Most of the private wells are located on the eastern end of Suffolk County. The private wells acquire groundwater from the Upper Glacial Aquifer, the aquifer that is generally closest to the surface, and thereby is most susceptible to contaminants from the surface. However, the majority of Suffolk County residents receive their drinking water through the public water supply. The largest provider of public well

service is the Suffolk County Water Authority. Public wells often reach into the Magothy Aquifer, going deeper into the earth than the private wells, because public well providers have more resources to dig deeper wells. There are exceptions, however, as certain public wells near Suffolk's shoreline are shallower. Removal of water from the Lloyd Aquifer, the deepest water source, is not authorized for either public or private wells.

The New York State Department of Health establishes drinking water standards that must be met by all public wells. The Bureau of Drinking Water for the Suffolk County Department of Health Services regulates public water suppliers to ensure that they comply with relevant drinking water standards. Though the standards are equally applicable to private wells, there is no regulation or mechanism to enforce the standards upon the individuals who use private wells. Thus, the Suffolk County Department of Health Services ("SCDHS"), Bureau of Drinking Water can only test private well water with the homeowner's consent, and may do no more than recommend that the homeowner not consume the water. The County has no authority to compel homeowners to avoid consuming water from their private wells even if the water does not meet the State standard.

The various layers of the aquifer are permeable and susceptible to contamination in various ways. As stated above, the aquifer is recharged through precipitation. When it rains or snows, the precipitation seeps through the ground until it reaches the aquifer. New precipitation will reach the aquifer at different rates based on the depth of the water table, *i.e.*, the distance between the surface of the earth and the Upper Glacial Aquifer, the aquifer's top layer. The precipitation also travels at a different rate based on whether or not the location is a shallow or deep recharge area. Eventually, water within the Upper Glacial Aquifer seeps down to the

Magothy Aquifer, and below it to the Lloyd Aquifer, increasing in purity as it gets filtered through the layers of sand and clay contained within various portions of the aquifer.

As referenced above, individuals who use a private well receive water that is more susceptible to contamination, primarily because private wells tend to be shallower than public wells. These private wells tend to tap into the Upper Glacial Aquifer, the aquifer closest to the surface. Thus, contaminants on the surface of the land are more likely to reach the Upper Glacial Aquifer, and private wells that tap into it, if they begin to leach into the ground and enter the area between the surface and the aquifer – an area known as the vadose zone.

THE EFFECT OF ILLEGAL DUMPING ON THE AQUIFER

Illegal dumping of solid waste and C&D material in Suffolk County has the potential to negatively affect Long Island's aquifer. Due to the sandy nature of the ground and the aquifer on Long Island, both the ground and the aquifer are permeable – meaning, water can pass through the ground and the aquifer quickly. This makes the aquifer susceptible to contamination. If material containing contaminants, *e.g.*, hazardous or acutely hazardous substances, are deposited on the ground, whether on a pile or graded land, the contaminants may reach the aquifer in the same way that water reaches the aquifer. If precipitation falls through a pile of material containing contaminants, the precipitation will leach through the contaminated material and cause any water-soluble contaminants to move through the material, the ground and eventually into the groundwater. As indicated, the layers of clay contained within various sections of the aquifer act as an additional natural barrier to the transfer of materials through the ground and the aquifer, however, some contaminants eventually travel through the clay and into the aquifer. Moreover, as indicated above, there is not always a layer of clay protecting the aquifer, nor is

there always a clay barrier between the Upper Glacial and the Magothy Aquifers. Even if the pile of material containing contaminants is spread out, graded or covered by clean soil, the precipitation may still infiltrate through the pile and move the contaminants into the ground towards the aquifer.

This scenario is not unique to solid material disposed directly on property. For example, if a drum or tank holding contaminants spills on the ground, the liquid will seep through the sand and can create a groundwater plume in the aquifer. A plume is a body of polluted water within an aquifer. These plumes can travel approximately one foot per day. With a contaminated liquid, the need for rain or water to move the contaminated material is eliminated because the contaminated liquid may find its own way to the aquifer. If a well, private or public, is located in a down-gradient direction from the contaminated liquid, the well water may collect the contaminants.

Notably, the differences in the depth of the water table throughout Long Island will affect how potential contaminants travel from the surface to the aquifers. Furthermore, as illustrated by Exhibit R-1, the positioning of the aquifers and the layers of clay separating the aquifers vary throughout Long Island. For example, around the northern and southern shorelines of Long Island, there exists what is referred to as a shallow flow zone. A shallow flow zone is the area where the water enters the ground and only travels into the Upper Glacier aquifer. Here, contaminants may reach the aquifer more quickly because it is closer to the surface. Deep recharge areas exist near the center of Long Island where there is more distance between the surface and the water table. At these deep recharge areas, the water reaches to the Magothy and Lloyd Aquifers. Though water and contaminants may take longer to reach these deeper aquifers, the threat of contamination still exists.

A 2018 Suffolk County Department of Health Services report highlighted analytical findings of contamination and concluded that at certain sites, wells that historically had been used to access drinking water were polluted. At one site, there were concentrations of heavy metals as high as 200 times the drinking water standard, as well as other contaminants. Contamination of the aquifer remains a predominant concern in Suffolk County, as the aquifer will remain the only means through which the County's residents may obtain drinking water for the foreseeable future.

THE EFFECT OF SAND MINING ON THE AQUIFER

Despite valid uses of sand mining, mining can negatively impact the environment, especially on Long Island due to its reliance on a sole source aquifer for drinking water. Sand mines can be dug to considerable depths, thereby removing the naturally protective layering of soil covering the aquifer and making the groundwater more susceptible to contaminants. The Special Grand Jury learned of one instance as recent as April of 2018 where observations were made of the removal of sand so deep that it exposed the groundwater, which could be seen with the naked eye.

Even legally permitted sand mining operations may present a danger to the environment by increasing the risk of groundwater contamination. In accordance with permits issued by the DEC, many of these mining sites have reclamation plans that include use of vegetative organic waste or other types of material that the DEC has approved for such use. These types of materials are concerning to ecologists and hydrologists when they are deposited layers below ground level at or near the level of the aquifer. When layers of filtration are removed, the ground, top soil and loam (soil composed mostly of sand, silt, and a smaller amount of clay) no

longer exist to provide natural filtration to reduce levels of contamination before entering the aquifer.

A collateral concern is that large holes in the ground become opportunities for illegal dumping, as these excavated areas provide attractive disposal sites for other types of problematic materials, such as solid waste, liquid waste and C&D material. The crime of illegal dumping has proven prevalent in Suffolk County, and this systemic conduct has contributed to the contamination of the groundwater. The recent findings of groundwater contamination referenced above reinforce the need to do more to protect against illegal dumping, particularly in sites such as sand mines where the groundwater is more exposed.

In addition, the unregulated mining of sand occurs throughout Suffolk County through a variety of means, from the extraction of excess sand at construction sites, to mass removal of sand from industrial sites and farmlands. Since sand is a valuable commodity and the removal and sale of sand is lucrative, the excavation of sand is often done in Suffolk County without a permit or registration, *e.g.*, under the guise of construction, farming or other unrelated projects. In these unauthorized mining operations, there are insufficient controls in place to ensure compliance with the ECL's mining requirements, *i.e.*, no oversight on boundaries or limits on depth and no requirement of reclamation. Mining without any oversight, boundaries, limits on depth or requirement for reclamation can be dangerous and cause hazardous sloping, land instability and other conditions that are dangerous to public health.

The mining of sand in unregulated mines that approaches or pierces the aquifer, striking groundwater, is problematic for a variety of reasons. One, there is no monitoring of the material being used to backfill and cover the exposed groundwater. Two, the use of bulldozers, excavators, and other heavy machinery in the aquifer can directly contaminate ground water.

Three, there is no testing of groundwater to determine whether there has been contamination. In these cases, the mined area does not have a proper reclamation plan, nor is there DEC oversight to safeguard against the use of bad material.

As discussed in the earlier portion of this report, the Special Grand Jury has been made aware of a scheme in which contaminated C&D material and solid waste is diluted and used to fill areas that have been excavated, which may include areas where mining has occurred and the aquifer has been exposed. When this material is dumped at ground level, it is an environmental hazard, as that material can leach into the groundwater by means of natural filtration. Even while some contaminants may reach the aquifer if they are dumped at ground level, this filtration process aids in the breaking down of contaminants before they penetrate the aquifer. When this type of material is placed directly onto mined or excavated areas, however, it poses a greater threat to the drinking water because that material is placed layers below the ground's surface, sometimes directly onto the exposed ground water, thereby allowing contaminants to access the groundwater without the benefit of filtration.

While the potential perils are discussed here in the context of sand mining, the same risks exist with respect to any large hole in the ground. For example, if someone has a pool in his or her backyard that is being filled in, and that hole is filled in with contaminated material, the risk of contamination to the aquifer is greater than if the fill were placed at ground level.

