P U B L I C H E A R I N G

before

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE STUDY COMMISSION

on

"Extent of Liability Insurance Crisis"

October 15, 1985
Room 440
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Raymond Lesniak, Chairman
Senator Lee B. Laskin
Assemblywoman Marlene Lynch Ford
Assemblyman Robert J. Martin

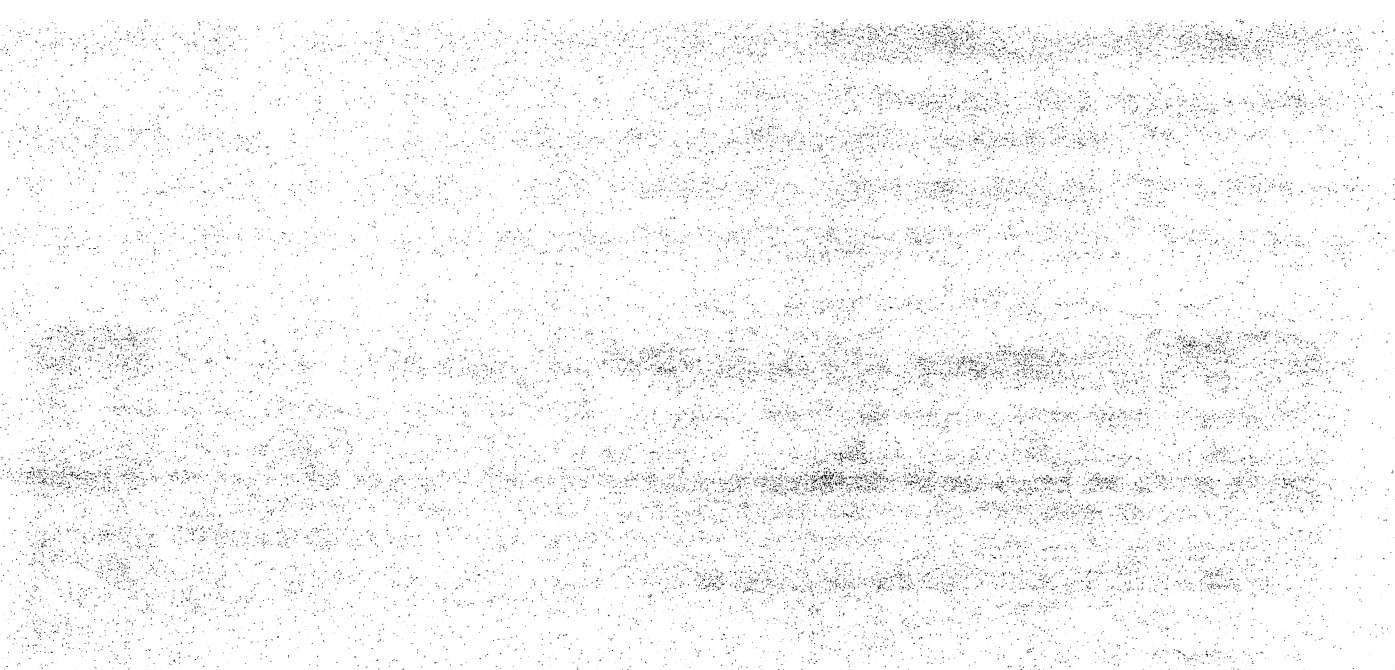
ALSO PRESENT:

Denise Drace
Office of Legislative Services
Aide, Environmental Impairment Liability Insurance Study Commission

* * * * * *

TABLE OF CONTENTS

TDM: 1;32-43
SK: 2-7
JB: 22-32
MJZ: 9-22;43-49



SENATOR RAYMOND LESNIAK (Chairman): The second public hearing of the Environmental Impairment Liability Insurance Study Commission will come to order. I am Senator Raymond Lesniak, Chairman of the Commission. To my left is Assemblywoman Marlene Lynch Ford. Senator Lee B. Laskin is to my right.

Before we begin, I am going to submit, for the record, written testimony, submitted to me by municipal officials who could not stay to present their testimony at the last hearing.

We are honored this morning to hear from Congressional Representative, Jim Florio, who is going to testify regarding Federal laws and regulations as they affect the State's problem. Congressman Florio, thank you very much for coming this morning.

CONGRESSMAN JAMES J. FLORIO: Thank you very much, Senator Lesniak, Senator Laskin -- my Senator, as a resident of Pine Hill, and Assemblywoman Ford. I am pleased to be here and to share some thoughts with you regarding the current insurance crisis that affects all of us across the country, particularly here in the State of New Jersey.

I chair a subcommittee -- the Subcommittee on Commerce, Transportation, and Tourism -- that has jurisdiction over insurance at the Federal level. I suspect you know this is a minimal involvement because of laws which provide that the business of insurance should primarily be regulated at the State level. That is being looked at, and we are now in the process of looking at specifically dealing with environmental insurance unavailability as part of our other jurisdiction which deals with environmental cleanup -- particularly toxic waste cleanup sites.

I thought I would like to share with you the results of Congressional hearings my Committee has conducted because I think it is important that we share some notes and observations in this area. This is going to take a two-tiered approach in order to deal with this problem -- that is, State and Federal cooperation.

At the risk of over-simplifying the basic message of industry, I think it is fair to characterize the position we have heard at our hearings regarding this problem in the following way: Industry maintains that strong liability provisions at the State and Federal

levels, particularly in environmental laws, partnered with an increasing awareness of the environmental and health problems caused by toxic pollution, means both that increasing litigation is likely, and that its outcome is uncertain. In general, the courts in states across the country — and especially in New Jersey — have taken a very traditional and conservative approach toward the interpretation of insurance policies in the environmental area, construing them to cover various types of pollution liability unless the intent of the insurer is to exclude such coverage and that intent is made unequivocally clear.

I call this approach "judicial and conservative," because it has been a general rule of contract interpretation in insurance law to construe policies against the immediate interests of the insurer, because the insurer has the ample opportunity to protect its interests in the initial drafting of the contract. That is to say, if there is any ambiguity in the law — in the contract — it will be interpreted by the courts against the insurer. The overall result of the courts' conservatism has been a series of cases holding the insurance industry responsible for a wide variety of environmental damages. These newly-decided liabilities have, in turn, helped provoke a backlash within the insurance industry, which has proclaimed a crisis in the market for environmental impact insurance, and has resulted in increasing cancellation or refusal to sell policies offering even minimal coverage for such claims.

The insurance industry has not attempted to soft-pedal its clearly preferred solution to the current crisis. As legislators, we have repeatedly been told, over the course of the last year particularly, that only radical changes in liability standards contained in major environmental laws will improve the marketplace climate enought to coax the insurance industry back into providing coverage. For example, as the Commission knows, the Congress is currently involved in a heated debate over the future of the Superfund program to provide for the authority and the funding to clean up toxic waste dump sites around the country. Taxing authority for the fund expired on the first of October, and we are now considering legislation to extend and expand the program.

The current Superfund law establishes a two-tier approach to the cleanup of the nation's worst abandoned toxic waste sites. First, it creates a Federal fund to provide the money for the immediate cleanup that is required when a site poses an imminent and substantial hazard to people's health. Second, the law imposes strong liability standards on private parties reponsible for creating the sites, so that the government can both compel additional private sector cleanups and recover the money the fund has spend on such efforts. So the money—In a sense, the fund will be a revolving fund, constantly being replenished from awards obtained against the private parties that caused the problem in the first place.

Early in the reauthorization process, the insurance industry came forward with some dramatic proposals to revamp this crucial environmental program by dropping the second tier which I just made reference to. Superfund, the insurers suggest, should be converted into, a massive public works project supported by a combination of industry taxes and general taxpayer revenues with no liability for those responsible for creating the sites in the first place. We were assured that by eliminating the liability provisions of current law, the risks of future litigation would be reduced and the market for environmental impairment insurance would once again be open for business.

The insurance industry's public works proposal has been almost unequivocally rejected by all parties to the debate in the halls of Congress. Members of Congress across the full political spectrum realized that the elimination of the liability principles from the Superfund program would, over the long run, cause enormous problems which would ultimately overwhelm the short-term problems caused by insurance shortages.

For one thing, the public works approach would have meant that government, and not the private sector, must assume the exclusive responsibility for cleaning up literally thousands of toxic waste sites across the country, a task which would very quickly exhaust current governmental resources.

Removal of liabiity would also have meant the spreading of the substantial economic burden of cleanup to sectors of our society that have no connection with, or responsibility for, the problem, and the unfairness of such a transfer was simply not palatable to the Congress.

Finally, removal of liability for Superfund problems would disrupt a whole series of delicately balanced incentives regarding future waste disposal. The Superfund program is the final destination of any carelessly managed waste disposal facility. Without liability for such mismanagement, incentives to comply with the other laws establishing standards for future waste disposal would be substantially undermined.

So the Congress has thus far rejected the public works approach for Superfund, leaving us back at square one in our efforts to develop a comprehensive response to the current environmental insurance crisis.

A couple of weeks ago, the House Subcommittee that I chair held comprehensive hearings on both the causes and the effects of the current insurance availability crisis. While the initial impetus for our hearing was a well-publicized crisis in environmental insurance matters, we very quickly discovered that the problems in this one sector of the marketplace are by no means unique.

Environmental risks are far from being the only areas where there is an insurance availability problem. Child care providers, ski resort operators, chemical manufacturers, fishermen, states and municipalities, corporate officers and directors, nurse-midwives, and a whole host of others testified before our Committee that they are having the same problem. Virtually every type of insurance purchaser appears to find it costly or impossible to find liability coverage.

Members of the insurance industry say they can not do business with the risks and uncertainties that they find in all these areas. They say that our system of civil justice needs reform. They attribute the crisis largely to the self-interest of attorneys and overly generous courts and juries.

On the other hand, consumer advocate assert that the situation is in part — and they say, in large part — the result of poor insurance business practices. These critics say that the insurance industry's current financial difficulties can be traced to the practice of "cash flow underwriting."

According to this view, insurance companies charged unrealistically low premiums in an effort to maximize cash flow to be used to gain investment income. Around 1983, when interest rates began to fall, investment income plummeted and the companies no longer could cover the underwriting losses resulting from the cut-rate premiums that had been permitted in a less than conservative way in the late 1970s. This analysis, by the way, is conceded to be factually correct by the insurance industry itself. We had representatives from ISO testify before our Committee. They have concluded the report which stated in its conclusion, that in large measure, insurance problems were brought on to the insurance industry, often as a result of some less than thoughtful policies that the insurance industry pursued in ways that probably should not have been allowed as a means of obtaining premiums for purposes of investment.

To give you one glaring example of how extreme this policy was at one point, the Hyatt Hotel disaster in Kansas City a few years ago, was an example of the insurance being written for the hotel after the accident. In a sense, what we saw in that instance was a policy written for— let's use wild numbers, $100, even though the payout was $120, because the $100 was used for investment that would yield $130. So, in that instance, we saw the insurance company feel that it was an appropriate business judgment to write discounted premiums not equal to loss payout, because they were gaining benefits from the investments. As you can see, when investment climates change and you can not obtain the yield on the investment, you are still left with the payout that is causing, in some respects, the problems that we are currently facing.

Industry critics contend that the industry is now using a crisis of its own making to step up pressures for tort law reform and what they would describe as unjustified rate increases. The views of

industry critics were supported by one case study that my Subcommittee pursued in some depth: The recent cancellation of medical malpractice coverage for certified nurse-midwives throughout the country. The insurance industry generally attributes the insurance crisis to the judicial system, yet in the instance of nurse-midwives, we had clear evidence that their loss experience in the courts had not, in any way, justified the premium increases that were being sought. That is to say that the risk loss payout for nurse-midwives was miniscule, compared to the premium increases that were being sought when policies were able to be obtained. In many instances, the insurance industry was not willing to write policies. My Committee has received similar testimony regarding widespread cancellation of insurance coverage for day-care centers and other insurance customers.

