

## CLEMENTE PARK

## ENVIRONMENTAL CRIMES

# Prosecuting polluters is a tough task

Authorities face litany of challenges with cases such as illegal dumping

BY JENNIFER BARRIOS  
jennifer.barrios@newsday.com

**E**nvironmental crimes prosecutions — such as the ongoing dumping case in Islip and Babylon — can pose unique challenges.

They range from the nature of the offenses themselves to a lack of resources within local district attorneys' offices for the expensive investigations, legal experts say.

It's often easier to nab alleged polluters on traditional white-collar crimes, such as fraud or falsifying business records, instead of charges under the state's environmental conservation law, they said. And jail time can be rare in successful prosecutions, while fines can pale compared with the cost of repairing the environmental damage the crimes have caused.

A special grand jury convened by Suffolk County District Attorney Thomas Spota last year returned a 32-count indictment in December against six men and four companies in connection with dumping contaminated fill at a park, a vacant lot and a development for returning war veterans in Islip Town, and a state-protected wetlands area in Babylon Town. All the defendants have pleaded not guilty to the charges.

Such environmental cases

can be a challenge to prosecute, and to be successful takes dedicated resources, said Robert Owens, who was head of the Nassau County district attorney's unit for 21 years until 2010.

"It's very, very expensive and difficult to have an environmental crime unit," Owens said. "The main issue is sampling."

Testing material to identify whether it is hazardous or toxic is an expense that can run into the thousands of dollars — a cost local district attorneys' offices would have to put up and risk not getting back, Owens said.

In addition, parts of the state's environmental law are written like drug laws — "the bigger the quantity, the bigger the crime," said Michael Lesser, former assistant counsel in the state Department of Environmental Conservation's general counsel's office and chair-elect of the New York State Bar Association's environmental law section.

To prove a case, investigators would have to "weigh and measure the quantity and volume of what you're sampling — and that's not always practical, especially if somebody's dumped something off the side of a mountain in the middle of nowhere," Lesser said.

Keeping environmental crime detectives fully trained to investigate environmental crime scenes is vital.

One law enforcement source describes that process, which

includes training on sampling and handling chemicals and hazardous substances in addition to the usual crime-scene investigative techniques, as "CSI on steroids."

"It takes a lot of time and understanding of regulations, understanding the laws and taking traditional law enforcement techniques and applying it to environmental crime, and that's where the failure is," the source said. "Nobody wishes to do that. It's expensive, and there's a large learning curve."

## Suffolk's prosecutions

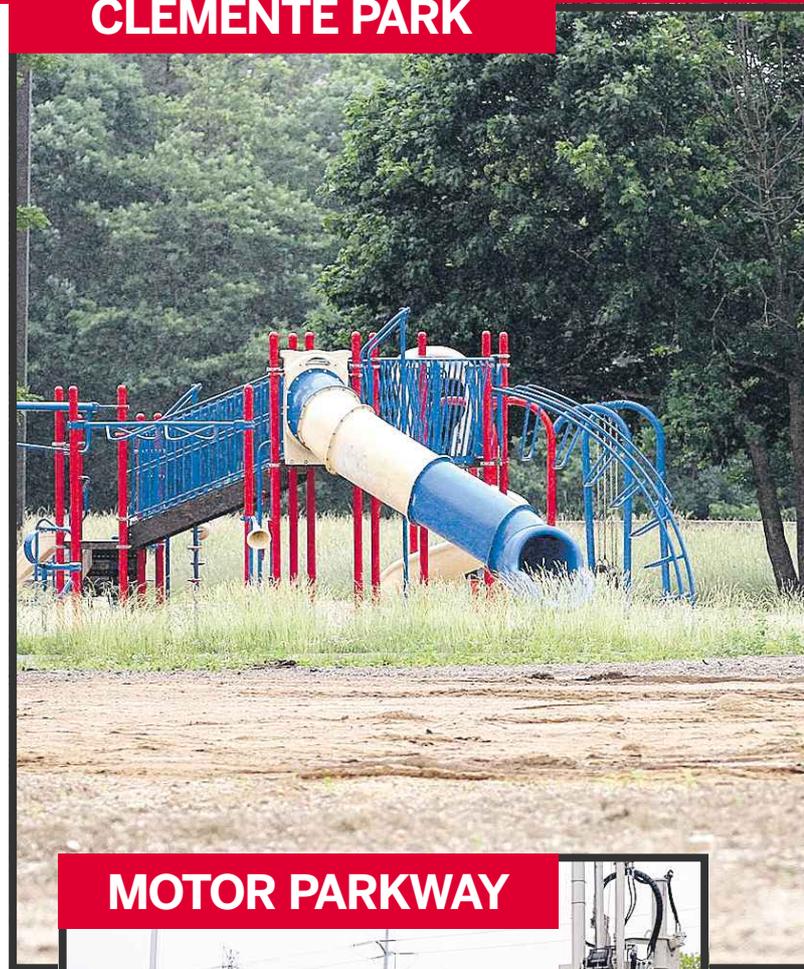
For many years, Suffolk — along with Nassau and Westchester counties — was a leader in the state in pursuing environmental crimes, according to former prosecutors who once headed up Suffolk's environmental crime bureau.