Local towns and municipalities can enact stricter laws to prevent unlawful sand mining. The Town of Brookhaven, for example, recently enacted significant amendments to its Town Code to prevent the excessive removal of material from a site, thereby effectively prohibiting sand mining within the Town. Prior to the change in Chapter 85 of the Code of the Town of Brookhaven, Section 85-925, entitled the Farmland Bill of Rights, material could be excavated

and removed from any agricultural property as “grading activities.” In 2015, the Town of Brookhaven amended its law to clarify that grading activities do not include removal of onsite materials, specifically excluding the excavation, stripping or removal of sand, gravel, stone, topsoil or other materials or other excavation purposes. Another important change in the law was the 2015 amendment to Chapter 53 of the Code of the Town of Brookhaven, entitled Sand and Gravel Pits; Excavation; Removal of Topsoil. This amendment specifically prohibited removal of excess material unless required by roads, recharge basins, drainage structures, sanitary systems, drywells, foundations, or pools. This eliminated language that allowed for mining incidental to development of the site for residential, commercial or industrial purposes and set forth the requirement that sand mining is only permitted on certain industrially zoned premises with a DEC mining permit or legal pre-existing mines with DEC permits.

In addition, in 2017, the Town Board adopted a code amendment to make it explicitly clear that material which is not clean sand and/or dirt shall not be imported to sites within the Town of Brookhaven. This code amendment, in conjunction with the sand mining code amendments detailed above, aided the Town’s ability to prevent the illegal export of sand and import of contaminated materials, and helped reduce instances where land is mined without regulatory oversight or used as a dumping ground for contaminated C&D material or other solid waste.

OTHER DETRIMENTAL EFFECTS OF ILLEGAL DUMPING AND SAND MINING

Risk of Exposure to Contaminants

The dangers caused by the deposit of contaminated material on residential and commercial properties go beyond damage to the aquifer. Illegal dumping exposes residents of

Suffolk County to contaminants while they remain on the surface. Exposure can occur through touch, ingestion, or inhalation. For example, if there is a pile of contaminated material on a property, someone can be exposed to contaminants dermally, *i.e.*, by touching the contaminated material. Depending on nature of the contaminant, it can be absorbed through the skin and enter the body. People can also risk ingesting contaminants. For example, if someone is handling contaminated material and touches his or her mouth, the material can enter the body through the digestive system. This is especially true for children who come into contact with the material, and then – as children often do – put the material in their mouths.

Contaminants can also be ingested through drinking contaminated groundwater or surface water, either by unknowingly drinking contaminated water or through exposure such as unknowingly swimming in a contaminated body of water. Exposure can also occur by breathing in contaminants. Wind can blow particles of material in the air, or if a substance is a vegetative organic compound or semi-vegetative organic compound, it can volatilize, *i.e.*, vaporize, in the air and cause an individual to breathe in the contaminants.

Lack of knowledge perpetuates the detrimental effects of illegal dumping and sand mining. In other words, if County employees and law enforcement agents are not aware of environmental crimes and the resulting damage they may cause to the water and to County residents, then environmental crimes will obviously go undetected and their ill effects will remain unreported. There are, however, various ways in which the County can be made aware of potential contamination, including, but not limited to: (1) a complaint by an individual or organization filed with the Suffolk County Department of Health Services; (2) the County's routine tests on public wells or testing pursuant to the private well testing program⁴; or (3) a

⁴ Suffolk County offers a private well testing program whereby, for a fee, residents in the County who receive their water from a private well may request to have their well tested by the County.

referral to the Department of Health Services from another agency, such as the DEC, the State Department of Health, the District Attorney's Office or the Police Department.

As for testing, water service companies and the Suffolk County Department of Health Services are able to test for approximately 300 different contaminants, including bacteria, metals, volatile or semi-volatile organic compounds, perchlorate and other emergent contaminants defined as hazardous and/or acutely hazardous substances. Although public water suppliers such as the Suffolk County Water Authority typically test the water routinely for contaminants, such testing is not mandated for private well water. If a resident or the County does not have reason to suspect contamination, the private well may never be tested. Further, even if contamination is discovered in public water, the contamination often cannot be traced back to the individuals responsible for the contamination.

Experts are required to identify the contaminant and the source of the contamination. For example, the Department of Health Services tests for an array of over 300 analytes, which includes volatile (VOC) and semi-volatile organic (SVOC) compounds, as well as PCBs. When contamination is suspected, an investigation begins. A critical part of the investigation is to ensure that there is no exposure to contaminated groundwater. Several wells are drilled at strategic locations relative to the known contaminated well. By sampling and testing at different depths at these locations, the Department of Health attempts to identify the location of the contamination in order to contain it.

Testing costs money, leaving the County's taxpayers footing the bill for contamination. Testing and isolation of contamination also requires training and expertise in environmental science, criminal investigations, and prosecution. Without funding for training and the development of expertise, the individuals responsible for environmental crimes will go

unidentified and un-apprehended, contamination to the environment will continue, and Suffolk residents will suffer. Thus, the Special Grand Jury finds that local and State governments must provide financial resources and training to educate those responsible for detecting environmental issues, identifying the perpetrators of environmental crimes, and prosecuting those offenders.

Effect on Legitimate Businesses

Along with the potential health risks involved, the Special Grand Jury also finds that illegal dumping has a detrimental effect on legitimate businesses in Suffolk County and throughout the State. The Special Grand Jury finds that legitimate participants in the C&D disposal industry are a vital and necessary part of an ever-advancing society as residential and commercial development occur and additions and improvements to infrastructure are made. To that end, there will always be business opportunities for legitimate financial gain for companies involved in demolition and construction and the removal, storage, processing and the ultimate disposal of the resulting debris. However, due to the costs associated with the proper disposal of this material, there is great potential for profit by illegally disposing of the material.

During the criminal investigation phase of the grand jury presentation, the Special Grand Jury received evidence that it typically costs \$58 per ton of C&D material to properly dispose of the material. Though it varies, each cubic yard of debris typically consists of approximately 1.35 tons of construction debris. In Operation Pay Dirt, for example, it was typical for individual trucks to transport approximately 30 to 40 cubic yards of debris, which would amount to an approximate cost of \$1,740 to \$2,320 per container. However, the Special Grand Jury investigation revealed that certain recycling facilities were paying trucking companies \$300 to \$700 per truck load of material when it was illegally disposed of at various locations, far lower than the cost per truckload of proper disposal. This cost does not factor in the transportation and

hauling fees that would be associated with proper removal. Based on these numbers, companies can save at least \$1,000 per truck load, or more than half of waste disposal expenses – an obvious financial motive to participate in illegal dumping activities.

Legitimate operations are negatively affected by those who illegally cut corners for profit. As the criminal behavior sets an industry standard for charging less, those operating legitimately will have to charge less and less to compete with these corporations. That leaves less profit for legitimate companies. As criminal actors get richer, legitimate businesses suffer and experience pressure to also cut corners and deviate from the law in order to maintain profitability.

CURRENT LAWS RELATING TO ILLEGAL DUMPING

A review of the current laws applicable to the evidence heard by the Special Grand Jury demonstrates that, as currently configured, the Penal Law is ill-equipped to sufficiently deal with a criminal scheme such as Operation Pay Dirt. For reasons discussed further in this report, the Special Grand Jury recommends the enactment of new Penal Law provisions that are better suited to protect the public from the harms of illegal dumping.

After hearing testimony and reviewing the exhibits accepted into evidence during the criminal investigation of Operation Pay Dirt, the Special Grand Jury returned two indictments, a 130-count indictment charging 30 individuals and 9 corporations and an additional 5-count indictment charging an additional corporation. Those charges included violations and offenses found in articles 145, 175, 115 and 105 of the Penal Law of the State of New York, as well as certain crimes provided for in Article 71 of the ECL of the State of New York.

The charges in the indictments included the following sections of the law, in relevant parts and in order from the highest level crime to the lowest level violation:

Penal Law Articles 145, 175, 115 and 105

- Criminal Mischief in the Second Degree, §145.10 – D Felony
- Attempted Criminal Mischief in the Second Degree, §110/145.10 – E Felony
- Falsifying Business Records in the First Degree, §175.10 – E Felony
- Criminal Mischief in the Fourth Degree, §145.00 – A Misdemeanor
- Conspiracy in the Fifth Degree, §105.05(1) – A Misdemeanor
- Facilitation in the Fourth Degree, §115.00(1) – A Misdemeanor
- Unlawful Posting of Advertisements, §145.30(1) – Violation

Environmental Conservation Law

- Endangering Public Health, Safety, or the Environment in the Third Degree, Article 71-2712(1) – E Felony
- Endangering Public Health, Safety, or the Environment in the Fourth Degree, Article 71-2711(3) – A Misdemeanor
- Operating a Solid Waste Management Facility, Article 71-2703(2)(c)(i) – B Misdemeanor
- Operating a Solid Waste Management Facility, Article 71-2703(2)(b)(i) – B Misdemeanor
- Transporting Solid Waste Without Authorization, Article 71-2703(2)(b)(i) – B Misdemeanor.