Another question raised by the hearing was the adequacy of existing regulation of the insurance industry. How did we get into this problem area? If cash flow underwriting is a major source of the problem, why didn't State regulators address the problem before it became a crisis; the suggestion here, of course, being that maybe we have put emphasis on rate increases -- appropriately putting emphasis on that -- without appropriate honing-in on rate charges that are being requested, perhaps rate charges that are not being requested at an increased level, so as to be commensurate with the anticipated underwriting expectations of losses.

The Congressional General Accounting Office -- the GAO, the investigatory body of the Congress -- stated that the system of State insurance regulation contains "serious shortcomings" across the board. The question then is, is the industry's focus on liability laws deflecting us from a more basic problem in the internal management of the industry's financial affairs?

It is my firmly held belief that in the environmental area, we need strong liability standards at the Federal and State levels particularly. Without such standards, we will perhaps have modified the insurance climate, but we will have guaranteed that those responsible for pollution bear no responsiblity, or reduced responsibility, for the pollution that they have caused which we are

now attempting to deal with. We will have designed a system that provides little disincentive to stop polluting now, a result which I believe no responsible individual would be supportive of.

At the same time, the establishment of financial responsibility by those involved with hazardous products -- waste products as well as hazardous, usable products -- which means insurance for most, is critical to the structure of hazardous waste control. The handling of toxics is an inherently dangerous business, with extraordinarily severe consequences for people and the environment if there is a mistake. Those who undertake this business must be prepared for the hazardous nature of the business -- the lucrative business -- that they are involved in.

In the past, hazardous waste disposal has been a low-risk, and particularly lucrative, business. Taking wastes without knowing what they were, and dumping them into the ground, has been the norm, in the past. Recently, we have become aware of the hazards associated with that type of disposal, and we are playing catch-up ball trying to deal with those types of problems. For many years, no one knew any better, but now we are only too aware of the dangers associated with inappropriate waste disposal. I think it is clear, only if the real costs of hazardous waste disposal are reflected in the marketplace costs of disposal, will we have created a system where it is cheaper to minimize the production of wastes or to become involved in the recycling of wastes or waste exchange, or any of the other multiple alternatives to just random waste disposal, will we set the marketplace forces working in the way so as to provide better environmental protection.

Financial responsibility, or insurance, is a critical factor in requiring the market to reflect the true costs of hazardous waste disposal. Insurance companies and others will simply not take the risk of covering people if their methods of disposal are not sound. That is to say that I am advocating rolling the insurance industry into the regulatory system, working in its own self-interest to insure that disposal systems are made safer. Requirements for financial responsibility will help adjust the market to reflect the real costs of

improper disposal, and at the same time, the insurance industry will become a policing mechanism of its own to ensure the best methods of disposal are undertaken.

In addition, insurance coverage is important because there is simply no other recourse for people who have been injured by improper exposure to toxics. While we have the beginnings of sound cleanup laws and regulatory systems in place, we have done very little to address problems associated with pollution exposure to people. Liability and insurance coverage that it requires is thus far the only way that we will be able to provide for assistance to individuals who have been adversely affected by years of disposal practices that are not sound.

Since both liability and insurance availability are critical to insure environmental protection, we have to take steps to maintain them both. Obviously, government has control over liability standards, but the provision of it is a private sector activity, although it is one that is supervised by governmental regulations.

Let me conclude by saying it is my belief that environmental insurance is a vast and potentially important market for the insurance industry. It is a market they are anxious to develop. That has been the case right from 1980, when we saw the Superfund go into operation and when we saw the regulations for the Resource Conservation and Recovery Act, which is the law which spells out perspective disposal mechanisms. We saw those regulations come into effect in 1979/1980. It is the responsibility of government to do what we can to allow the private sector to fulfill the need for insurance, and I think we are taking steps to do that. For example, in the Superfund legislation I mentioned earlier, we are in the process of including in the bill we are marking up to reauthorize the law, a provision which removes the whole question of whether insurance companies will be liable beyond the limits of the policies. We are saying that the liability of the insurance companies should be limited to the coverage contained in the policy. This is designed to deal with the insurance companies' concerns about interpretations of the courts that provide for liability beyond the stated limits.

In addition, there are provisions which will allow companies to provide for risk retention groups and self-insurance pools. This is comparable to action we took in the late 1970s, when there was a product liability crisis in this country, to provide for risk retention groups for small machine tool operators and others who were being adversely affected by product liability insurance unavailability at that point.

Likewise, we are willing to make modifications in the law to address concerns that some have and that insurance companies have put forward as reasons for not insuring. Let me give you a very important dramatic example. Cleanup contractors, engineers, and others who are involved in the cleaning up of these toxic waste sites have come and said, "Insurance companies won't insure us because they maintain that we may be held to the same strict liability standards that the generators of waste are being held to, that the dumpers and the polluters are being held to." It is clear that under the law, generators of waste, polluters, and dumpers of waste are held to standards of strict, joint, and several liability, as well they should be. It was never the intention of the law that those who came onto the scene to clean up the problem should be held to the same standards as those who caused the problem.

Therefore, what we are willing to do, and are in the process of doing, is spelling out clearly that contractors, engineers, and all of those who are part of the remedying process should be held to negligence standards, that is to say that if they err while they are in the process of cleaning up through their own negligence, they would be liable, but they should not be held to the strict joint several liability.

I would hope that that would deal with the problem that the insurance industry says it has in providing for cleanup contractor insurance. After reasonable efforts to clarify these points are made, and I trust they will be made at the Federal level, it may very well be that some of these types of recommendations will be made by this Commission for State law modification.

If the private sector is still unwilling to enter the marketplace with liability standards that are reasonable, then I think we are going to have to start looking for other alternative methods of providing insurance or financial responsibility assurance. There are a whole host of alternatives. To give you but one -- which to this point I have been reluctant to endorse -- banking deregulation. Banking deregulation initiatives provide for proposals to, in a sense, obliterate the distinctions between financial services companies, between banks, between insurance companies, and between investment and securities industries. The proponents of that approach would say that these different companies should be allowed to go into each other's businesses. As I said, I have not been a proponent of that approach, but, frankly, if we are going to be in a position where different financial securities industries don't want to do the business that they are charged with doing, and someone else wants to, then maybe the arguments for banking deregulation should be listened to more closely; that is to say, if the insurance industry doesn't want to insure, and Citibank does, as it does, maybe there is some justification for reexamining the arguments against banking deregulation.

Let me conclude by saying that I certainly appreciate the opportunity to come and share some thoughts with you, and to pledge my cooperation in the specific area of environmental concerns, but likewise -- I know the Commissioner of Insurance is here -- to offer to the Commissioner, as well as to the Legislature my continuing efforts and willingness to work across the board in all of these insurance matters. More and more people are saying that state-by-state approaches to insurance regulation need to be looked at again, because it is clear that we have a national insurance crisis. So, I suspect that greater cooperation is going to be called for and will be required, and I stand ready to provide that cooperation.

SENATOR LESNIAK: Thank you, Congressman. We especially thank you for offering the proposed solutions you are looking at in Washington. That is the basis of my question. What can we do as a State? In terms of at least RCRA and CERCLA, aren't we preempted by what the Federal government does? In other words, could we adopt-- If

we adopted the standard for cleanup contractors tomorrow, would we be able to implement that under the current law?

CONGRESSMAN FLORIO: As you know because you have been a leader in this area, the whole Spill Fund concept you have in New Jersey parallels, but is not required to automatically track everything the Federal government does. I am hopeful that we will make these reforms. If we make the reforms, for example, in the contractor liability question, there is no reason why you couldn't make the appropriate changes in your law to parallel the Federal changes. If for some reason if we don't make those changes, there is still no reason, in my opinion, why you couldn't make those legal changes here, because as you know, there is a question as to whether the Federal law preempts your ability to even have a Spill Fund.

I think the ultimate result of that litigation will be that the Federal law does not preempt your ability to have a Spill Fund. I think what flows logically from that is that the Federal law, therefore, does not preempt your right to spell out the provisions of your Spill Fund; that is, the liability recapture provisions you have in your law. So, in a sense, I think many of the things I have suggested can be done at the State level. This takes away the arguments that some in the industry may make, presuming they are good-faith arguments, which is the presumption I work from.

Mr. Thomas, the present Administrator of EPA, has testified before my Committee that he, in his dealings with the insurance industry, is extremely frustrated because many of the proposals he has made to clarify these points— He addressed this question to the insurance industry: "If we take care of all of the points you have raised, will you assure me that you will provide insurance?" The response he reported to our Committee was, "No, the insurance industry will not assure that they will insure."

So, I think the thing we can do is try to take away all of the legitimate, reasonable arguments which people come forward with. If insurance is not available after that, we will have to shift to more broad-based generic initiatives to provide insurance, however we provide it.

SENATOR LESNIAK: Cleaning up sites is an inherently dangerous operation in and of itself. If we were to lower the standard of care from strict liability to negligence, how would you feel about what the State ought to do in terms of indemnifying people injured from strict liability concepts of tort law?

CONGRESSMAN FLORIO: I think we are making distinctions between the strict liability that flows from the generation of the problem. I am not in any way advocating — although some are — that we reduce strict joint several liability down to negligence for the responsible parties. All I am suggesting is —in the process of cleanup -- theoretically if we reduce the contractors' liability to negligence, and the contractors are able to obtain insurance, then anyone who is injured as a direct and proximate cause of the contractors' activities, will then have a remedy by way of action against the contractor who will have liability coverage for his negligence.

I do not think it is equitable to hold the contractor to the extreme standard of strict liability, because the contractor, in a sense, is not responsible for the problem. The contractor should only be responsible for his own negligence resulting from him attempting to implement the contract specifications that are spelled out in the cleanup mode.

SENATOR LESNIAK: What about the person who is injured as a result of the contractor being engaged in this inherently dangerous business? You can prove the cause or connection between what the contractor did and the person's injury, but you can't prove that the contractor was negligent. Will that victim have a remedy against some fund to collect damages for that injury?

CONGRESSMAN FLORIO: Well again, I think what you are talking about is, if one can make the argument that the person was injured as a result of activities by the contractor, then you are almost defining the fact that the activities by the contractor went beyond the reasonable risk that anyone should have expected. I think you are almost defining negligence. Therefore, the cause of action would lie, and the insurance coverage would-- If you can't demonstrate negligence

against the contractor, then I am not sure the contractor should be held to the exalted standard of strict liability, because, presumably, the contractor did nothing to cause the problem in the first place.

SENATOR LESNIAK: But, shouldn't we provide a remedy for the person who is injured through an indemnity—

CONGRESSMAN FLORIO: Well, I don't have any difficulty in answering your question, yes, in a direct way, because I have been a proponent in Washington of victims' compensation funds. I have also been a proponent of a Federal cause of action for individuals who have been injured as a result of these particular sites. All I am suggesting is that by dealing with the engineers and by dealing with the contractors, I think we can track their activities closely enough to be able to make a determination as to whether or not they fulfilled their contractual duties in cleaning up these sites, and to make a determination as to whether or not they caused the problems that may have injured someone. If we can, then they should be held under a contractual basis.

SENATOR LESNIAK: One last question from me. Do you believe, or at least do you hold out the possibility of-- As you said, certain suggestions were made to the industry, and then the industry was really moot in terms of whether they would get back into the marketplace. You talked about the industry. Is there an industry that makes the decisions for all the companies? Do we really have a free market of insurance companies out there which make decisions on their own, or do they act as a group?

CONGRESSMAN FLORIO: Well, I think it's an open-- I mean, we acknowledge -- it is not a conspiratorial theory — that there is underwriting cooperation, and that there are organizations that underwrite for the industry. So, it is not a free market competitive situation in the classic free market sense. In different areas, there are initiatives that are coming forward. Let me give you an example. Industry says they are having difficult times because of new awards or new liberalized interpretations of responsibilities and, therefore, they can't calculate anticipated losses. Well, first of all, that is what they are in business to do. But, over and above that, I found it

strange when I had a tour recently of a very prominent insurance company in this country, which has gone into a new business involving multinational corporations, and is insuring risks from multinational corporations for foreign government coups— I don't know how they do it, but I admire the capability of the insurance industry in calculating what the underwriting risk or probability is of a coup taking place in some far-off country. I suspect that if they can do that, they probably have the capability to anticipate and calculate losses flowing from things that are a little bit less exotic than that.