Commack attorney Frederick Eisenbud, who was the bureau's first leader, said that in the three years after its creation in 1984, he had more convictions "than the attorney general had in the rest of the state combined."

Linda Spahr, who headed the bureau from the late 1980s until 2001, the year Spota was elected district attorney, wrote in 1998 of Suffolk's dedication to rooting out environmental crime.

"By 1989, Suffolk County was responsible for a full third of all criminal hazardous-waste prosecutions being brought in the entire state of New York," she wrote in a paper prepared for an international conference on enforcing environmental law.

The unit was made into its own independent bureau in 1990



## MOTOR PARKWAY



In Islandia, hazardous materials were found in the area surrounding several homes dedicated to troops who were returning from the wars in Iraq and Afghanistan.

JAMES CARBONE

by then-District Attorney James Catterson, wrote Spahr, who declined to comment for this article.

The Suffolk district attorney's environmental crime bureau had once been free-standing, with five criminal investigators and at least two full-time prosecutors, one source said.

Spota's spokesman Robert Clifford said while the unit is now under the economic crimes bureau, it has devoted to it three assistant district attorneys and four detectives trained to handle hazardous

waste — with more investigators and prosecutors added on extensive investigations, as with the dumping case.

He said the office does not keep stats on the number of environmental prosecutions it does.

But information from the state Department of Criminal Justice Statistics, which keeps data on arrests and arraignments of individuals — but not corporations — in cases in which the top charge is a violation of the state environmental law, shows Suffolk with 110

Even when a prosecution is successful and the polluters pay fines, those amounts can be a fraction of the actual cost of cleaning up the environmental damage caused.



Roberto Clemente Park, in the Town of Islip, has been closed since May. The Suffolk County district attorney's office said last year that the site had asbestos — contamination linked to two other sites.

DANIEL RAIDER

## ISLIP AVENUE



And in Central Islip, the cost has not yet been determined for the cleanup of an area at Islip Avenue and Sage Street. ■ Explore possible polluted sites on LI: [newsday.com/data](http://newsday.com/data)

JOHN ROCA

such arrests and arraignments between 1995 and 2014.

Only New York City had more during that time, with 119.

The data show Nassau County had a total of 25 in the same period. But Shams Tarek, a spokesman for that county's office, said that number does not reflect the county's true number of environmental prosecutions.

He said there were 71 arrests on environmental prosecutions in Nassau between 2006 and 2009, for example, with seven felony convictions during that

time. Eight individuals received local jail sentences.

### Classic penal law

Prosecutors often find it easier to rely on classic penal law statutes, not environmental ones, when confronted with a polluter — making it less likely the top charge will be an environmental one.