The conduct that the current criminal mischief statutes target relates to the damage to the property of another person. The degree of the offense is based on the mindset of the criminal actor, whether intentional or reckless. The different statutes are also distinguished by the value of the damage caused to the property. Criminal Mischief in the Fourth Degree, an A misdemeanor, holds a person accountable for intentionally damaging the property of another (with no monetary value required), or recklessly damaging the property of another in an amount exceeding \$250. Criminal Mischief in the Third Degree, an E felony, criminalizes the intentional damage of another's property in an amount exceeding \$250. Criminal Mischief in the Second Degree, a D felony, criminalizes the intentional damaging of another's property in an amount exceeding \$1,500. The highest level of the criminal mischief statute, the First Degree offense, a B felony, is not applicable to the Operation Pay Dirt scheme, as it deals with

intentional damage to another's property by means of an explosive. As currently configured, there is no C-level felony offense as it pertains to the damage of another person's property.

Other conduct in the Operation Pay Dirt scheme is addressed by various other provisions of the Penal Law. That additional conduct included: the falsification of records related to the hauling and disposing of solid waste, C&D, and hazardous and acutely hazardous substances; the organized conduct by different actors in the scheme; and conduct by those who facilitated the illegal activity.

In addition to the Penal Law, certain conduct is classified as criminal in the ECL. These statutes, under Article 71-2712(1), an E felony, and Article 71-2711(3), an A misdemeanor, make it a crime to endanger the public health, safety, or the environment. These crimes focus on reckless behavior, which causes the release of acutely hazardous or hazardous substances, respectively, into the environment.⁵

Other crimes from the ECL relevant to the Special Grand Jury's investigation included Operating a Solid Waste Management Facility, Article 71-2703(2)(c)(i), an A Misdemeanor; Operating a Solid Waste Management Facility, Article 71-2703(2)(b)(i), a B Misdemeanor; and Transporting Solid Waste Without Authorization, Article 71-2703(2)(b)(i), a B Misdemeanor. These crimes target conduct that results in the release of more than ten (10) cubic yards (a class B misdemeanor) and a release in excess of seventy (70) cubic yards (an A misdemeanor) of solid waste into the environment.

⁵ The ECL also contains a D felony (71-2713: Endangering the Public Health, Safety, or the Environment 2nd Degree) and a C felony (71-2714: Endangering the Public Health, Safety, or the Environment 1st Degree). The D felony criminalizes, among other conduct, the knowing release of a hazardous substance or reckless release of an acutely hazardous substance, which causes physical injury to another person; or the knowing release of acutely hazardous substances while knowing that those substances meet certain criteria. The D felony also makes it a crime to knowingly or recklessly cause a release of a hazardous substance that enters a primary water supply. The C felony criminalizes the intentional release of an acutely hazardous substance, which knowingly meets certain characteristics and which the actor is aware can create a risk of serious physical injury. The C felony also makes it a crime to knowingly release an acutely hazardous substance, which the actor knowingly meets certain criteria and which causes a physical injury.

Pursuant to Title 3 of Article 27 of the ECL, except for exemptions that do not apply to the Operation Pay Dirt scheme, no person shall engage in the transportation of regulated waste originating or terminating at a location in this state without a permit pursuant to this section. Further, pursuant to Title 7 of Article 27 of the ECL, except for exemptions that do not apply to the Operation Pay Dirt scheme, no person shall commence operation, including site preparation and construction, of a new solid waste management facility until such person has obtained a permit pursuant to this title. Under these provisions, certain defendants involved in Operation Pay Dirt were charged for conduct such as transporting solid waste without the appropriate permit or registrations. Also, based on the disposal of the solid waste at a property, certain defendants were charged with operating a solid waste management facility without a permit.

While these ECL charges are viable to address environmental crimes, and were used in the publicly-filed indictments issued by the Special Grand Jury, the laws present certain hurdles that make them imperfect tools to hold all participants in environmental crimes accountable and deter future criminal conduct. For example, with respect to the release of substances hazardous or acutely hazardous to the environment, there are often significant issues of proof related to knowledge of the actors, such as a hauler involved in the transportation of the material. Moreover, the focus of the statutes on the release of the material often allows those individuals in the scheme other than the truck driver who actually is dumping and releasing the material (generally at the direction of others) to claim ignorance as to the circumstances of the release, thereby shielding themselves from liability.

With respect to operating a solid waste management facility or transporting solid waste without a permit, those crimes are dependent on proof that a certain volume of material was unlawfully released. Moreover, the highest level of crime under these circumstances is an A

Misdemeanor for the release of more than 70 cubic yards of solid waste. That amount, 70 cubic yards, is the rough equivalent of two truckloads where each truck has a 35 cubic yard container of material. Many of the properties that were the subject of the Special Grand Jury's investigation saw multiple truckloads of material being disposed of and released on their property, totaling amounts far greater than 70 cubic yards.

Current Sentencing Provisions for the Charged Crimes in Operation Pay Dirt

The sentencing provisions for the crimes charged in the indictments are found in Penal Law Article 70. Specifically the following sections apply:

- §70.00, Sentence of imprisonment for felony
- §70.06, Sentence of imprisonment for second felony offender
- §70.15, Sentences of imprisonment for misdemeanors and violation.⁶

The highest level of crime charged in the indictments previously issued by the Special Grand Jury was a D Felony, Criminal Mischief in the Second Degree. Under this law, a first-time felony offender convicted of a D Felony faces a minimum indeterminate term of imprisonment of 1 to 3 years and a maximum term of imprisonment of 2 1/3 to 7 years, or a definite sentence of up to 1 year in local jail. However, jail is not mandated and is discretionary, and a first-time offender can receive a term of 3 to 5 years of probation, or in some instances a conditional discharge. A second felony offender faces a minimum indeterminate term of imprisonment of 2 to 4 years and a maximum term of imprisonment of 3 1/2 to 7 years. The second felony offender is not eligible for a definite sentence or a sentence of probation. Restitution is generally capped at \$15,000 for a felony. Penal Law § 60.27.

⁶ There are additional provisions in the Penal Law that allow penalties other than incarceration such as probation, conditional discharge, and fines. There are also provisions in the ECL for separate fines related to the crimes of Endangering the Public Health, Safety, and Environment, as well as Operating a Solid Waste Management Facility without a Permit and Transporting Solid Waste without a Permit.

For those crimes classified as misdemeanors, there is no mandatory imprisonment or jail. Individuals convicted of crimes classified as an A misdemeanor are eligible for a definite sentence of up to 1 year in local jail. Those individuals are also eligible for probationary sentences and conditional discharges, which require no jail. The same is true for those convicted of a class B misdemeanor, except that the possible jail time is limited to three months. Jail for violations is limited to up to 15 days. Restitution is generally capped at \$10,000 for those convicted of a misdemeanor. Penal Law § 60.27.

To summarize, based on the crimes that were the subject of the Special Grand Jury's investigation, the most severe penalty available for a first-time offender was a possible indeterminate term of 2 1/3 to 7 years of incarceration. However, that same first-time offender is also eligible for a non-incarceratory sentence.

THE CURRENT LAWS RELATING TO SAND MINING

The Special Grand Jury heard evidence relating to sand mining in the second phase of the grand jury presentation. Based upon that evidence, the Special Grand Jury finds that the Penal Law crimes defined above are most closely applicable to the unlawful mining of sand. Unfortunately, as with the illegal disposal of solid waste and other materials, there are no Penal Law statutes specifically addressing the unique perils of sand mining. Moreover, the criminal mischief statutes currently in existence will not deter illegal sand mining because that statute requires damage to the property of another person without permission or authority to cause that damage, and often the individual(s) or entity(ies) doing the mining is the actual owner of the property. In such cases, while the excavating and related work may damage the property and expose it to environmental contamination, that damage is done to the actor's own property and with the owner's permission in pursuit of profits; thus, it is not actionable as a criminal mischief.

As stated above, the DEC is the only regulator of legal sand mines and has been entrusted by the State Legislature as the sole regulatory agency for the sand mining industry. However, local municipalities may govern their land use, and the Suffolk County Department of Health Services is entrusted with maintaining the County's water resources to safeguard the health of residents. This permits localities and the County to inspect areas that are impacting water quality, which includes sand mines and other sites engaged in the extraction and removal of sand. For example, Article 7 of the Suffolk County Sanitation Code provides enforcement power to Department of Health Services employees, thereby allowing Department of Health Inspectors to gain access to legal sand mines and perform site inspections, as well as issue summonses or commence criminal charges when appropriate. The purpose of this law is to protect all the County's water resources, especially in deep recharge areas and water supply sensitive areas, by preventing and controlling discharges of sewage, industrial and other wastes, toxic or hazardous materials and storm water runoff, and also preventing further pollution. This law also codifies the powers of the Department's Commissioner, allowing for broad discretion in investigating any property, including ordering an independent groundwater investigation where evidence suggests that a discharge of toxic or hazardous materials may have occurred.

Under this provision, if the Commissioner finds a condition that has the potential for contaminating County waters with toxic or hazardous materials, or which otherwise constitutes an immediate danger to public health, and determines that it could appear prejudicial to the public interest to delay action, the Commissioner may serve an order upon the permit holder, or if there is no permit, upon the person in charge of the facility or site, citing such conditions and specifying the corrective action to be taken and a time period of less than 15 days. The order may also immediately suspend a permit or direct that operations at the facility/site be

discontinued. In this event, a hearing will be scheduled within 15 days of service of the Order, providing the accused an opportunity to be heard.