SENATOR LESNIAK: It is almost as difficult as predicting the Jets over Miami last night. Nobody is in a jovial mood this morning, or maybe that just wasn't funny. Senator Laskin?

SENATOR LASKIN: Well, we're from South Jersey, so the Jets/Miami game really doesn't interest us. We would prefer an Eagles game.

I don't want to get bogged down in legal niceties that only lawyers can understand anyway. The bottom line that I worry about is, suppose with all the changes you advocate, that we advocate, that everyone advocates, insurance companies say, "We don't want to write it. It's too risky. Even though we can charge high premiums because it is a high risk business, the potential damage awards are so unbelievably high, so astronomically high, that we don't want to write it anyway." I think that is the biggest problem.

What do you do when you have insurance companies which say, "We don't want to write it. Go to your secondary approach, and let the government handle the compensation problem?" What do you do, if you know? You might not have really gotten enough on that yet.

CONGRESSMAN FLORIO: There are multiple options, some of which I regard as offensive from a public policy standpoint. There are proposals in Washington now to remove liability and then, of course, the insurance industry would be willing to come in. One would not be surprised that if you remove liability and there is no prospect of award, certainly someone would be happy to collect premiums. Then there are proposals that the government should be the insurer. I am not enthusiastic about that either, because then what you are doing is socializing the risks and having us all be insurers.

SENATOR LASKIN: I agree with that, but I am now, at this level, being faced with a lot of legislators -- regardless of party; I am not going to make this partisan -- advocating that the government step in and be the ultimate insurer. I find that horrible because you remove all of the incentive -- from good adherence to high standards -- from the industry when they know, "Well, the government will pay for the wrongdoings anyway." But, I am afraid that is starting to pick up a little steam because of the pressure being brought to bear by the insurance companies saying, "Go jump in the lake; we are not going to write."

CONGRESSMAN FLORIO: Let me just emphasize a point I made at the end. We conservative, free marketplace, forced competition people may have to go back and take a look at this whole idea as to who goes into the insurance business. We have had testimony in my Committee from people who are not in the insurance business now, who obviously are financially secure -- investment brokerage houses, large banks -- which have said that if the insurance industry does not want to, they are more than anxious to.

I have had some apprehensions about those things, but I am prepared to go back and look again. If someone who is financially secure and meets the standards of insurability, is willing to write insurance, maybe there is a need to do that. I would suspect that if those outside players become involved, maybe some of the members of the insurance industry might want to rethink their position.

The other point, and the long-term approach is to-- If you subscribe to the deficiencies in the insurance industry itself which have been described by some and have been acknowledged by the insurance industry, with this whole concept of cash flow underwriting being the precipitating cause of the insurance industry wanting to back out of the insurance business until the investment market improves, maybe there is a need for closer scrutiny of that part of the insurance cycle, so that we are not faced with that periodically.

I can recall this same thing happening -- not to the same degree -- in the mid-1970s, when we had medical malpractice and unavailability. We had product liability unavailability. What you are

talking about is a cycle. When you are at the top of the cycle, the insurance companies are doing very well and the investment picture is good. What you then have is competition for the dollar, not for insurance purposes, but for investment purposes. You have costing at less than throughtful levels, without an appreciation of what it is going to cost the industry in payouts. Then, of course, when the picture changes, the industry is stuck with insufficient reserves and concerns about paying out, because the investment income is not bringing in the money it hoped for.

If we deal with that problem through the regulatory mechanism, maybe we can avoid these wild fluctuations in the insurance industry.

SENATOR LASKIN: I have a few specific questions because many of the concepts you discussed have been brought out at different hearings at different levels. It seems like all of us are having a very difficult time finding the answer, and that is the purpose, I guess, of having these hearings. They do bring in some fresh ideas and new approaches.

I have thrown out a few times, not necessarily in jest, but some have taken it that way, that when we are dealing with environmental problems, as you have indicated, it is a national issue, as opposed to a State issue. What is your thinking about Federal regulation of the insurance industry in specific areas, such as environmental liability? Of course, not homeowners, because that is more of a local situation; I mean liability for environmental problems.

CONGRESSMAN FLORIO: It's happening already. The Ford process is starting to be developed. To give you one example, the RCRA law that I made reference to before — the Resource Conservation and Recovery Act — is a law which spells out how we are to dispose of toxic waste from this point forward, so we won't have any new Love Canals being created. Part of the law says that disposal facilities are required to be conducted in certain ways, one requirement being that you have financial responsibility. That presumes insurance or bonding or self-insurance. Well, that is not available, as we know, because of this problem, and there are proposals saying, "Well, the

Federal government is imposing those responsibilities; therefore, the Federal government is going to have to start becoming involved in doing something to ensure those regulations."

Ironically enough, the insurance industry is starting to come to Washington to ask for some Federal laws to relieve it from some of its problems. For example, I made reference earlier to Citibank, which is using a particular loophole in the law in one of the states -- I think it is North Dakota or South Dakota -- to go into the insurance business, which technically they are not allowed to go into. Well, the insurance industry is coming and saying they want Federal laws to stop that from happening. They don't want the competition. That is a double-edged sword. Once the precedent is established that the Federal government has some involvement in insurance regulation, that is a foot in the door that I suspect, before too long, is going to result in other Federal involvement.

If we are sitting here 10 years from now, I haven't any doubt that the McCarran-Ferguson Act, which is the law that spells out the primacy of the states in insurance regulation, will still be on the books, but it will be riddled with sufficient loopholes, exceptions, and changes and we will have a much greater Federal presence than we currently do.

SENATOR LASKIN: You discussed in detail the strict liability versus ordinary negligence issue, and again, most people who are not lawyers cannot follow that specifically. Personally, I have been a pretty strong advocate of strict liability and have had something to do with writing strict liability into our hazardous waste siting law, and some others. The problem with lessening a strict liability standard generally-- I have not thought of your two-tier-- The contractors' level may not necessarily, or perhaps should not be held to that same standard. I haven't really thought about that, but I guess it is something we will think about. But, what concerns me is, we have had some bills already put into this Legislature which would lessen the strict liability standard generally. It is not, as you have indicated, with contractors at one level and generators at another. To eliminate or lessen the strict liability standard for those who are generating or really causing the problem scares me.

We have also had people -- and you addressed this -- introduce bills which also scare me because there is no unlimited pot with government. They have introduced bills which say that the government should compensate victims for damages in these pollution cases. My concern is that we seem to be saying, "Well, insurance industry, you do have a problem. We recognize it and we feel sorry for you, so we are going to lessen the strict liability standard, and we are going to let the government pay the people who get sick," thereby leaving the insurance industry almost off the hook. That scares me.

CONGRESSMAN FLORIO: Let me just respond to the latter point with regard to governmental funds. I am not intimately familiar with the proposals you are talking about; that is State level. But the compensation fund that people have talked about at the Federal level is going to be a fund -- if it is enacted into law -- that will be financed by assessments on industry. In a sense, you're talking about a pooling of the risk. Ironically enough, it is something that some in industry, at one point, were totally against. They are now starting to think that it may very well be in their own interest, that this will, perhaps, avoid some litigation, avoid-- It is almost sort of a Workmen's Compensation concept. It would provide for quicker remedies for people who have been injured. There have been suggestions about a two-tier approach, that is to say, a fund financed by industry, everyone sort of in a no-fault way, kicking in assessments, and people who are injured having an opportunity to make application and prove their case at lesser standards than one would prove in court. But for those who are seriously injured, who want to avoid the limited capability of recovery growing out of the fund, with the lesser burden of proof that goes with the fund, would still have access under a Federal cause of action to go to court. So, no one that I know of is talking about a Federally funded, that is, taxpayer funded, fund to pay people. That would be something I would be 100% opposed to. I think that would shift the costs onto the general taxpayer for the problems which have been caused by certain private-sector parties.

SENATOR LASKIN: Thank you.

ASSEMBLYWOMAN FORD: Jim, thank you for coming to testify for us. You answered a question that was posed at our last hearing, and that was the extent to which this was a nationwide problem, as opposed to just a unique problem within New Jersey. I think you indicated to us that it is one of nationwide proportions, and that other states are addressing the same issue.

Are you aware of what solutions, if any, have been proposed in other states by some of your colleagues?

CONGRESSMAN FLORIO: The answer is, we are, by virtue of this Commission and this intention, giving as much attention to this problem as anyone else is in any of the other states. This is a problem that has really just surfaced in terms of public awareness within the past 12 months. Many of the people, as I said earlier-- Many of the insurance companies that were very anxious to become involved in this in 1981, have now started to retreat. Certainly, the risks are not too terribly much different than they were in 1981; there is just a greater appreciation of some of the court decisions. I also think there is a greater appreciation of the points I made before about underwriting deficiencies which may have occurred.

SENATOR LASKIN: And the interest rates have gone down.

CONGRESSMAN FLORIO: And the interest rates have gone down, which is a very important point. Let me just emphasize one other thing. This is an example. We have it here in New Jersey and we have seen it. Court interpretations are reacting to perceptions of our laws being enforced or not being enforced. I think the Judiciary, as one of the three branches of government, feels reluctant to leave individuals and communities with no remedies in instances where they have injured people.

Let me give you a specific example. Superfund, as I think you all know, provides to our Federal government, the EPA, and to our State government, the DEP, the capability of pursuing polluters under strong legal weapons, and forcing cleanups. I don't think it is overly partisan to say that some people have not been enthusiastic about the degree of aggressiveness that has been demonstrated by those governmental entities. Therefore, the court, faced with a situation in

Boonton, New Jersey, where they found that local community people and local public health officials were not satisfied with Federal or State activity, brought actions themselves to pursue the polluter to force cleanup. The court, and this was a Federal District Court, gave a very creative interpretation of the law, so as to give -- as they did -- the municipality the same powers that we in Washington gave to the Federal government and the State government, saying that after all, the town is a subdivision of the State, ergo the town should have the same capability.

Now, whether you agree with that, or disagree with that, I think it is the inevitable result of a less than vigorous enforcement of some of our laws. The states are providing citizens with more rights just by reinterpretations of the laws, because they are not prepared to tell Citizen X, "Sorry, you're out of luck," as was the case, for example, up in New York, at Love Canal. Many of those people were thrown out of court because the statute of limitations -- which was a very narrow one -- ran before the injuries had manifested themselves. Many of these injuries, or these damages, are long latency damages, so we are going to have to change the laws to deal with our general sense of equity, or we are going to have enforcement agencies do the work out of the Legislative Branch, or out of the Executive Branch. Because if they don't, the Judicial Branch is going to fill the void.

ASSEMBLYWOMAN FORD: Some people have suggested to us that the remedy might be -- as we discussed earlier -- limiting the amounts of awards or damages for which money can be awarded by a jury or by a judge -- whatever the case is -- to injured parties. What are your feelings about limiting-- For example, I'm thinking specifically of the types of awards that were given in the Jackson Township case for medical surveillance. I think the other award was-- Two out of three of the theories that they got awards on, especially the medical surveillance part which was a very large portion of that award, were knocked down by the Appellate Division as not being pain and suffering and, therefore, not recoverable under the Tort Claims Act.

CONGRESSMAN FLORIO: I am apprehensive about arbitrarily limiting awards to whatever level, because then you start getting involved in whether jury verdicts are appropriate deterrents to induce people to take action before rather than after the fact. I would hope that most people in industry would not ever get to the point of doing cost calculations as to whether activities are going to cost more than the potential adverse results of an award. But, I am apprehensive that if we start down that road, we may very well start having that factor ruled into people's computations. Rather, I think what we should be doing is trying to provide for clear statements of what the law is, particularly from this point forward. The insurance industry is now on notice, perspectively, that they should be writing their insurance policies so as to clearly define what it is they are insuring against. I think that should be more than sufficient protection in the future for the insurance industry.