In the Suffolk County dumping case, for example, the top charge for all but two of the defendants was from the penal law: criminal mischief in the

second degree, a D-felony. The other two defendants face a top charge of third-degree endangering public health, safety or the environment, an E-felony under the state's environmental conservation law.

"We tend as state and local prosecutors to use our traditional bag of tricks — which are falsifying business records charges, offering a false instrument for filing, larceny charges — those are our bread and butter," said Michael Mansfield, former Queens County executive assistant dis-

trict attorney and former head of New York City's Business Integrity Commission. "And if somebody has dump tickets and they're falsifying the dump tickets, well, bang — you've got an E-felony. It's a straightforward economic crime, and much easier to prove."

Scott Fein, a former criminal prosecutor in the Nassau County district attorney's office and past chair of the state bar association's subcommittee on environmental enforcement, said classic penal law charges also can be more digestible for juries.

"Juries tend to understand penal crimes more quickly than the more arcane environmental offenses," Fein said. "If you say, well, it's one part per million, and then a defense attorney says one part per million is the equivalent of one inch in three miles, they wonder: Why are they here for this?"

Owens said most of the environmental cases he prosecuted were based, at least in part, on paper evidence such as permits or correspondence — evidence he said was "critical" to a successful prosecution.

Others agreed.

"The best record-keepers are sometimes the ones that get prosecuted," said Raymond V. Casey, a former Queens prosecutor and expert on the solid-waste industry.

But the smaller the company, Mansfield said, the less likely a paper trail exists.

### Jail time is rare

While individual offenders do often fear jail time, Owens said, it's uncommon for a polluter to end up jailed for an environmental crime.

James Periconi, a former assistant New York State attorney general in the environmental protection bureau, wrote in an American Bar Association publication in 2009, for instance, that there were "no jail cases in Suffolk County in recent years" in environmental cases.

"Most of these defendants are charged as corporations and subject to fines and sanctions, and they pay the bill for the cleanup of whatever property they despoiled," Clifford said, adding that individuals who are charged often do not have criminal histories.

Eisenbud said polluters in Suffolk took the environmental law more seriously in the 1980s after two people were jailed on environmental crime convictions and a third paid a \$350,000 penalty.

"Suddenly, the health depart-

ment sanitarians when they inspected would say, 'Either you cooperate or we're referring it to the DA,'" he said. "And suddenly people were listening to them."

Sometimes prosecutors found it difficult to get the courts to consider environmental violations similarly to other crimes.

"I had to persuade judges that even though these are white-collar people who never got into trouble in their lives, they're not such good people because they created irreversible damage," Eisenbud said.

Even when a prosecution is successful and the polluters pay fines, those amounts can be a fraction of the actual cost of cleaning up the environmental damage caused.

In one of the biggest environmental crimes prosecutions in Queens history, that county's district attorney's office spent nearly two years investigating a "fill-for-fields" scheme in College Point, culminating in two indictments in 2001.

In that case, a nonprofit sports group contracted with a company to build a sports complex on city-owned land for free, with the company — Enviro-Fill — making a profit by charging contractors a fee to dump clean fill there.

Instead of the expected earth, gravel and sand, the company allowed the dumping of asphalt, wood, metal drums, plumbing fixtures and pulverized construction and demolition debris, then covered it all with a thin layer of topsoil that eroded over time, according to court papers and Queens District Attorney Richard Brown.

The investigation yielded a 734-count indictment in May 2001 against three men and three of their corporations, and months later a 906-count indictment against two more individuals and their company, Enviro-Fill.

Ultimately, the first three men cooperated with the investigation in exchange for each pleading guilty to one environmental misdemeanor, and were fined a total of \$250,000.

The individual controlling Enviro-Fill pleaded guilty in 2003 to falsifying business records and releasing more than 70 cubic yards of solid waste to the environment, and was sentenced to 3 months in jail and ordered to pay restitution of \$250,000 to the city.

But the cost to New York City to clean up the property and rebuild the ballfields properly?

\$16.5 million.

With Sarah Crichton