Along this same vein, New York State Assemblyman Fred Thiele, Jr., representing Assembly District 1, located on the South Fork of Suffolk County and a portion of the Town of Brookhaven, and New York State Senator Kenneth LaValle, representing Senate District 1, located in the five eastern Towns of Suffolk County and the eastern portion of the Town of Brookhaven, introduced legislation that specifically addressed concerns that legal sand mines present to the geographic area. Legislation they sponsored was enacted into law as Chapter 298 of the Laws of 2018, amending Environmental Conservation Law § 23-2703,⁷ authorizing local governments to enact or enforce local laws or ordinances requiring the monitoring of groundwater impacts resulting from mining, or the reclamation of mines, within a county with a population of one million or more that draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer – a description that includes Suffolk County. Specifically, this legislation allows for Suffolk County and its municipalities to enact new laws, and enforce existing laws, to ensure that sand mining and/or mining reclamation is not polluting the County’s drinking water.

As discussed below, the Special Grand Jury is proposing a further amendment to Environmental Conservation Law §23-2703, adding language that would affirm the rights of the Suffolk County Department of Health Services, and its Commissioner of Health, to conduct investigations and pursue enforcement of laws intended to secure the safety of the County’s drinking water. The Special Grand Jury also recommends expansion of Article 7 of the Suffolk County Sanitary Code to assist the Department of Health Services in combatting environmental crimes. By extending regulatory oversight in this manner, the Suffolk County Department of

⁷ This section of the ECL is the “Declaration of Policy” section of the law as it relates to the mining industry.

Health Services will be able to ensure that all mining activity, regardless of the existence of permits, does not endanger the safety of the County's drinking water.

RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE ACTION TO COMBAT ENVIRONMENTAL CRIMES

The Special Grand Jury recommends several legislative and administrative actions to more effectively deter and prevent environmental crime. The first recommendation of the Special Grand Jury relates to the Suffolk County District Attorney's Office and its commitment to investigating and prosecuting environmental crimes occurring in Suffolk County. Specifically, it finds that the formation and expansion of the District Attorney's Environmental Crime Team ("ECT") is a critical part of the effort to prevent, detect, and prosecute environmental crimes. The ECT currently consists of seven prosecutors, numerous Suffolk County Police detectives, including two detectives with highly specialized training, and agents from the DEC. The Special Grand Jury recommends that the District Attorney expand the number of detectives with specialized training, as well as include a member of the Suffolk County Department of Health Services to participate on the ECT.

Second, the Special Grand Jury finds that there is a lack of sufficient protocols documenting the collection, transportation, and disposal of solid waste, construction and demolition material, limited use fill, restricted use fill, and material containing hazardous or acutely hazardous substances. The grand jury investigation revealed that criminal actors either did not maintain proper documentation or created false documents. These false documents included business records, particularly dump tickets detailing the classification of material that was to be dumped and the location at which it was to be dumped. Often times, both of those entries were false or intentionally incomplete.

As such, the Special Grand Jury recommends requiring business entities to document the handling of solid waste and other material from the point of pickup to the point of final destination, often referred to as cradle to grave. Entities should be required, at a minimum, to certify the nature and volume of material, and where that material was received, transported and disposed of. It is further recommended that such requirement be in electronic form, including the use of geolocation technology to assure the accuracy of the certification relating to the movement of said material. Currently, paper records have not been effective in curbing solid waste related crimes, as it is all too common that a perpetrator makes the claim that he received the problematic material from a DEC permitted facility, and then the facility claims ignorance as to the material's final destination. An electronic record signed by an identifiable person, detailing the date and time of collection and the type and volume of material, coupled with the geolocation information regarding the movement of that material, will assist in combatting fraud in the industry. It is further recommended that it should be a crime to fail to maintain the proper electronic documentation related to the cradle to grave handling of solid waste and other material.

The Special Grand Jury has also heard evidence of mass dumping. When dealing with solid waste, volume presents a greater risk of contamination to the environment. Therefore, in line with the above described electronic filing requirements, an alert system should be created that notifies DEC of any site that receives greater than a threshold number of truckloads of material within a 30-day period. This would limit illegal disposal by allowing DEC to conduct responsive site inspections to ensure material is lawfully on site and that contaminants do not go undetected.

Third, while there are criminal provisions and penalties provided for in the ECL, some of which were included in the Operation Pay Dirt indictments, the Special Grand Jury concludes, consistent with the evidence that it has heard, that the greatest deterrent effect against environmental crimes will come only with enhanced enforcement and punishment available under the Penal Law. This conclusion is based on several factors. To begin, the ECL was developed primarily to support a regulatory scheme rather than criminal prosecutions, although there are sections that do criminalize conduct such as those that were charged in connection with the grand jury investigation. Moreover, certain provisions of the ECL may be dependent on DEC regulations that are ambiguously defined, posing challenges to law enforcement and courts that are considering criminal sanctions for violations of those laws. By clarifying legal standards and enabling more effective enforcement through the Penal Law, law enforcement agencies, district attorney's offices, and the judiciary will be able to protect the public more effectively, and prevent those who seek to circumvent the law or take advantage of loopholes.

The Special Grand Jury therefore finds that amendments to the Penal Law are necessary to adequately address the issues and conduct that were revealed during the grand jury investigation. Specifically, the Penal Law lacks laws criminalizing conduct that damages the public or the environment in general, rather than the specific property of another, as there are no laws specifically addressing damage to the aquifer, a public resource, nor are there laws targeting the illegal acceptance or disposal of and possession of solid waste, construction and demolition material, hazardous substances, and acutely hazardous substances, or the transportation of any of those substances. Likewise, there are no provisions of the Penal Law specifically targeting illegal sand mining.

The deficiencies in the law exist in terms of both the substance of the available crimes, as well as the level of severity of the applicable crimes. The recommendations that follow seek to address the gaps in the current Penal Law statutes as they relate to the enforcement of crimes against the environment, particularly crimes related to the illegal dumping of solid waste and sand mining. The recommendations seek to provide more severe consequences to deter bad actors in order to protect individual victims, the environment, and the County's most precious resource – our drinking water.

These changes are particularly important in light of the potential danger to the aquifer and groundwater. The Special Grand Jury finds the protection of the aquifer of ultimate importance and that action should be taken to specifically deter contamination of the aquifer and to enhance penalties for intentional or reckless damage to the aquifer

The first area for proposed legislation targets the illegal disposal of solid waste, construction and demolition material, hazardous substances, and acutely hazardous substances; the possession, transportation, and acceptance of said materials; the criminal scheme used to carry out the illegal disposal, possession, transportation, and acceptance of said materials; and the maintenance and falsification of records related to the disposal, possession, transportation, and acceptance of said materials. The recommendations further seek to provide enhanced protection to and punishment for exposing the aquifer to contaminants or for damage to the aquifer. A summary of the proposals is outlined below.

The Special Grand Jury recommends increasing the severity of crimes pertaining to illegal dumping based on the volume or weight of the material disposed of. The more material that is disposed of on a property, the greater the potential risk to public health and safety, the greater the damage to the property, and the greater the cost to remove the material. As it currently stands,

the top charge available to combat illegal dumping is a class D Felony, Criminal Mischief in the Second Degree. This only represents damage to the property of another in a value of greater than \$1,500. For example, where a property has damages in excess of \$1,000,000 due to the illegal disposal of material, the top criminal charge is still the class D Felony.

The Special Grand Jury also recommends enhancement to the penalties for illegal disposal based on the composition of the material. For example, materials containing substances defined as acutely hazardous substances would be penalized most severely, compared to material containing hazardous substances, and further as compared to solid waste or C&D material in which there were no hazardous or acutely hazardous substances. Currently, the Penal Law does not address the types of material encountered in Operation Pay Dirt; thus, the penalties are the same if the dumping consists of acutely hazardous substances or solid waste or C&D material without any additional indications of contamination. Enhancements based on the composition of the material will provide for levels of punishment consistent with its dangerousness to the environment. In essence, to deter the type of behavior revealed in Operation Pay Dirt, there should be increased penalties based on the potential harm to the environment. To leave the sentencing structure as is will only perpetuate this conduct, as ECL fines and corporate dispositions are built in to the price of doing business for many bad actors.

The Special Grand Jury also recommends that specific knowledge of the composition of the material not necessarily be required under certain circumstances for criminal liability to attach. In other words, the individuals or entities possessing, transporting, or disposing of the material should not be able to evade liability through deliberate ignorance. The Special Grand Jury recommends statutory modifications to allow a permissive inference that certain individuals or entities possessing a heightened duty of care are responsible for knowing the contents of the

material in their possession and control. The Special Grand jury further recommends that where such individuals or entities unlawfully release acutely hazardous or hazardous substances into the environment, they are charged with knowledge, thus obviating the need for prosecutors to prove actual knowledge. The Special Grand Jury also recommends that the law allow an inference of knowledge when an individual is in possession of an aggregate weight of 10 or more cubic yards or 20,000 pounds of material containing an acutely hazardous or hazardous substance without the proper, legally-mandated tracking e-documents discussed above. Under such conditions, the possession of that material without the proper tracking e-documents would be presumptive evidence that said substance is knowingly possessed by the individual in whose possession the material is found.