If the Legislature, or any body, is inclined to start putting limits on awards, I think the first thing they ought to do is call the insurance industry and get clear statements from the industry that those types of limitations would, in fact, satisfy their concerns, and that we could be virtually assured there would be insurance if there were going to be those types of awards. The worst situation would be to limit awards and provide the disincentive for purposes of cleaning up and anticipatory activities by industry, and then not having any insurance anyway.

ASSEMBLYWOMAN FORD: Thank you.

SENATOR LESNIAK: Congressman, I think we have seen possibly -- not possibly — we've seen in the past that those calculations have been made by some pharmaceutical companies. Maybe not as quantitatively, but those calculations, I think, are probably made throughout industry. If we start putting those limitations on jury awards, those calculations are going to look better if you go ahead, when, in fact, it may be dangerous to people's health.

CONGRESSMAN FLORIO: On the last point, lest we tar industry with a common brush that they would be inclined to do this, I have had — and I have tried to make the argument to industry with -- I think,

some minimum degree of success, to say that these uniform standards we are trying to apply to everyone. We are trying not just to pass laws, but to have the laws enforced. In a sense, we are reenforcing better elements of industry to do what they are supposed to do. Failure to enforce those laws reenforces the worst elements of industry, because those who have put the capital into complying find themselves at a competitive disadvantage when we either don't enforce the laws, or don't have the laws to be enforced against those who do not take the appropriate precautions.

So, industry -- sophisticated parts of industry, sensitive parts of industry -- I think, will sign on to the proposition. Even-handed enforcement of the law is in the interest of industry.

SENATOR LESNIAK: I would concur. I think those arguments are starting to take effect finally.

Thank you very much, Congressman. We appreciate your testimony.

CONGRESSMAN FLORIO: Thank you very much.

SENATOR LESNIAK: Commissioner Gluck? Commissioner, I want to thank you very much for coming here this morning.

COMMISSIONER HAZEL FRANK GLUCK: It is nice to be here.

SENATOR LESNIAK: Are you going to give us all the solutions to the world's problems this morning?

COMMISSIONER GLUCK: Well, I don't know about all the solutions, but maybe some things to think about and talk about.

Some of the things the Congressman mentioned, you'll find that we are in agreement, but there are other things that I think maybe we could talk about. What I would like to do, if I may, is just go over some of the history involved and give you some of the concerns from the regulatory point of view with regard to this particular problem.

In recent years, growing awareness and concern over the state of the environment has produced remedial environmental liability legislation on both the Federal and State levels. The overall goal of these measures has been the restoration of a clean, healthy, and safe

environment by imposing financial responsibility requirements on any entity that generates, stores, transports, treats, or disposes of hazardous materials. One method of satisfying these financial responsibility obligations has been through environmental impairment insurance.

Unfortunately, while the need for this type of coverage has grown, its availability and affordability have diminished to such an extent that we are now in the throes of a major crisis. The crisis is national in scope, as evidenced by the fact that the United States Environmental Protection Agency is considering whether to revise its financial responsibility requirements for owners and operators of hazardous waste management facilities in light of the current state of the insurance market.

It is clear that a solution to the complex problems associated with the management of toxic wastes can only be achieved through a cooperative effort between Federal and State authorities aimed at determining the relative responsibilities of those entities which generate, transport, or handle toxic waste and consequent liability of their insurers.

Restoration of a viable insurance marketplace is an essential component of that solution. As EPA has pointed out, "Insurance is a vital part of the Agency's regulatory program for improving environmental management practices of insured parties. By offsetting a degree of activity-related risk, insurance fosters broad participation in hazardous waste management. The requirements may also instill public confidence in hazardous waste management activities."

While requiring financial responsibility of those responsible for the generation, transportation, and handling of toxic waste is essential, it is only part of the solution. The importance of a vigorous regulatory oversight and enforcement policy cannot be over-emphasized. In this regard, cooperative action by both Federal and State authorities is necessary not only to ensure adequate management of hazardous wastes, but also to combat a social perception that these wastes cannot be handled safely.

The current crisis in environmental impairment insurance must be viewed in perspective. To a certain extent, the problems associated with environmental impairment insurance reflect overall conditions in the commercial lines insurance market.

New Jersey is experiencing an availability and affordability crunch in most commercial lines, with liability lines being among the hardest hit. These problems are not unique to New Jersey, but represent a national, even an international, trend.

Among the underlying reasons frequently cited for the availability and affordability problems are: recent court decisions which have interpreted exclusion clauses as ambiguous and therefore inapplicable, as well as decisions expanding the extent and amount of coverage available; large underwriting losses accompanied by declining investment income; evaporation of the reinsurance market; and, escalating litigation costs.

Moreover, the responsibility for cleanup and removal of hazardous substances, as well as liability for personal injury or property damage claims imposed by certain Federal and State environmental liability laws, can be monumental and further exacerbate coverage problems in this critical area. Furthermore, judicial decisions have, through interpretation, rewritten essential terms and conditions of insurance liability contracts.

Generally, there are two basic types of liability coverage available for environmental pollution incidents: comprehensive general liability policies and environmental impairment liability policies. The terms and availability of these two types of policies vary significantly.

In addition, policies may be defined as either "occurrence" or "claims made" policies. Under an occurrence policy, coverage is triggered by the occurrence of the cause or manifestation of injury during the term of the policy, while a claims made policy is triggered by the making of a claim during the term of coverage. The significance of this distinction is important since an occurrence policy has a long tail on claims, that is, the insurer may be required to indemnify and defend an insured long after the policy has lapsed or been canceled, if the occurrence is within the time that coverage was in effect.

The premium charged for such occurrence policies may subsequently proved inadequate because of the long tail aspect. Insurers prefer claims made policies since the term of liability exposure is more clearly defined and current premium can be adjusted to reflect contemporary loss and expense experience. Some claims made policies also provide extended reporting periods on retroactive dates of coverage at an additional premium.

I know that is technical and maybe even a little confusing. The Department held a hearing on Friday, and the record is still open with regard to ISO coming in to change the policy form from occurrence to claims made. In that, there will be a difference in the kinds of coverage that will be afforded to people and their ability to sue.

CGL policies are generally issued on an occurrence basis. Since the 1970s, standard CGL policies contain a "pollution exclusion" clause which routinely states that the insurance does not apply "to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any water course or body of water. But, this exclusion does not apply if such discharge, dispersal, release, or escape is sudden and accidental."

Under this exclusion, the insurer intended that there would be no coverage under the CGL policy for any pollution incident, except where such pollution was sudden and accidental.

Recently, however, some court cases, most notable Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co., have ruled that the pollution exclusion clause is ambiguous and, in accordance with general contract law, interpreted that ambiguity in favor of the insured. Consequently, insurers claim they are being forced to defend and/or indemnify their insureds for risks they did not knowingly assume and for which they did not receive a premium. I should say, not a proper premium for that kind of insurance.

A new standard CGL policy developed by the Insurance Services Office has been rewritten to exclude all damages caused by pollution, and this form has been filed for approval with many state insurance departments, including New Jersey. A hearing on this new policy was held at the Department on October 11, 1985.

Environmental impairment liability policies were developed to specifically cover damages caused by pollution incidents, whether sudden and accidental, or gradual. Generally, EIL policies provide coverage on a claims made basis. In the last two years, however there has been a significant decline in the number of insurers offering this coverage and in the policy limits that are available. As with CGL policies, some of the reasons for this trend are the decline in interest rates on investment income and a severely restricted reinsurance market. Reinsurance is an essential mechanism for broadly spreading risks and losses. The lack of actuarial data to set realistic premiums and the perception that hazardous substances cannot be adequately managed, as well as the exorbitant costs associated with such liability, have curtailed reinsurers from participating in this coverage.

There are two major Federal hazardous waste regulatory statutes imposing liability for cleanup costs and other damages. The Congressman mentioned both of them. One is the Resource Conservation and Recovery Act, and the other is the Superfund Act, or the Comprehensive Environmental Response, Compensation, and Liability Act.

The Resource Recovery Act was designed to control waste disposal and conserve natural resources. It establishes a control mechanism that tracks hazardous waste from generation to final disposal. Specific obligations, including financial responsibility requirements, are imposed on waste generators, transporters, and treatment storage and disposal facilities.

Superfund was designed to finance remedial measures involving the release or threatened release of hazardous substances. The act imposes strict liability and joint and several liability upon responsible parties, which include those who generate, transport, or dispose of hazardous wastes. Financial responsibility is required of those responsible parties.

An important aspect of Superfund is the provision that claims may be asserted directly against any guarantor of financial responsibility, which in most cases, is an insurer. Furthermore, the act only allows the guarantor or the insurer to invoke the defense of willful misconduct of the insured and only those other defenses available to the responsible party. The act specifically prohibits a guarantor or insurer from invoking any defense it may have been entitled to invoke in any proceeding brought by a "responsible party" against it. Therefore, the failure of an insured to comply with certain contractural obligations, such as maintenance of a specific risk management plan, could not be used to avoid coverage.

On the State level, the Spill Compensation and Control Act also imposes joint and several, strict liability on responsible parties. This act also specifically provides that claims made be brought directly against the insurer so that it presents problems similar to those occasioned by the Federal legislation.

The potential exposure to environmental claims can be enormous as an examination of contaminated site cleanup costs reveals. The Federal EPA estimates a cleanup cost of $8 million to $10 million per National Priority List site; 85 such sites have been designated in New Jersey. These figures do not include litigation or claims management costs.

The end result of these Federal and State mandated environmental liability programs, combined with recent court decisions, has been to persuade insurers that they may be exposed to unlimited liability by issuing any environmental pollution policies. These State and Federal programs impose strict liability without regard to fault on responsible parties and operation of these program proceedings are instituted directly against insurers.

Insurers believe provisions for joint and several liability open the door for the insurers to be responsible for all the costs associated with an environmental pollution claim, even though their insured may have been minimally involved in the pollution incident.

The availability of large and liquid funds make insurers prime targets for primary payment of these claims. The fact that the

insurer can seek contribution from other responsible parties offers little aid if these other parties are insolvent.

Furthermore, any action for contribution entails additional litigation. Adding to insurer concerns have been some recent court rulings, i.e., Jackson Township, which have convinced insurers that they cannot rely on the terms and conditions of their contracts. Although the actual extent, if any, of increased exposure to liability is uncertain, insurers claim that the potential is catastrophic and this pervasive perception of uncertainty makes it impossible for them to evaluate the extent of their exposure to environmental claims. Therefore, they are unable to establish sound premiums.

Possible solutions: The current unavailability of environmental liability coverage is a complex problem resulting from the interaction of many factors: State and Federal regulation, judicial decisions, public attitudes, and insurer perceptions. There is no simplistic solution. Any alleviation of the existing problem must be addressed on both the Federal and State level.

Some of the options available to the State to address the environmental impairment liability problem include:

1) Revision of the Federal and State environmental liability legislation to provide that any joint and several liability that may be imposed for cleanup of future pollution must require mandatory apportionment of damages by an independent arbitrator based on actual causation of and responsibility for such damages. The share of the expenses of any unidentifiable contributors or those unable to pay would be paid from a general fund collected from the polluting industries, the Federal and State governments, and assessments, fines, or liens against violators of environmental laws.

2) Implement through legislation or regulation standardized and binding definitions of such pollution concepts as "sudden and accidental" and "gradual and non-sudden," to stifle any future judicial revisions of essential terms or conditions contained in liability insurance contracts.

At this point in time, the Department of Insurance is meeting with one of the insurance companies in the State to go over definitions

of sudden, accidental, gradual and non-sudden to see if we can come up with something that would be acceptable to the industry.

3) Create a pooling arrangement composed of all authorized insurers, backed by a governmental excess guarantee or reinsurance mechanism. Under this arrangement, insurers would provide primary liability coverage up to a defined monetary amount, for argument's sake or for discussion's sake, $6 million. Any damage exceeding this amount would be borne by the government.