The Special Grand Jury further recommends legislative enhancements that focus on deterring and punishing deceit and fraudulent conduct of dirt brokers, and those working with brokers, related to the disposal of solid waste, construction and demolition material, hazardous substances, and acutely hazardous substances. Such enhancements should target the organized activity of criminal actors who seek to take advantage of unwitting victims and seek to dispose of contaminated material or solid waste and construction and demolition materials on the properties of these victims, under the guise that the material is purported to be safe and clean. Based on the serious threat posed to the environment, the Special Grand Jury recommends that criminal schemes relating to illegal dumping implemented through fraud and deceitful tactics should be more seriously punished. Currently, in the Penal Law, and as charged in the indictments, the conspiracy to commit the crime of Criminal Mischief in the Second Degree is only classified as a class A misdemeanor, under Conspiracy in the Fifth Degree, P.L. 105.05(1). The organized

criminal conduct uncovered in Operation Pay Dirt should be penalized at a higher level, minimally as a felony.

Finally, the Special Grand Jury recommends that the Penal Law provide for enhanced penalties when the illegal dumping scheme caused harm to the aquifer. As stated above, the Special Grand Jury finds that it is imperative to take steps to protect the County's most precious resource – our drinking water.

Illegal Sand Mining and Related Offenses

The second group of proposed legislative and administrative actions targets the illegal mining of sand, as well as the incidental disposal into mined areas of solid waste, liquid waste, vegetative waste, construction and demolition material, hazardous substances and acutely hazardous substances. These recommendations, like those outlined above, seek to provide enhanced protection of the environment and, in particular, the aquifer.

First, the Special Grand Jury finds that, similar to illegal dumping, the law falls short in deterring illegal sand mining and related offenses. ECL § 23-2711 defines the level of mining activity requiring a permit as the removal or attempted removal of “1,000 tons or 750 cubic yards of minerals from the earth within 12 successive calendar months.” The proposed recommendations here target the situations in which sand is illegally extracted and removed from residential, commercial, industrial, or farm land. The following proposed legislation can be limited to Region 1 (Nassau and Suffolk Counties) per DEC's Declaration of Policy § 23-2703, which acknowledges the sole source aquifer of the region.

Important to the issue of sand mining is the prevention of the extraction and removal of sand under the guise of some other authorized activity, such as construction or farming. Sand mining in any form should only be authorized upon issuance of a valid permit by DEC with the

consent of the locality. When it is done without permits or the permission of the municipalities, there should be criminal consequences. The Special Grand Jury recommends the creation of a presumption that an individual is engaging in the illegal mining of sand when that individual is operating without a DEC permit or registration and that individual or corporate entity removes any material from residential, commercial, industrial, or farm land for the purposes of extracting sand. The severity of the crime, like in the case of illegal dumping, should depend on the amount of damage to the property, as well as the harm to the aquifer.

Second, as indicated previously, a particular concern regarding the regulation of unpermitted sand mining is that often the conduct occurs under the pretext of other legitimate business, rather than as a permitted mining use. Permits are obtained for certain conduct other than mining, but for the actual purpose to conduct a sand mining operation. The Legislature should criminalize conduct whereby an individual presents a written instrument to a governmental agency for a permit for agricultural or building purposes, but where the intent is to use the property for another purpose not authorized by the permit.

Third, the Special Grand Jury recommends laws specifically targeting the illegal disposal of certain materials into land that has been mined. As described, there are particular perils associated with the mining of sand, namely – as it relates to illegal disposal – mining can decrease the depth to water, or even worse can directly expose the aquifer. When material is disposed of in a location that is mined, the potential threat of contamination to the ground water increases. The severity of these crimes should also depend on the volume and composition of the material that is actually disposed of in the mined area, and whether the material contaminated the ground water.

Fourth, in light of the fact that sand is an extremely valuable commodity, the Special Grand Jury recommends adoption of legislation providing for increased penalties concerning the theft of sand, *i.e.*, the illegal mining of sand from the property of another. This may occur when a mining operation extends onto an adjacent property without the consent of that property owner.

Fifth, as it relates to all of the aforementioned legislative amendments, the Special Grand Jury recommends, as an additional aggravating factor, enhanced penalties for any individual who has a prior conviction under any of these crimes to deter repeat offenders.

Sixth, the Special Grand Jury recommends the passage of A.7558/S.5652 recently proposed by Assemblyman Thiele and Senator LaValle, which would prohibit the issuance of sand mining permits by the DEC where contamination to groundwater or drinking water on site or attributable to the site exceeds state or federal drinking water or groundwater standards. This law, if passed, would apply only in counties with a population of one million or more which draw the primary source of drinking water from a designated sole source aquifer. This legislation was reported to the Assembly Rules Committee on June 11, 2019. The Special Grand Jury finds that the proposed legislation is essential to the benefit of Suffolk County, as mining would no longer be permitted in areas where groundwater contamination already exists or is attributable to the mining site.

Seventh, the Special Grand Jury recognizes the unique harm caused by illegal or irresponsible sand mining to Suffolk County and finds that increased local regulatory enforcement, in conjunction with the DEC, may be necessary. Under current law, the SCDHS has authority to conduct investigations and pursue enforcement, thereby permitting the SCDHS to pursue bad actors where necessary. Moreover, as noted above, to further ensure collaboration with law enforcement, the Special Grand Jury recommends the expansion of the Suffolk County

District Attorney's Environmental Crime Team to include a representative from the SCDHS to concentrate on, among other public safety threats, harm caused by illegal dumping and sand mining and, in particular, to the aquifer. The Special Grand Jury also recommends that the local legislature designate the SCDHS as a mandated reporter, requiring it to report environmental crimes to law enforcement, which will enable law enforcement to conduct timely and thorough investigations. Specifically, the SCDHS should be required to report any and all potential criminal violations, as well as analytical results that bear on public health and safety, to the Office of the Suffolk County District Attorney, Suffolk County Police Department and the DEC.

Eighth, the Special Grand Jury recommends further amending the ECL to specifically require that the DEC shall not issue a permit for sand mining in areas that could affect public health without the approval of the public health authority of the locality where the site is located – in the case of Suffolk County, the SCDHS.⁸ This could be accomplished through a consistency review process. In order for DEC to issue a permit or renew or modify a pre-existing permit, the DEC would be required to first obtain approval from the SCDHS. SCDHS would review a referral from the DEC and render a determination as to whether the requested permit is consistent with the best interests of water quality protection and public health. SCDHS would then issue a consistency review certificate prior to the approval of any new mine, mine modification, or mine expansion. The SCDHS would conduct its review under provisions set forth in the Suffolk County Sanitary Code and the latest duly adopted Comprehensive Water Resources Plan.⁹

⁸ This provision would be limited to counties with a population of one million or more which draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer.

⁹ This oversight should be in addition to any necessary local approvals from the town or village governments where the site is located.

Finally, Suffolk County should consider enacting code amendments prohibiting individuals from removing excessive material from any site absent a permit to do so. This new law could apply to sites used for residential, commercial, industrial, or agricultural purposes. By doing so, the County can limit zoning abuses wherein individuals purchase plots of land under the guise of construction or development, when the true intent is to mine sand without a DEC permit. Site inspections coupled with summonses and criminal charges will act as a major deterrent and limit opportunities for offenders to commit fraud against local municipalities.

REMEDICATION AND VICTIM COMPENSATION

Much of this report has focused on the harm caused by illegal dumping and sand mining to the environment and the general public. The Special Grand Jury, however, also heard evidence about dumping that occurred at several properties located across Suffolk County and Nassau County. The Special Grand Jury heard directly from some of the property owners whose properties were used as illegal dumping grounds after being deceived by dirt brokers into accepting diluted C&D material. Some of these victims were left with multiple piles of contaminated material on their properties, while others had already begun to grade and incorporate contaminated material into their properties.

They requested this material, which was promised to be “clean fill” by the dirt broker, to assist in completion of home improvement projects. The victims of the scheme sought to add value to their properties. Instead, they were left with incomplete work, contaminated material, and the prospect of exorbitant costs to remediate their properties of this material.

There are several costs related to the remediation of a property. These costs include, but are not limited to: heavy machinery to excavate a property; carting bins to place material in for

removal; labor costs; and tipping and hauling fees for the trucks to transport and dispose of the material at an appropriate facility. Based on the evidence, the Special Grand Jury finds that these remediation costs can reach tens of thousands of dollars. One property owner had an estimate for remediation of between \$20,000 to \$25,000. Other property owners shared estimates that they received, including: over \$6,000; up to \$10,000; and up to \$4,000 just for the dumpsters themselves.