Funding for the government reinsurance might be obtained through a surcharge on all environmental liability insurance policies, yearly assessments on polluting industries, and fines on violators of environmental laws.

I think if I had my druthers, I would really like to see something like this done on a national level, for obvious reasons, much the way that we have flood insurance. That kind of a concept used in this sense-- It may be that New Jersey may not be able to wait for it to happen, if it is going to happen on the Federal level. We may have to take some kind of steps ourselves. Obviously, if it could be done nationally, it would spread all of the reinsurance across the board nationally, not just in the State of New Jersey. I think it would be far better if it could be done on a national level.

4) Consideration might be given to whether all entities associated with hazardous substances should be held to the same standard of responsibility. In evaluating these entities, it might be argued that those who create or improperly dispose of hazardous substance should be held to a strict liability standard, which is what Congressman Florio was talking about, while those who attempt to clean up or mitigate the resultant damages should be held to a negligence standard measured against compliance with state-of-the-art knowledge or technology at the time of performance.

5) Last, but not least, a new concept of limited sovereign immunity, which the insurance industry -- I don't know if you have received that report -- has had their own task force on liability insurance. What they came up with was to suggest the strengthening of Senator Lynch's bill, which would give limited sovereign immunity to

municipalities. I don't know if they are testifying here today, Mr. Chairman, but I think it is something we should consider.

Lastly, the gentleman who is going to testify after me, David Grubb, has a concept of vis-a-vis risk-sharing that he thinks he should put before this Committee -- the Department thinks so, as well -- which would allow municipalities and counties in the State to be involved in a risk-sharing mechanism up to the percentage of whatever that risk is. I will let him give you the details on that.

Those are some of the things that we wanted to put on the table for discussion that we feel may have viable alternatives or solutions to some of the problems. I think the Contillo/Dalton bill and the Lynch bill address part of the solution to the problems, but there is more than that which needs to be done.

SENATOR LESNIAK: I would concur with you. I think these suggestions are all the ones we are looking at, and there has to be a package that we are going to put together. SEED is very appropriate. It is something we have to build on, but we can't just take those bills and say they are going to handle the problem.

Thank you, Commissioner. Senator Laskin?

SENATOR LASKIN: We don't have a giant list of witnesses today, so I don't mind asking some questions. Normally, I would refrain.

SENATOR LESNIAK: That didn't stop you last week.

SENATOR LASKIN: Yes, it did.

SENATOR LESNIAK: Oh, it did? (laughter)

SENATOR LASKIN: After about three or four questions, I stopped because I saw we were getting nowhere. But, today we seem to be getting more specifics, which is what I think we need.

In your conclusions or your summations of suggested solutions, they seem to be pretty much what we have been hearing. Maybe they are the only solutions. It just frustrates me that I can't think beyond what you suggested, or what Congressman Florio suggested, or what this Committee has already discussed. I just wonder whether or not there could be something else. We seem to be revolving around lowering liability standards -- these are things that have been raised

-- perhaps placing a cap on awards, and back-up by the government on higher-than-standard, or higher-than-usual, judgments. Those are the three things I seem to hear all the time: lowering the standards of liability; a cap on awards; and, a government super fund to take up beyond a certain level.

It just bothers me that we don't seem to be attacking or addressing what I think is a major problem, and that is the insurance industry itself. These remarks are not meant to have anything to do with the present Administration or the past Administration. I'm talking historically now. It just seems to me that New Jersey has always been a haven, if you will, for the insurance industry. I'm talking about for years and years. Don't misinterpret my remarks to mean that they have anything to do with what is happening today. It just seems that, historically in this State, we have had astronomical insurance premiums for everything, not just automobile insurance, but the homeowners, the environmental lobby, liability, and fire insurance. You name it, and the premiums in this State have always seemed to be astronomical. I'm just wondering whether or not we ought to finally take a different philosophical approach towards our handling of the insurance companies and say to them, "If you want to write in our State -- we think you make money on some policies, maybe not as much on others -- either you are going to write as we say for all fields, or you are not going to write at all."

For example, suppose a major company -- I won't use a name; I'll use company "A" -- writes homeowner's insurance in New Jersey and in 35 other states. In the 35 other states, they also write environmental liability coverage, but they don't write it in New Jersey for some reason. Can't we start thinking of saying to those kinds of companies, "Well, if you write something in other states that we would like to have written here, we are not going to let you write the other things unless you give us the same package that you're giving everywhere else"? I don't think that is the answer. That may be an emotional response, but I'm starting to think that maybe that kind of approach is the only solution.

COMMISSIONER GLUCK: Well, let me just say this, Senator. When we have people who come in to write in the property and casualty area, we ask them if they are going to be writing automobile insurance, for instance. We get a commitment from them to write automobile insurance. We don't get a percentage commitment. However, there are a couple of perceptions here that I think are incorrect, if you will allow me.

First of all, New Jersey's homeowner's insurance— New Jersey's automobile insurance is the most expensive in the country. Period. This is not a reflection, of course, on other lines. Homeowner's insurance in New Jersey is going down. We have just had two requests for the Department of Insurance to decrease rates. So, it just depends on what the line of insurance is at that particular time, and what the results are that industry is finding they are having. For some reason, the homeowner's market is opening up very wide now in New Jersey, and maybe all across the country. I don't think, except for automobile insurance, that we are treated any differently in New Jersey than we are across the country -- whether it is environmental, homeowners, or anything else. I think that perception is not valid. Yes, we have a problem with automobile insurance. There is no question about that. This problem may not exist in many other states, but, by the same token, that is beginning to change a little bit; however, this is not a forum on that.

I think your perception that New Jersey gets higher prices than everyone else is just not so. From what I have seen in the short period of time I have been here, we are treated no differently. Could we say to them, "You can't write here unless you write environmental liability insurance"? Sure, we could, but no one would write anything.

SENATOR LASKIN: No, if they are writing something elsewhere, we can't say to a company that writes coverage on lambs that they are going to have to write coverage on foxes, because they might not do that. What I am saying is, if they write that coverage elsewhere, then we might be able to say it to them.

COMMISSIONER GLUCK: We might be able to, but I think in this particular instance that is not what is happening across the country, as I understand it.

SENATOR LESNIAK: Would elsewhere be Oregon as opposed to New Jersey?

COMMISSIONER GLUCK: Yes. Oregon has done some things that New Jersey did with its new regulation regarding non-renewals, cancellations, and mid-term cancellations. There have been varying responses to that particular problem across the United States which gives states breathing time in order to try and come up with some of these solutions.

I really feel New Jersey will be in the forefront of writing some of these solutions that have been proposed, probably, maybe — well, not probably and not maybe, but definitely — before the Federal government gets into it. I really think that a lot of the responsibility, whether it be reinsurance or whatever it is, should be handled at the Federal level. However, having said that does not mean we should stop, because we have the problem here.

SENATOR LESNIAK: Isn't the reinsurance issue complex? The Federal government has Cercla and RCRA that affect us, but most environmental actions -- damages that can arise from environmental pollution -- can and do arise from other instances in municipalities, such as past damages at non-Super Fund sites. I would think this would be extremely difficult for the Federal government to take on that problem, and I am not sure they are predisposed to do so.

COMMISSIONER GLUCK: They have flood insurance and it works.

SENATOR LESNIAK: They are doing away with flood insurance; they are phasing it out.

COMMISSIONER GLUCK: Not flood insurance.

SENATOR LESNIAK: No?

COMMISSIONER GLUCK: No, crime insurance.

SENATOR LESNIAK: Pardon me?

COMMISSIONER GLUCK: Crime insurance.

SENATOR LESNIAK: Isn't there a proposal to do away with flood insurance?

COMMISSIONER GLUCK: Not to my knowledge.

SENATOR LESNIAK: I think that has been floated.

COMMISSIONER GLUCK: As it turns out, they make money on it.

SENATOR LESNIAK: But, isn't flood insurance a lot simpler than this?

COMMISSIONER GLUCK: Yes. The reinsurance market is one of the more substantial reasons why the private insurer in the states is not insuring environmental liability. The reinsurance market -- whether it is Lloyds of London or anyone else in reinsurance -- has said, "Hey, what we want is a claims made policy. What we want is reform of the American tort system, and until we get that, we are telling you we are not going to reinsure at all, or certainly not at the levels we were reinsuring before."

SENATOR LESNIAK: Does that mean if the State took over reinsurance in the State of New Jersey, all the insurance companies would say, "Fine, we will now start writing these policies"?

COMMISSIONER GLUCK: They will write primary. In other words--

SENATOR LESNIAK: They would?

COMMISSIONER GLUCK: A lot of them would, yes.

For instance, I had a company come to the Department last week, and they said, "Look, our reinsurance treaty has been canceled. We had a reinsurance treaty on a particularly large business in the State of New Jersey for up to $25 million. We can only get up to $10 million now. We can't find reinsurance anyplace else. The only choice we have is to either stop writing it or be allowed to pull back to the $10 million level, which we will insure ourselves." They are slowly twisting in the wind.

SENATOR LESNIAK: That tells me that we ought to at least be focusing on that issue, as opposed to the other issues which may have a serious impact on the way people do business in creating additional risks.

Commissioner, I have a question. It just came in over the phone. (laughter) The woman writes, "There is an insurance company in Illinois which is waiting for approval to sell environmental insurance in New Jersey." Is that--

COMMISSIONER GLUCK: Well, that is the walk-through that Jim Sheeran just came through the Department with the other day. It may be

so. If that is the case, what happens is it goes through an expedited process, obviously, in the Department, but there is still certain criteria they have to meet, obviously, in order for us to say, "Okay, you now have a certificate to go ahead and insure in the State of New Jersey."

As I said, Jim did come in on Friday and say that he thinks he has someone who passes all the tests and will write environmental liability insurance -- to what extent, I don't know yet.

I have one last thing I want to leave you with, if I may, Mr. Chairman. You asked Congressman Florio if there was any competition in the industry. My answer to that is simply, once the Commercial Deregulation Act was passed in the State of New Jersey, it opened up a floodgate for competition, maybe not the competition you and I would have been able to say would happen; nevertheless, it was a form of competition in that because of the high yields in investment, a lot of companies started offering much reduced premium prices to the insurers. If I did it, and you were insured by Senator Laskin's company, you would go back to Senator Laskin's company and say, "Listen, I can get it from Hazel Gluck, and I can get it $20 thousand or $30 thousand cheaper. Are you going to meet that price?"

That is exactly what happened. It seems to me that underwriting standards -- if there are such things -- guidelines, reasons, or whatever, simply went out the window in an effort to keep market share, to keep competitive, and to get the cash to invest in those high yields. So, there was a form of competition, albeit maybe not the kind of competition we anticipated when the Act was passed.

SENATOR LESNIAK: Thank you.

COMMISSIONER GLUCK: Thank you.

SENATOR LESNIAK: We are now going to hear from Mayor David Grubb from the Borough of Park Ridge. Mayor Grubb, do you have written testimony? (affirmative response)

MAYOR DAVID N. GRUBB: Honorable members of the Commission: From a municipal standpoint, it is becoming increasingly evident that the insurance industry cannot provide the solution to the pollution liability crisis. The dilemma is that either the coverage will be so

watered down that the municipalities will face huge uninsured exposures, or the coverage will be too broad for the insurance companies to underwrite.

Jackson Township is a good case in point. If the coverage was limited to the traditional definition of "sudden and accidental" pollution, then Jackson Township would have had to bond for over $5 million to pay this claim, because this claim would not have been covered by their insurance policies. On the other hand, if the court's broad definition of sudden and accidental holds, then no underwriter in the world will issue a pollution liability policy to a municipality. The point is that either way, pollution claims will have to be paid by the community, and not by insurance.

Just to divert for a second, I think we have to understand the basic principle of insurance clearly, that is, commercial insurance is based on the concept that given large enough numbers, a risk becomes predictable. But, for the many reasons previous speakers have noted, this risk is no longer predictable; hence, the surplus and financial capabilities of insurance companies are not great enough to handle a potentially catastrophic risk of this nature on a commercial basis. Furthermore, there is no reinsurance available. Many of the decisions that are affecting this are not being made in Hartford or New York; they are being made in London, Paris, and Brussels.

The problem here has nothing to do with cash flow underwriting; the problem is that this has become an exposure which just may be uninsurable from a commercial standpoint, without assistance from elsewhere. It does not matter whether one is talking about a commercial insurance company or a bank; it is unpredictable for all, and there is no reinsurance available anywhere at the present time.

In discussing this problem, considerable attention has been focused on towns with landfills. Yet, every community is a potential defendant in a pollution liability claim. For example:

A town can be sued if its private scavenger dumps the communities garbage in a contaminated landfill many miles away. The most extreme example that I know of involves Norwood in Bergen County,

which has been sued in the case involving the GEMS Landfill in Gloucester Township, Camden County.

Virtually every town has an underground gasoline tank to fuel police and public work's vehicles.

Numerous town halls and other buildings contain asbestos.

Many communities have municipal water utilities. The recent case where a landscaper contaminated a municipal water system with fertilizer graphically demonstrates the potential of class action suits from all of the customers in a town.

Therefore, there are two major questions which must be addressed.

1) What should be government's liability for pollution-related injuries, and

2) Considering the fact that there is no real pollution insurance, how will government pay for this liability?

I want to briefly comment on the first question and then discuss the second in greater detail.

We need to balance the rights of an injured party to collect damages, with the ability of government to pay. Obviously, the easiest answer to the problem is to make government immune from these suits, but that would be grossly unfair to the people who have been injured. Conversely, it is equally unfair to expect the taxpayers to pay 100% of the damages if government was only partly responsible, or was only responsible for a portion of the negligence. This is especially important because government's legal exposure is becoming greater due to the fact that government has no alternative but to indemnify the contractors it hires to clean up the environment. Therefore, government's liability should be limited to that portion of the negligence caused by its actions and the actions of its indemnified contractors.

The second question is how to pay for government's liabilities. As I indicated before, every town, county, school board, utility commission, etc., as well as the State itself, will have a huge uninsurable exposure. Each unit of government will either stand alone, or we will join together to share this risk among ourselves. Let me

submit that it is poor public fiscal policy to virtually bankrupt a community with a large bond issue to pay an uninsured claim. Yet, this is exactly what is going to happen unless we take action.

A potential solution is the formation of an Intergovernmental Environmental Impairment Liability Fund with the following characteristics:

1) It should be organized as a risk-sharing fund so that each member's assessment is based on its own exposure. Under this structure, the standard environmental liability premium is computed for each member. Towns with little risk will have a very small premium, while towns with landfills, asbestos, or who indemnify cleanup contractors will have a much higher standard premium.

The total cost of the fund is divided among the members based on each member's standard premium.

Claims are fully reserved and funded as they occur. Therefore, if at the end of the year claims are more than expected, everyone pays an additional assessment, pro rata, based on their original assessment. Conversely, if claims are less than expected, everyone receives a dividend.

The point here is that there are no large unfunded liabilities passed onto future years.

2) The fund should be open on a voluntary basis to all municipalities, school boards, counties, and utility commissions, as well as the State government itself. Public Law 1983, Ch.372, already permits municipalities to join a joint insurance fund. However, this legislation does not allow other types of governmental units to join. If this law was changed, it would be possible to create a broad-based organization with the greater financial resources necessary to provide more meaningful coverage for its members. With a larger membership, the fund can offer higher coverage limits which should be supplemented with excess insurance, if any is available.

I might comment here that the proposal to form an excess insurance pool through the State organization would complement this.

3) The State should offer broad environmental impairment liability coverage rather than narrow--

SENATOR LESNIAK: Excuse me, I'm sorry— Through what organization, excess insurance?

MAYOR GRUBB: Yes. There was a proposal made earlier by Commissioner Gluck to form some sort of an excess liability reinsurance pool, and that would supplement this organization very well.

3) The fund should offer broad environmental impairment liability coverage rather than narrow sudden and accidental coverage. However, the fund should be able to exclude sites which are imminent hazards, or where a member refuses to comply with DEP recommendations within a reasonable period. The existence of a fund should not become an excuse to avoid resolving environmental problems.

As a matter of public policy all members should be able to arrange for the fund to indemnify contractors cleaning up problem sites. Cleanup coverage should be available even in cases where the site itself has been excluded as an imminent hazard.

There should also be an annual deductible which should be determined by each member's net revenue. Therefore, Park Ridge would have a different deductible than, say, Bergen County, or the State itself.

4) A major advantage of a broad intergovernmental fund is that a specialized team of engineers, attorneys, and expert witnesses can be retained. If you recall, one of the problems experienced by Jackson Township was developing a defense when its insurers refused to handle the case. The fund's team should also be available to help members confirm coverage from prior insurers in the event of a claim, particularly in situations where the prior insurers refuse to honor the claim.

5) Under the municipal pooling law, each member town selects a commissioner who has a vote in electing the fund's executive board. This basic principle should be retained even if the fund is broadened to include other types of governmental units. The executive board should include representation from the State, counties, school boards, and municipalities, so that each has a voice in the operation of the fund.

In conclusion, the ramifications of the pollution liability crisis will continue to escalate unless something is done to resolve the issue. The lack of coverage for contractors will cause the cleanup program to come to a halt. All levels of government are exposed to potentially huge uninsured claims.

If insurance companies are not allowed to issue pollution exclusions, many of them will have no alternative but to voluntarily terminate their licenses and leave the State. This will further exasperate the liability insurance crisis. Again, there is no reinsurance available for this type of exposure anywhere in the world right now.

It would be easy to say these problems should be solved at the expense of the State Treasury or the parties that have been injured by pollution. But, that is not realistic. If we are going to clean up the environment and protect the fiscal solvency of local government, then cooperative effort is essential between the Legislature, State government, and other levels of government throughout New Jersey. All of us are going to have to participate.

Thank you, Senator, for giving me an opportunity to state my views.

SENATOR LESNIAK: Thank you, Mayor. Let me say that this is the most comprehensive proposal we have seen to date. What is your background, by the way?

MAYOR GRUBB: In addition to being the Mayor of Park Ridge, I was originally a consultant. I was involved in putting together the Bergen County Municipal Joint Insurance Fund, which currently has 25 members in northern Bergen County. It is the first operational joint insurance fund in the State.

SENATOR LESNIAK: I can assure you that we are going to take the proposal under serious consideration.

One point I do want to make. You imply it, but you do not specifically mention it. One of the effects in having victims compensated for damages is that it affects the actions of the person who causes the damages. As Senator Laskin has mentioned so many times this morning, when we absolve people from liability, or we reduce their

liability responsibility, we also increase the chance of a reoccurrence of hazards, and having the health and lives of people affected because of less than appropriate actions.

MAYOR GRUBB: I absolutely agree with you. Along that line, any program that is put together has to have two principles: Number one, not picking up liability for imminent hazards. In other words, not taking somebody else's claim. And, number two, there should be a deductible, based on the financial size of an institution, so that there will, at least, be a little sting from the claim.

However — and this is one of the ironies — let's go back to the Jackson Township situation. We have been talking about the fact that we need the insurance industry as a part of the regulatory environment. Well, the insurance industry is in essence saying, "We are not going to be in this business any more."

If we go back to the Jackson Township situation, what advantage is there for homeowners if a claim ends up bankrupting their municipal government? I think we can all imagine a $5 million, $5-1/2 million, a $6 million bond issue, or a $15 million bond issue. Whatever the final number is, it would have a devastating impact on the fiscal solvency of a municipality. Unless we do something, that is exactly what is going to happen.

SENATOR LESNIAK: What makes your proposal most attractive is that there is a risk assessment aspect, so one would be paying based on the risk, and there is an incentive to reduce the risk in order to reduce the premium.

MAYOR GRUBB: Exactly. Why should Park Ridge, without a landfill, pay as if we had a landfill?

SENATOR LESNIAK: Or, if you have a landfill, you ought to take proper precautions in terms of administration.

COMMISSIONER GLUCK: Exactly.

SENATOR LESNIAK: Senator Laskin?

SENATOR LASKIN: Yes. After what Ray has said, I don't know whether your points are good or bad because we haven't studied them, but they are different. That is something I like to see because we have been stuck with three points: The cap, the lessening of the

liability standards, and "that other thing," so it is good to see something other than those three approaches. Thank you.

MAYOR GRUBB: Thank you, Senator.

SENATOR LESNIAK: By the way, I want to acknowledge Assemblyman Martin. He has been here for quite a while.

Do you have any questions, Assemblyman?

ASSEMBLYMAN MARTIN: Just a couple. One is a thought in relation to what we have said with respect to having a situation where there would be an incentive for corrective action. It seems to me that we may not only reduce premiums for a town, such as the Borough of Park Ridge which has no landfill, but we may even be able to rate levels within landfills or major liability risks. So, if a town is able to reduce its landfill from a category "C" to a "B," or something like that, they would benefit by having a lesser premium.

I have one question regarding the risk-sharing structure. The point here -- as you indicate in the last paragraph -- is that no large, unfunded, liability would be passed to future years. As you noted in the beginning, what happens if we really do have a catastrophic situation in which it is unrealistic to fund it in one year, or don't you foresee that under this formula?

MAYOR GRUBB: First of all, obviously the fund would have an absolute limit on how much it would pay per site -- at least the way I visualize it. However, the way the municipal pooling legislation has been set up -- and I think this is a wise principle -- when a claim occurs and is reserved, the fund should be pulled up at that point to cover it.

The danger is, if you don't do that -- you may side-step that for a short period of time -- you end up with exactly the same situation that has occurred in a number of other cases where the government has attempted to play insurance company, and where future administrations end up with a couple of million dollars worth of unfunded liabilities.

However, another advantage to the pay-as-you-go system is that it immediately makes all the members, and all the various different levels of government, aware of what the liabilities are and

what is happening. If you have a major claim which results in additional assessment, I think that would create a greater awareness for everyone to roll up their shirt sleeves and get these problems resolved before additional liabilities are created.

So, this is a mechanism which helps to motivate and encourage responsible public policy in cleaning these things up. But, I agree with you: If you had a real "whopper," you may want to fund that over two or three years -- or something like that.

SENATOR LESNIAK: Thank you very much, Mayor.

MAYOR GRUBB: Thank you, Senator.

SENATOR LESNIAK: Is Mayor Peter Nelson from Fieldsboro Borough present? (negative response)

Is Robert Grist, Governmental Risk Manager's Association present? (affirmative response)

SENATOR LESNIAK: Mr. Grist, can you tell us exactly what, or close to what, the Association of New Jersey Governmental Risk and Insurance Managers is?

ROBERT S. GRIST: Yes.

SENATOR LESNIAK: Oh, you have testimony?

MR. GRIST: Yes. May I hand these to you? (Mr. Grist referring to copies of his statement.)

SENATOR LESNIAK: Sure, please do.

MR. GRIST: To respond to your question, and before I go into my prepared statement, Governmental Risk Insurance Managers is a catchy name and it comes out to GRIM. I am a professional Risk Manager, and have spent many years in the insurance industry. A few of the other people who are in the same capacity throughout the State, oh, two years ago, felt that everyone needed help. We needed a place to exchange ideas, not to be at the risk of the insurance industry. We had to get together and help each other, in particular, the small community. That is what we do on a fairly loose basis; we gather and we meet. I am speaking on behalf of those people; also, in my capacity as a Risk Manager for Atlantic County.

My name is Robert Grist, and I come before you in a dual capacity as the Risk Manager for Atlantic County and as Chairman of the

Association of New Jersey Governmental Risk and Insurance Managers, appropriately, especially at this time, known as GRIM. On behalf of my County and GRIM, I appreciate the opportunity to present the following comments relative to the current dilemma in environmental impairment liability.