Victims such as the ones who testified in the grand jury are often left without anywhere to turn to for assistance in both the work to remove and remediate the property, as well as financial assistance to assist in offsetting out of pocket costs for the removal and remediation of the property.

Victim Compensation

The Special Grand Jury received into evidence Article 22, § 631 of the Executive Law. This law relates to the Office of Victim Services and provides for certain monetary awards for victims of certain crimes. The law sets forth certain requirements to qualify for this monetary award, including a finding that (a) a crime was committed, (b) such crime directly resulted in personal physical injury to or the exacerbation of a preexisting disability or condition, or death of, the victim, and (c) criminal justice agency records show that such crime was promptly reported to the proper authorities (no more than one week after the occurrence of such crime unless the office, for good cause shown, finds the delay to have been justified). This provision does not readily apply to the victims of environmental or property crimes such as the ones described herein.

One of the witnesses who testified before the Special Grand Jury described potential aid to victims. This witness is a Victims' Advocate employed by the Suffolk County District

Attorney's Office. The Victims' Advocate works with victims of crimes to assist them in addressing the harm caused by their offenders, whether financial, physical or psychological in nature, and relies upon the Executive Law to assist victims with financial compensation when available. Assistance to victims of environmental crime is limited under Article 22, § 631 of the Executive Law. The Victims' Advocate explained that in conjunction with the Office of Victim Services (OVS), a state-wide agency established to help victims of crimes, which also relies upon the Executive Law, OVS resources can provide compensation to victims for personal injury, property loss, or death. For example, OVS provides financial compensation for medical bills, funeral costs, therapy, counseling, cost for transportation to and from court, moving costs, "essential personal property" and "crime scene clean-up."

"Essential personal property" consists of items that a person needs for their health, safety or welfare, such as eye glasses and any medical devices. Not all property is covered as "essential personal property," and the property must be associated with a physical injury case. There are exceptions, but which are not applicable to cases such as Operation Pay Dirt. The Victims' Advocate explained that "crime scene clean-up" is generally limited to homicide or personal injury cases.

Where there has been damage to property consisting of real estate, as was the case in Operation Pay Dirt, OVS is viewed under the law as a payer of last resort. The victim advocate must first refer the victim to call his or her homeowner's insurance to determine whether the damage is covered by the policy. A victim can also seek compensation through the criminal justice system, which is often in the form of a judge's order for restitution to remediate the damage to the property. Those amounts, however, are severely limited by statute.

The Special Grand Jury also heard evidence relating to the Asset Forfeiture laws, and how the District Attorney's Office was able to utilize those laws, in their current state, to assist the victims of environmental crimes. A witness who has served as the Chief of the Asset Forfeiture Unit for the Manhattan District Attorney's Office testified that she has handled civil litigation pursuant to the asset forfeiture laws for the past 20 years. The laws of which she spoke are found within the New York State Civil Practice Law and Rules (CPLR), Article 13.

This witness testified about restitution and reparations, as defined in the Penal Law. Penal Law § 60.27 authorizes "restitution of the fruits of [defendant's] offense or reparation for the actual out-of-pocket loss caused thereby." Restitution orders are generally limited to \$15,000 for felony convictions, or \$10,000 for a misdemeanor conviction, with certain exceptions. The statutes of New York generally provide that the collection and distribution of restitution or reparations are made by other state agencies, not a district attorney's office, because generally the district attorney's office carries out the prosecution of criminal actors – not the collection of restitution for victims. Restitution can be ordered by the Court, but in cases where the defendant claims lack of assets, the victim may or may not be able to enforce the judgment. That is why the current civil asset forfeiture laws are so critical – they enable a district attorney's office to trace and forfeit the criminal actors' illicit financial gains and to then use those monies to compensate crime victims.

The witness testified that asset forfeiture laws, codified in CPLR Article 13-A and effective August 1, 1984, authorize prosecutors to seize and forfeit proceeds, substituted proceeds and instrumentalities of crime; or in the alternative obtain a judgment in the amount equivalent in value to those assets (a "money judgment"). The law seeks to return the defendant to the place he was before committing his criminal activity, and also seeks to return victims to

the place they were prior to being victimized. An example of “proceeds” can be money received for illegally transporting hazardous substances. An example of “substituted proceeds” may be a truck that was paid for with the illegally obtained money. An example of an “instrumentality” of a crime may be a truck used to commit an offense such as illegal dumping. Money seized by a prosecutor’s office and forfeited by a defendant as a result of a civil asset forfeiture action may be used by a prosecutor’s office to restore stolen funds to victims of crime. Additionally, a portion of asset forfeiture monies are provided to fund the State’s substance abuse treatment (*i.e.*, “OASAS”) and other critical public safety services and initiatives.

The Special Grand Jury heard evidence concerning certain provisions found within that law, all of which may be used by prosecutors’ offices to compensate victims of environmental crimes. For example, CPLR 1311(1) and CPLR 1312(1) and (2), collectively, allow a prosecutor to obtain a restraining/seizure order (“Order of Attachment”) and maintain the status quo of property owned by a criminal defendant up to the amount of the proven criminal gain, regardless of whether the property was used in, or obtained from, the crime. This aspect of the law is essential to its utility. The witness explained that by the time a prosecutor is ready to file an indictment and related civil forfeiture action, the targets have usually spent or hidden most of their ill-gotten gains. Moreover, in some crimes, by definition there are no proceeds to seize – those proceeds consist of the money saved through law-breaking. This may be particularly true in environmental crime cases such as the ones investigated by the Special Grand Jury, where environmental laws impose compliance costs that can be avoided through law-breaking.

The Special Grand Jury also heard about CPLR 1312(4), the provision allowing a defendant to ask the judge who ordered the assets frozen to be released for attorney expenses or to pay living expenses. Currently the judge has the discretion to consider the source of the funds

in deciding motions under this section of the law. This helps to ensure that defendants do not profit from their criminal activities by using their ill-gotten gains to fund their legal defense or lifestyle.

Finally, the Special Grand Jury heard testimony concerning CPLR 1311(1)(a), a provision in the law that is particularly germane to this case, a case involving multiple victims and multiple criminal acts committed by the same actor in a common scheme or plan. CPLR 1311(a) permits the prosecutor's office to sue the defendant for an amount of money that represents the defendant's "criminal activity arising from a common scheme or plan of which [the felony] conviction is a part." Thus the prosecutor can forfeit proceeds of a felony and of all additional crimes – even misdemeanors – that are part of the same common plan and scheme. This provision in the forfeiture law gives the prosecutor the opportunity to prove in the civil forfeiture case that the defendant obtained proceeds through an ongoing scheme, thereby allowing the District Attorney's Office to recover all of the ill-gotten gains for additional victims and harms.

The Special Grand Jury heard testimony regarding how this provision of the law has been used by the Suffolk County District Attorney's Office to seize and place in escrow funds obtained pursuant to a large-scale environmental crime scheme, and that those funds then can be repurposed to provide resources for remediation of the damages caused by environmental crimes. Once the money from the escrow fund is used to compensate all the victims represented within the indictment, any remaining money will seek to be used to cover the cost of remediation for financial harm to other properties definitely linked to the defendants' actions, but that were not specifically charged in an individual count of the indictment.

The Special Grand Jury further learned that all of the CPLR provisions explained to the Grand Jury, and used by the Suffolk County District Attorney's Office, have been changed by the New York State Legislature, signed into law effective October 1, 2019. First, CPLR 1311(1) and CPLR 1312(1) and (2) delete the "money judgment" provisions. Under the new law, a prosecutor may only sue to recover, and only obtain a pre-trial restraining/seizure order, for property directly obtained from or used to commit crimes. Therefore, each and every dollar sought to be forfeited by a criminal must be specifically traced from the source to the defendants' possession. Untraceable property can only be seized *after* a judgment has been obtained and only *after* a prosecutor proves that he/she is unable to locate property traceable to the crime. Thus, if the prosecutor cannot prove that the asset is directly derived from the criminal activity (*i.e.*, the money was the actual payment made to dump a truckload of hazardous substances, or that the truck was the specific truck used to transport the hazardous substance), the prosecutor may not seize and forfeit the asset. By the time this extensive "tracing" is accomplished, the defendant will have ample time to deplete or sell his assets. By the time of trial, when the prosecutor can prove the assets are proceeds, substituted proceeds, or instrumentalities of the crime, the defendant will have sold, spent, transferred, laundered, or depleted his assets. The victim will be left with nothing but a piece of paper for the money judgment, and any ultimate money judgment will be unenforceable.

The State's restitution compliance track record is a stark example of how this proposal would hurt victims. Restitution orders filed as civil judgments are rarely collected and the tools available to prosecutors to assist them are weak. The victims remain victimized. If a prosecutor is not able to restrain such property until after a criminal conviction and civil judgment are obtained, in most cases no property will be available to satisfy that judgment.