The testimony you have received from the parties that have preceded me has responsibly set forth the problems of the availability of insurance protection to address the liabilities that may develop under environmental impairment. Environmental impairment liability is only a portion of the current plight of the public entity as there is either restricted or no market for professional liability, or for public officials liability. Without this, the governmental entity is not protected to respond to the activities needed to protect or to clean up the environment.

The insurance that is available today in New Jersey to the commercial or public buyer is being issued with reduced coverage, lower limits, and dramatically increased premiums. The calendar year 1986 portends the possibility of an entirely new general liability policy, which in many areas, may be even more restrictive than those policies issued in 1985. I believe the Insurance Commissioner alluded to her hearings with the insurance industry relative to this new policy. The impact it will have is that those people who are not educated in the field of insurance are going to have a very large surprise when they go to collect under their insurance policy, because they are reverting back to the 1950s.

It is apparent that those companies underwriting insurance in New Jersey have taken the position that with the legislation in existence, and from the judicial renderings based on these laws, they are unable to make a reasonable underwriting profit in New Jersey. This has resulted in a situation wherein the only commercial insurance currently being written in the State of New Jersey is that being written under the force of the Governor's emergency action.

In order for the public entity to be able to respond to the obligation to protect the environment from pollution, there must be a reasonable source of insurance availability. In my opinion, this

availability will only be developed through proper legislative change, which may be in the form of the return of some immunities, a cap on the liability limits -- and I don't mean, Senator, to keep being repetitious, but this is where we are -- and relief from exposure to joint and several liability. The legislative relief set forth in the preceding will aid the public entity; the private contractor in the area of environmental liability exposures may need relief from loss under the concept of strict liability. Now we are talking about the contractor who is going to clean it up. Is he responsible for the polluter? He is trying to do his job, but he just can't do his job currently.

The actions of your Commission may develop an acceptable insurance market in the area of environmental impairment liability; however, without the proper relief in the other areas of liability insurance -- in particular public officials -- the public entity in New Jersey will not be able to respond to the mandates to protect the environment.

To sum up the dilemma of New Jersey counties, they are mandated to solve the solid waste disposal problem, which often involves the acquisition of old landfill sites, or the development of new landfill sites. At the same time, the counties are unable to insure against any risk that might result from these activities which puts the taxpayer in the position of having to bear the cost of development, and the full cost of any liabilities.

This situation cannot be looked on in a vacuum, as the public official who makes the decisions how to address the solid waste disposal problem is unable to obtain liability protection for his decisions. This means in the context of solid waste management, that the public official must make decisions that risk the full assets of the public entity and his own personal assets, while being compelled to make these decisions in the absence of any insurance coverage.

SENATOR LESNIAK: Senator Laskin?

SENATOR LASKIN: You are the last witness, so I guess I'll ask some more questions.

MR. GRIST: Please.

SENATOR LASKIN: We go back to the same basic three solutions, and I don't say this in a critical way. It is a matter of frustration with me. They seem to be the three solutions that crop up all the time. The cap on the limit of liability— Let me just ask you about that. Suppose you put a cap, "X" dollars, on the limit of liability and you have some poor citizen who is horribly mangled by a pollution exposure — I'll give you the worst case scenario -- who becomes a paraplegic, brain damaged, can never function for the rest of his life, and who was 27 years old when the accident happened. If you put a cap on the liability, is it fair? Is it fair to say that vegetable, which you have created, or we have created, or someone has created by negligence in the pollution field— Is it fair to say that person is a vegetable and is only going to be getting "X" dollars because of a cap, when we really know he deserves more and probably needs more by way of medical care for the rest of his life? That is the problem I have with this cap thinking.

MR. GRIST: I will respond to that in several ways. One, do I think there is a social response to those people? I think they and their families need to be supplied with their basic needs. I will go back to my position on fair housing. I think everyone needs decent housing, but I don't think they need blue toilets where a white one will suffice.

SENATOR LASKIN: How do you provide decent care for that description I gave you?

MR. GRIST: I made a notation here, sir, that I believe may be one of the answers. I was following up on one of the other speakers. I think the answer might be some type of governmental funding, an insurance pool as mentioned by Mayor Grubb, ex of — that is insurance language for excess of -- a basic retention. I think everyone involved, the counties and maybe some of the small municipalities, are going to hurt at this, but I think we have a responsibility for some basic retention. But it has to be a source above that basic retention to which we go.

You're asking for responsibility again. I think the Jackson Township rendering was an overkill.

SENATOR LESNIAK: Let's stay on the issue of caps.

MR. GRIST: Yes, sir.

SENATOR LESNIAK: Stay on the issue of caps. You're basically saying that person's family should be covered by welfare.

MR. GRIST: I don't say welfare, sir. I think there is some type of obligation. Now it may be welfare, and if it is, maybe there is some type of funding. I don't think anyone— In this day and age, we do not throw people on the street to be eaten by the dogs, no.

SENATOR LESNIAK: Oh, we give them welfare though.

MR. GRIST: Yes, sir.

SENATOR LESNIAK: That is how we should take care of that person because of someone's negligence? Their family should have to go on welfare?

MR. GRIST: I don't think they should have to go on welfare because of negligence, no.

SENATOR LESNIAK: That is what a cap could do.

MR. GRIST: A cap could do that; yes, sir, a cap could do that. But again, I'm looking at a position— I'll put my Risk Manager of Atlantic County hat on now. I do not know how, right now, and I am working on a budget-- I do not know what to budget for 1986. I had a 300% increase in my liability insurance last year. I budgeted 100% increase. Do I do that this year?

SENATOR LESNIAK: But the solution to that problem is what we are looking at.

MR. GRIST: I understand that.

SENATOR LESNIAK: We have to look at the ramifications of whatever solution we come up with.

MR. GRIST: It is not overly simplistic. It is a composite of all of the thoughts of the people. Mayor Grubb's idea of a pool will entail everyone. The State will have to be included in that. Some of your small communities have too old dumps. They just can't do a thing with them. A county the size of Atlantic County could probably stand on its own, be uninsured. Now, they will not like me for saying that, but they probably could. The public official dilemma on top of it-- They have to make the decisions on this, which is another area outside of your Commission.

SENATOR LESNIAK: And we can't get insurance, because we've tried.

Senator Laskin?

SENATOR LASKIN: I am going to conclude. I, as you may know, am sort of a conservative in this Legislature and a real strong advocate of the free market system. I hate to even think of government intervention and regulation in most cases. But I think that Senator Lesniak has had a great influence on me because he seems to be rather -- how shall I say -- not expert, but pretty familiar with what we have been talking about, and we have had a lot of discussions. It just seems to me that perhaps my free market thinking cannot win out in the area of insurance. I am starting to think that maybe we have to regulate the insurance industry to make them do what I think they should be doing in the free market field.

The insurance industry, in my opinion, and I'll say it again— I think that New Jersey has become a haven for the insurance industry, not recently, but traditionally. The premiums on everything, including the homeowners that I spoke about with Commissioner Gluck— I know that the homeowners' premiums are now being lowered a little bit, but they are so high that any lowering is still going to keep them high. I am starting to think that maybe government is going to have to step in a little harder with regulation of these insurance companies to mandate certain coverages.

SENATOR LESNIAK: That was addressed to me because I am not sure how I put those ideas in your head, Senator.

MR. GRIST: May I speak?

SENATOR LASKIN: Well, your concern about the problems has brought a lot of information to me. It has made me think that maybe a conservative approach is not necessarily the right approach in this area.

MR. GRIST: Speaking as an ordinary, everyday insurance person, and following pretty much the international trend of the insurance industry, really, it becomes involved. You've heard about capacity, policyholders, and the "whole thing." I think you are going to have to consider that the insurance industry does not like the

judicial renderings in New Jersey. It does not like the activities, the local bar associations--

SENATOR LESNIAK: Excuse me, I'm sorry. We heard testimony that this is a problem nationwide.

MR. GRIST: Yes, sir, it is, but New Jersey is a bad word in the insurance industry. Our Tort Claims Act-- We have paid claims in my county; we are a self-insured county. No way in the world do we have a responsibility, but we had that much, and there were horrendous injuries.

SENATOR LESNIAK: But joint, and several is nationwide.

MR. GRIST: Not in all states.

SENATOR LESNIAK: Under CERCLA AND RCRA it certainly is.

MR. GRIST: Okay, then I stand corrected, sir. The renderings by the judiciary in New Jersey apparently-- Maybe it is not correct, but the international market says, "Oh, New Jersey." My understanding is -- I am probably not correct in the exact percentage -- that of the policies written in New Jersey, 85% goes out of the country to the reinsurance market. I think possibly one of the solutions would be a strong stand collectively on the part of the National Association of Insurance Commissioners. If you have 40, or 30, strong industrial states that take a position, then the insurance industry in this country, and world-wide, would stand up and take notice. I am afraid that New Jersey, standing alone, might have some problems, because they do pull licenses, although they say they won't do it. It is hard to tell someone they have to do that with their money.

SENATOR LESNIAK: Senator Laskin, do you have any more questions?

SENATOR LASKIN: No, thank you.

SENATOR LESNIAK: Assemblyman Martin?

ASSEMBLYMAN MARTIN: No questions.

SENATOR LESNIAK: Okay. Thank you very much. This concludes today's hearing. We will meet again on October 24 to hear the defense by the insurance industry.

(HEARING CONCLUDED)

APPENDIX

CONTAMINATION
CONTROL
UNLIMITED
39 MILLTOWN RD.
EAST BRUNSWICK
N.J. 08816
201-390-8800

October 9, 1985

New Jersey Office of Legislative Service
State House Annex
Room No. 305
Trenton, New Jersey 08625

Attn: Ms. Drace

Dear Ms. Drace:

For the past fifteen years, we have been in the insurance restoration business. Four years ago, we were asked by various insurance carriers to become involved with pesticide contamination claims and to develop decontamination procedures. We accomplished this task and have been successfully decontaminating residences for the past four years. During the course of that time, we sincerely believe millions of dollars have been saved by the insurance industry due to our quick response and realistic approach to handling these unique problems.

Now, after four years of serving the public and insurance industry without filing even one claim, we are faced with the problem of being without insurance coverage. Fully aware that we cannot continue business without insurance, but being unable to obtain coverage, we must ask for your aid. We are only one of many companies facing the same dilema.

We serve not only the insurance companies, but the people who through no fault of their own become victims of chemical contamination.

In this day and age when chemical contamination is a real nightmare and not just something that could happen in the future, we urge you to look into this problem. Your assistance is greatly needed.

Very truly yours,

CONTAMINATION CONTROL UNLIMITED

Alan Goeltz

AG/ejd

1X

BOROUGH OF BLOOMINGDALE
COUNTY OF PASSAIC

MICHAEL D. LEARY
BOROUGH ADMINISTRATOR
(201) 838-7995

101 HAMBURG TURNPIKE
NEW JERSEY 07403

The Honorable Raymond Lesniak
Chairman
Legislative Environmental Impairment
Liability Commission
State House Annex
Trenton,N.J. 08625
Attn: Ms. Denice Drace

October 10,1985

Dear Senator Lesniak,

On behalf of the Mayor and Council of the Borough of Bloomingdale, I would like this letter entered for the record to reflect our concerns on the availability anf affordability of insurance.

The Borough has, for the past several years, had competitive bidding on it's insurance policies. With this procedure and a favorable market, the Borough's payments for all its insurance (outside of Group Medical Coverages) dropped from $75,000 in 1982 to $66,100 in 1983. This payment rose to $72,710 in 1984, reflecting a 10% increase which the Borough was able to absorb. I should also point out that some coverages were increased in that year after we studied our rise exposure. We concluded that the increase was a small price to pay to assure our taxpayers of necessary coverage in the event a major loss occured.

During the first few years the Borough's policies attracted four to five agents a year that were willing to provide coverage in that atmosphere, the agents attempted to give the Borough better coverage and service every year.