The Special Grand Jury also learned about the change to CPLR 1312(4), which deals with applications to the court for a release of funds. The new legislation adds the following language: “That funds sought to be released are alleged to be proceeds, substituted proceeds or instrumentalities shall not be a factor for the court in considering and determining a motion under this provision.” Under this proposal, when considering a defendant’s motion to release frozen funds to pay attorneys’ fees and living expenses, a court is precluded from considering whether the funds are stolen or illegally obtained. Thus, a defendant may steal money and use it to pay his legal bills and living expenses. This amendment eliminates a court’s discretion in determining an application by the criminal defendant for living expenses and/or attorney fees. Beginning October 1, 2019, the court will be required to turn a blind eye to the source of restrained funds or property when considering a motion by a defendant for release of restrained funds for attorney’s fees or living expenses. The Special Grand Jury finds that this amendment will increase the likelihood that defendants will request the court to release funds since the court lacks discretion to consider the illegal source of those monies.

Finally, an amendment made to CPLR 1311(1)(a) deletes the “Common Scheme or Plan Provision” from the current law. This amendment deletes the provision that permitted a civil suit and forfeiture of all property linked to criminal activity arising from the same common scheme or plan for which the defendant is convicted. The proposal removes the prosecutor’s authority to forfeit property from “criminal activity arising from a common scheme or plan of which [the felony] conviction is a part.”

Starting October 1, 2019, a prosecutor will *no longer* be able to sue for proceeds of a crime obtained outside the time period alleged in an indictment, or on behalf of victims whose losses are not covered by the indictment – even if they were part of the defendant’s same

criminal acts and scheme. Defendants involved in criminal enterprises harming multiple victims will only be responsible for forfeiture on the charges indicted and tried, and only if the criminal assets can be specifically traced. The Special Grand Jury finds that this revision would affect forfeiture in the instant case, since many of the defendants' actions occurred outside Suffolk County, and affected unidentified victims. Forfeiture is currently available since these harms resulted from the defendants' common scheme or plan. The new laws, however, will eliminate prosecutors' ability to recover forfeiture of the full amount of a defendant's ill-gotten gains from similar schemes in the future.

RECOMMENDATIONS TO ENHANCE REMEDIATION AND VICTIM COMPENSATION

Based on the credible evidence, the Special Grand Jury recommends the following changes to the laws to permit for remediation for environmental crimes and compensation to the victims of environmental crimes:

First, the Special Grand Jury recommends that Article 22, § 631 of the Executive Law be amended to clearly and unambiguously apply to victims of environmental crimes if it can be established that the crime directly caused damage to the personal property of another as the result of an environmental crime.

Second, the Special Grand Jury recommends that the recent amendments to the asset forfeiture laws, as described above and found in CPLR 1311(1), 1312(2), 1312(4) and 1311(1)(1a) be repealed, and that the amendments not go into effect on October 1, 2019, so as to permit victims of environmental crimes, such as those described herein, an opportunity to be made whole.

RECOMMENDATIONS FOR DEDICATION OF RESOURCES

The Special Grand Jury recognizes the volume of resources that were involved in the investigation, including resources of the Suffolk County District Attorney's Office, the Suffolk County Police Department, and the DEC. These resources included hundreds of human hours dedicated to this investigation, including time spent on, but not limited to the following: physical surveillance, execution of eavesdropping warrants, review of records, execution of search warrants, meeting with victims, drafting legal documents, and various other investigation specific tasks.

The Special Grand Jury commends the inter-agency cooperation in their efforts to combat this activity that creates harm to both innocent victims and the environment. Recognizing the importance of the protection of the environment, the specialization required by law enforcement, and the resources needed to investigate and prosecute these crimes, the Special Grand Jury makes the following recommendations:

The Special Grand Jury recommends that local police departments incorporate training on environmental crimes to all police officers. This training should include instruction on how to recognize signs of a potential environmental hazard or crime. It should also include training on how to properly respond to the discovery of an environmental crime.

The Special Grand Jury recommends that local police departments have dedicated officers and detectives assigned to receive environmental complaints and investigate environmental crimes. They will work with assistant district attorneys who are specially trained in prosecuting environmental crimes. Together they will conduct environmental investigations, and manage the collection of evidence from crime scenes, which includes the necessary sampling and preservation of environmental evidence.

The Special Grand Jury also recommends more dedicated resources at all levels of government, local and state, to combat environmental crimes.

GRAND JURY CONCLUSIONS

The Special Grand Jury heard testimony and reviewed evidence over the course of the past year. That evidence highlighted the importance of protecting the environment of Suffolk County from illegal dumping and sand mining, particularly in light of the fact that Suffolk County sits atop an aquifer, which is the sole source of drinking water for residents of Suffolk County. Through the evidence that was presented during the course of the Special Grand Jury's investigation of illegal dumping of solid waste, construction and demolition material, and hazardous and acutely hazardous substances, it is clear that the current criminal consequences provided for in the ECL and the Penal Law are insufficient to deter the conduct investigated here.

As a result, the Special Grand Jury finds that the recommendations made through this report will address the gaps in the current Penal Law – providing clarity to law enforcement as well as clarity to the industries involved, thereby acting as a deterrent to individuals that might be motivated by greed to try to take advantage of innocent victims, damaging their properties and causing harm to the environment. The recommendations also include additional regulations to deter environmental crimes in the future, such as electronic tracking of the handling of solid waste and hazardous and acutely hazardous materials. Finally, the recommendations will allow victims of environmental crimes to have options available to assist in offsetting the costs of remediation, so that they are not re-victimized as they try to return their property back to normal.

The Special Grand Jury urges the New York State and the Suffolk County Legislatures to review and approve these recommendations to help further protect the people of the State of New York, including the residents of Suffolk County, from the dangers of unlawful dumping and sand mining.