This picture changed dramatically when Bloomingdale bid its insurance in 1985. The pricing on the same coverage we had in 1984 rose from $72,710 to $92,800, a 26% increase. The Borough received only one bid even after fifteen agencies in the area were contacted. The explanation we received over and over from the agents was that Municipalities had become a high risk due to the various functions they perform and the possible liability exposure established in the Jackson Township Case.

The Borough was forced to make very difficult decisions in its budget deliberations in order to accomodate these increased costs. Plans to expand other Municipal Services were postponed. Fortunately, there were no cutbacks.

Now, we are being informed by our agent that the pricing may double or triple in 1986 for current coverages. The Borough will not be able to absorb increases of this magnitude and there is no doubt some coverages or other municipal services will have to be reduced.

In this situation, the taxpayers are going to be the losers; they will either pay higher premiums for less coverage or incur the risk of a major lawsuit.

We would think that the municipalities and the Sate must examine the possibility of alternate methods of obtaining coverage. Pooling and self insurance among municipalities in order to share the increasing costs and risks may be a potential solution. We feel the Legislature should attempt to have regulations that will make access to these alternatives easier.

Sincerly,

Michael Leary

NJPIRG
204 West State St.
Trenton, NJ
08608
(609) 393-7474

STATEMENT OF THE
NEW JERSEY PUBLIC INTEREST RESEARCH GROUP
FOR THE
ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE STUDY COMMISSION

October 15, 1985

My name is Marlen Dooley. I am an environmental advocate for the New Jersey Public Interest Research Group (NJPIRG). NJPIRG is a statewide non-profit, non-partisan public interest group that works in the areas of environmental preservation, consumer protection, and corporate and government accountability on behalf of its 62,000 members.

NJPIRG recommends three solutions to the present environmental liability insurance crisis. Both private industry and public entities should be encouraged to develope self insurance programs. The state should take on the role of reinsuror. The state should take a more active role in regulating insurance industry rate making.

1. Self Insurance and State Reinsurance Programs

The Property-Casualty insurance industry's threat to deny coverage to high risk enterprises is not unique to the area of environmental liability insurance. The Seventies saw the sharp rise in liability and malpractice insurance premiums and the Sixties saw the denial of insurance for the inner cities. Robert Hunter, president of the National Insurance Consumer Organization, in testimony before the Subcommittee on Commerce, Transportation, and Tourism, stated that the problem is a cyclical one. He noted that when he was federal insurance administrator, malpractice insurance premiums sky rocketed. Although the federal government investigating the situation eventually found the "crisis" to be unwarranted, half the

states nevertheless reduced victims' rights in malpractice cases.[1]

It is possible that the same sequence of events is now occuring. We, therefore, urge the commission to investigate the true nature of this insurance crisis before making drastic changes in liability standards.

a. State Sponsored Reinsurance Programs

NJPIRG is aware, however, that during period of insurance company withdrawal and price hikes, very real problems face municipalities and businesses. Many cannot afford, or in many instances, cannot even obtain environmental liability insurance. It is NJPIRG's position that FAIR plans should be instituted by the state government. This system was utilized in the 1960's when insurance companies refused to insure inner cities that were likely to incur damage during the rioting. The federal government became a reinsuror for insurance companies. Companies agreed to participate in an insurance pool and thereby guarantee coverage to all parties eligible for insurance. The insurors paid a premium to the government for this service. And, despite the insurance companies initial claims for withdrawing (that insuring inner cities was unprofitable) "the federal government made $125 million writing this reinsurance."[2]

b. Self Insurance

In addition, both industry and municipalities should be encouraged to form self insurance pools. This can be accomplished through relaxing laws prohibiting such activities. To self insure, municipalities or industries place the premiums ordinarily paid to insurors into a common pool. Claims would then be paid from this account. It may be helpful to examine Senator Stafford's (R. Vt) Risk Retention Act amendment to the federal Superfund. This act allows chemical companies to create insurance pools.

2. New Jersey Should More Actively Regulate Insurance Companies

Insurance Companies were granted a monopoly under the McCarron-Fergeson Act. Congress left to the states all power to regulate the insurance industry. According to a recent

United States General Accounting Office study,[3] for the past ten years, many casualty insurance companies underwrote high risk ventures at very low premiums, because the cash made available through premiums could be invested and a large profit turned. Therefore, although the figures indicate that during the 1974-83 period, casualty companies had underwriting losses of 28 billion, investment gains of 100 billion were realized. This resulted in a net gain of 72 billion dollars. It is apparent that there was little relationship between risks and premiums. This led to price wars with companies often fighting over seemingly undesireable property. An excellent example of this was the MGM Hotel fire. Coverage for the hotel was written after the fire.

In recent years these investment practices have become less profitable. The gap between investment gains and premium shortfall is much smaller. Now, insureds are finding unprecedented rises in their insurance premiums. This is because insurance companies are now not only covering risks, but also covering the lost investment profit. The present situation could have been less dramatic if the state took a more active role in regulating the insurance industry. NJPIRG applauds this commission for the action now being taken. We further urge that the state take a more active role in overseeing the insurance rate determinations.

In addition, it is important to note that if there is a clearer relationship between risks and premiums, the manufacturing and production industry would be more safety conscious, because it would be more cost effective. Activities that are very dangerous to the community warrant high premiums. Had this incentive been in operation in the past, we might not have the environmental problems that we presently have.

3. <u>Present Tort Law Should Not Be Modified</u>

NJPIRG opposes caps on liability or alteration in the strict liability standard as the solution to the present insurance situation. Polluters should remain responsible, because they have created the problem. Our justice system

should not be altered to place a heavier burden on innocent victims of toxic tragedies. In addition, companies are often better situated financially and often have access to records and information that makes the burden easier for them to bear.

Lastly, limiting liability would yield no incentive for owners to operate hazardous facilities more safely.

Conclusion

NJPIRG finds that the premium sky rocketing is a cyclical problem. For the short term, the state should offer to reinsure insurors willing to cover environmental liability insurance holders. Self insurance pools should also be encouraged.

For the long term, the state should impose stricter regulations on insurance company rate making practices.

NJPIRG opposes caps on liability and modifications of the present tort law.

I appreciate being given the opportunity to present this statement to the Commission. NJPIRG commends the Commission for its investigation into this difficult and important area.

FOOTNOTES

1. Statement of J. Robert Hunter, president, National Insurance Consumer Organization, before the Subcommittee on Commerce, Transportation and Tourism of the United States House of Representatives, September 19, 1985, pp 1-2.

2. Statement of J. Robert Hunter at p 5.

3. Statement of Natwar M. Gandhi, Group Director, Tax Policy, General Government Division, U.S. Government Accounting Office, before American Risk and Insurance Office, August 20, 1985, p 2.

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF ENVIRONMENTAL QUALITY
BUREAU OF PESTICIDE CONTROL
380 Scotch Road, West Trenton, N.J. 08628

October 4, 1985

Ms. Denise Drace
NJ Legislative Service
State House Annex-Rm. 305
Trenton, NJ 08625

Dear Ms. Drace:

The purpose of this letter is to submit testimony to the Environmental Impairment Liability Insurance Study Commission.

This Bureau licenses businesses which apply pesticides for hire. One of the requirements for business registration is that the firm carries certain minimum liability insurance coverage. This is mandated by our regulation N.J.A.C. 7:30-7.4 (copy enclosed).

Our office is receiving an ever increasing number of complaints from the businesses we regulate that they either cannot obtain the liability coverage necessary or that the premiums are so high that they cannot afford the cost. Since our regulations mandate that they must have general liability insurance coverage, businesses without coverage must either go out of business or operate illegally. The very high premium costs are very detrimental especially to small businesses.

I assure you that this insurance crisis is very real. I firmly urge the Commission to recommend measures to alleviate this situation.

Thank you for providing this opportunity to present these comments. If I can be of any assistance I can be reached at (609)292-5890.

Sincerely,

Ralph C. Smith
Certification/Registration Supervisor
NJ Bureau of Pesticide Control

RCS:oar
Enclosure

9X

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

NEW JERSEY PESTICIDE CONTROL CODE

N.J.A.C. TITLE 7 CHAPTER 30

SUBCHAPTER 7
PESTICIDE APPLICATOR BUSINESSES

10X

SUBCHAPTER 7
PESTICIDE APPLICATOR BUSINESS

7:30-7.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Act" means the Pesticide Control Act of 1971 (N.J.S.A. 13:1F-1 et seq.) as amended.

"Brand" or "Brand name" or "Trade name" means the characteristic designation by words, symbols, name, number or trademark of a specific, particular pesticide or formulation thereof under which the pesticide is distributed, sold, offered for sale, handled, stored, used or transported in the State of New Jersey.

"Commercial pesticide applicator" means any person (whether or not he is a private pesticide applicator with respect to some uses) who uses or supervises the use of any pesticide for any purpose or on any property other than as provided by the definition of "private pesticide applicator."

"Commercial pesticide operator" means any person who applies pesticides by equipment other than aerial under the direct supervision of a responsible commercial pesticide applicator.

"Department" means the State Department of Environmental Protection.

"EPA" means the United States Environmental Protection Agency.

"Person" means and shall include corporations, companies, associations, societies, firms, partnerships, and joint stock companies as well as individuals, and shall also include all political subdivisions of this State or any agencies or instrumentalities thereof.

"Pest" means (a) any insect, rodent, nematode, fungus, weed, or (b) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria or other micro-organisms on or in living man or other animals) which is injurious to health or the environment.

"Pesticide" means and includes any substance or mixture of substances labeled, designed, or intended for use in preventing, destroying, repelling or mitigating any pest, or any substance or mixture of substances labeled, designed, or intended for use as a defoliant, desiccant, or plant regulator; provided, that the term "pesticide" shall not include any substance or mixture of substances which the EPA does not consider to be a pesticide.

"Pesticide applicator business" means for the purposes of this subchapter any person who either wholly or in part holds himself out for hire to apply pesticides in the State of New Jersey.

(f) A registered business must notify the department, in writing and within 30 days, of any changes in any information on its application for registration, or if the business is no longer engaged in the application of pesticides.

7:30-7.3 Records

(a) Every business required to register pursuant to the provisions of N.J.A.C. 7:30-7.2 shall keep, for each application of pesticides made by that business, a record of application containing the following information:

1. The date of application;
2. The place of application;
3. The brand or trade name of each pesticide used or symbol representing such name, providing the business also keeps a list which clearly correlates the symbol used with full and complete pesticide product names;
4. The amount of each pesticide used;
5. The dosage or rate of each pesticide used; and
6. The name of the person making the application.

(b) In addition to the records required by (a) above, the business shall also keep, in writing, the following information:

1. A listing of the names and corresponding EPA Registration Numbers of all the pesticides applied by the business; and

2. The names and applicator registration numbers of all the certified and registered responsible pesticide applicators employed by the business together with a delineation of the applications for which each is responsible. (The delineation may be by type or category of application or by any other classification or grouping used to define responsibility.)

i. This information may be kept separately from the records required by (a) above or may be integrated with such records by including on the record of each pesticide application the full name and EPA Registration Number of the pesticide used and the name of the applicator responsible for the application.

(c) All records and information required to be kept pursuant to this section, or copies thereof, shall be kept for a minimum of two years at the place of business and must be immediately available upon request by the department.

(d) A pesticide applicator business shall, upon written request, provide a customer with a copy of the application record which is required to be kept pursuant to this section and which pertains to a pesticide application performed for that customer.

7:30-7.4 Financial responsibility

(a) Businesses required to register under N.J.A.C. 7:30-7.2 shall submit with the application for registration an attestation by the person providing the coverage that the business has in force an insurance policy (or surety bond in equivalent amounts) which meets or exceeds the standards set forth below:

(b) The department, in addition to any penalties authorized by the Act, may deny, suspend, or revoke the application or registration of a pesticide applicator business if the applicant or pesticide applicator business has failed to comply with any provisions of the Act or any rules and regulations promulgated thereunder.

7:30-7.7 Additional authority

In the event of the issuance of a final order assessing a civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) or a criminal conviction under Section 14(b) the department will review and may suspend or revoke the registration of any person so assessed or convicted.