Appendix A

Exhibit R-1

Suffolk County's Water Supply





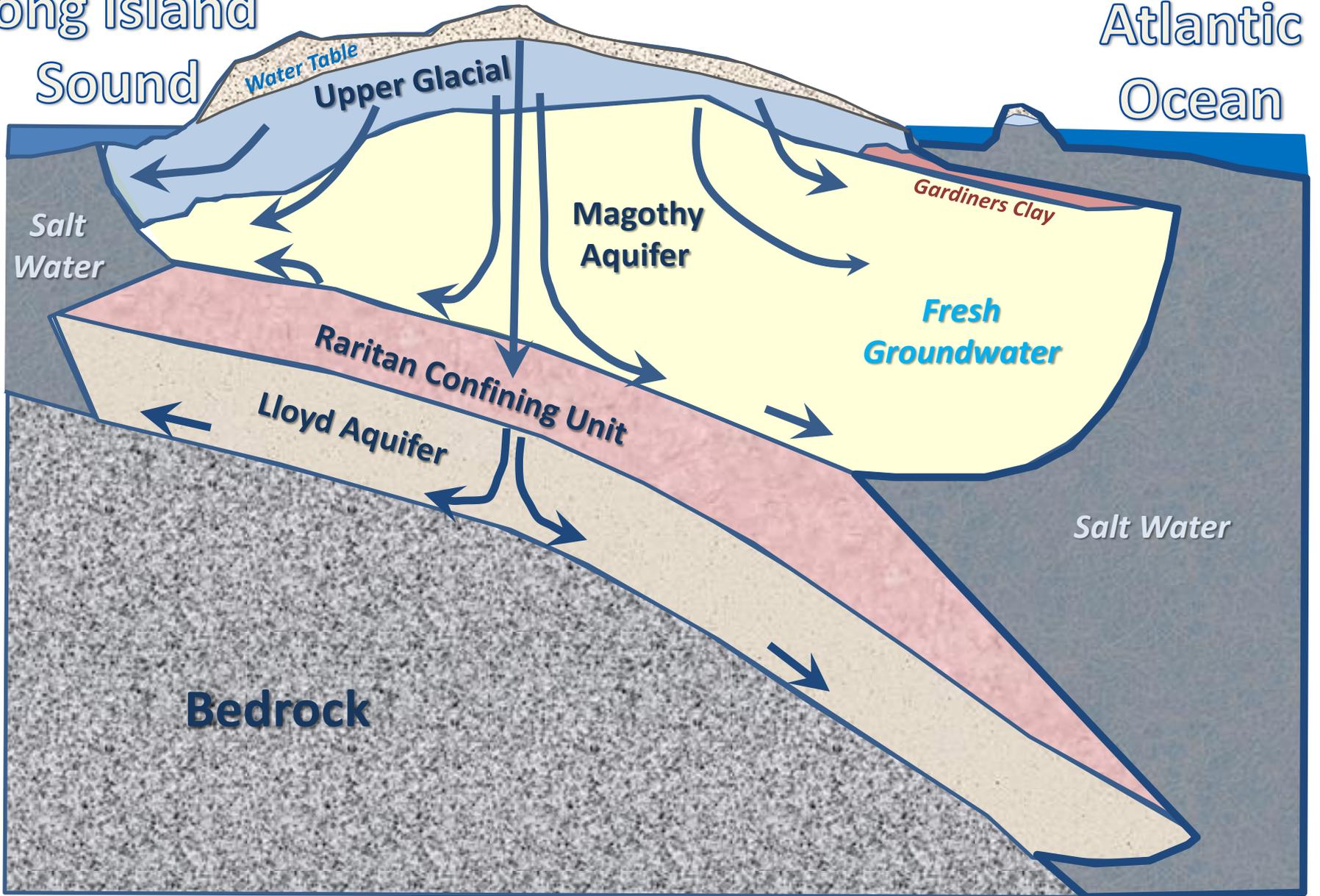
Long Island Sound

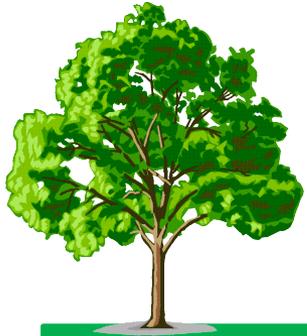
Atlantic Ocean

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

Long Island
Sound

Atlantic
Ocean

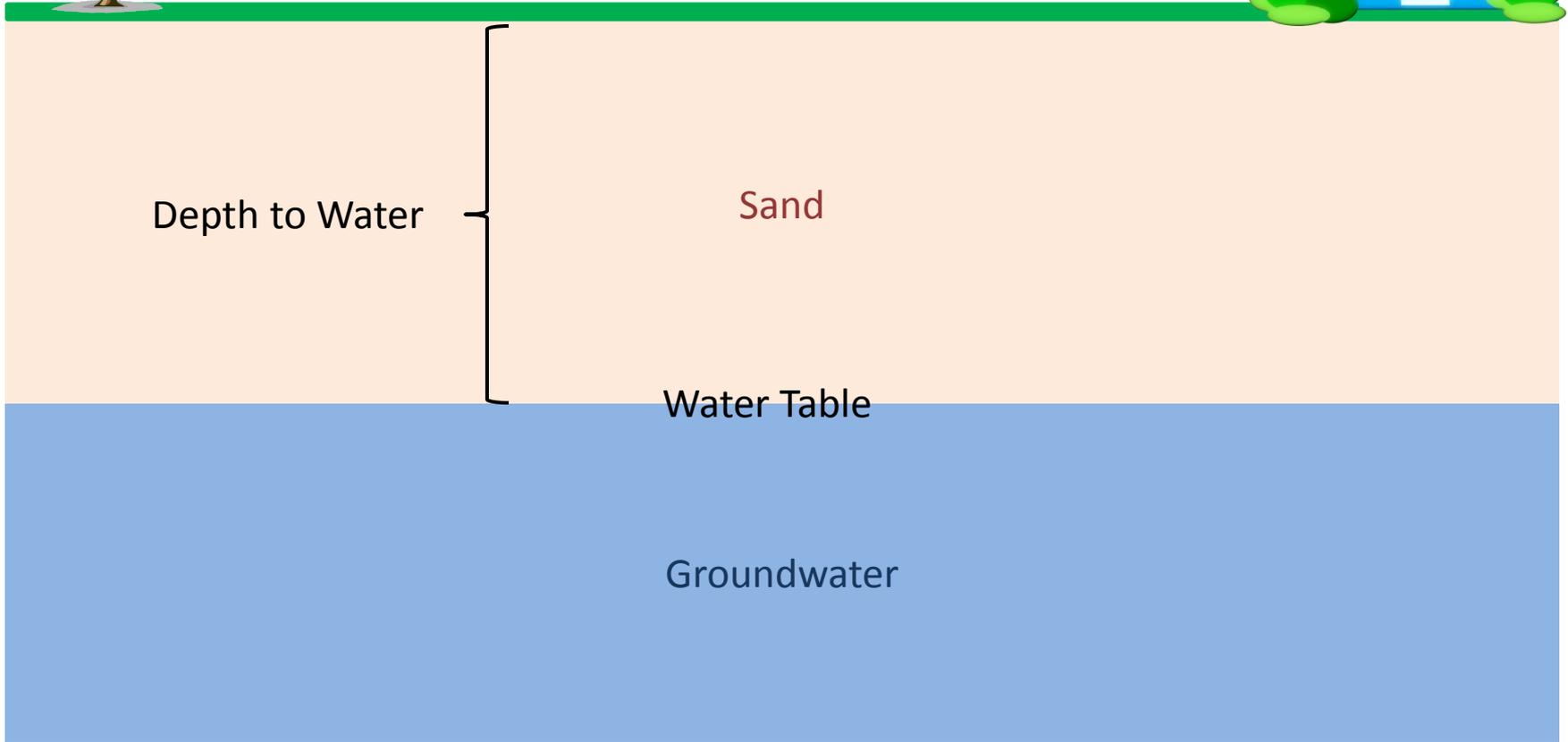




Sand

Water Table

Groundwater

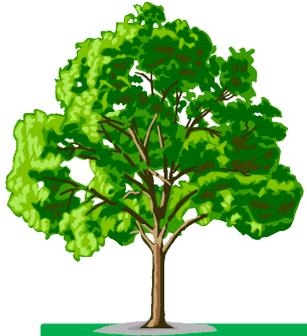


Depth to Water

Sand

Water Table

Groundwater

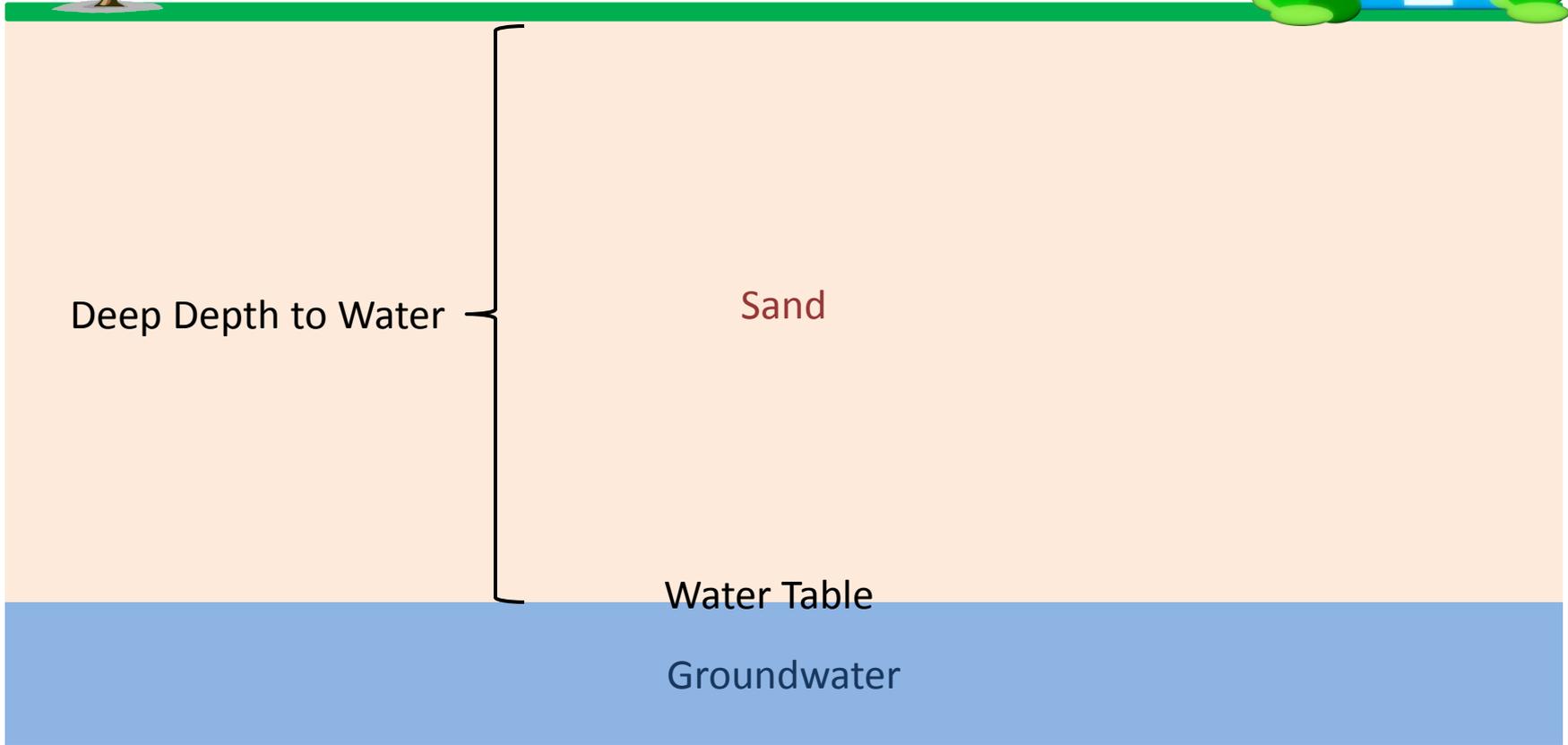
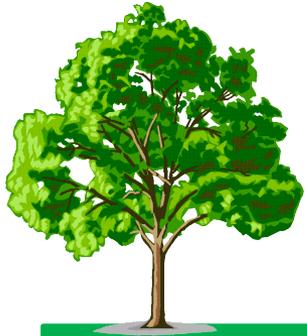


Shallow Depth to Water {

Water Table

Sand

Groundwater



Deep Depth to Water

Sand

Water Table

Groundwater

