JOINT PUBLIC HEARING

before

SENATE ENVIRONMENTAL QUALITY COMMITTEE

AND

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

SENATE BILL NO. 2188

("The Clean Water Enforcement Act)

February 13, 1990
Cedar Ridge High School
Old Bridge, New Jersey

MEMBERS OF SENATE COMMITTEE PRESENT:
Senator Richard Van Wagner, Co-Chairman

MEMBERS OF ASSEMBLY COMMITTEE PRESENT:
Assemblyman Robert G. Smith, Co-Chairman
Assemblyman Neil M. Cohen, Vice Chairman
Assemblyman Thomas J. Duch
Assemblyman Arthur R. Albohn

ALSO PRESENT:

Mark T. Connelly
Patricia Cane
Office of Legislative Services
Aides, Senate Environmental Quality Committee

Spiros J. Caramalis
Raymond E. Cantor
Office of Legislative Services
Aides, Assembly Energy and Environment Committee

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Hearing Recorded and Transcribed by
Office of Legislative Services
Public Information Office
Hearing Unit
State House Annex
CN 068
Trenton, New Jersey 08625

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

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1989

New Jersey State Legislature
OFFICE OF LEGISLATIVE SERVICES
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625

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NOTICE OF A JOINT PUBLIC HEARING

The Assembly Energy and Environment Committee and the Senate Environmental Quality Committee will hold a joint public hearing to assess:

"THE CLEAN WATER ENFORCEMENT ACT"
(S-2188*)

The hearing will be held on *Tuesday, February 13, 1990 at 10:00 a.m. in the Cedar Ridge High School, Route 516, Old Bridge, New Jersey*

The public may address comments and questions to either Spiros Caramalis, Aide to the Assembly Energy and Environment Committee, or Patricia Cane, Aide to the Senate Environmental Quality Committee. Persons wishing to testify should contact Deborah Del Vecchio or Carol Hendryx, committee secretary, at (609) 292-7676.

**Assembly bill is pending introduction.*

Issued 2/2/90

(*Directions:* New Jersey Turnpike exit 9. Head east on Route 18, 4 or 5 miles past Macys Mall; down hill - sign Matawan, Route 516. Proceed on that 5 miles - on the right is Carl Sandburg Middle School - behind it is *Cedar Ridge High School*. (The phone number is 201-290-3901.)

Or, if you prefer: Route 9 - look for Route 516-Matawan, proceed 3 miles - on right is Carl Sandburg Middle School.

SENATE, No. 2188

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1990 SESSION

By Senators VAN WAGNER, DALTON and BENNETT

AN ACT concerning water pollution control and prevention, amending and supplementing P.L.1977, c.74, supplementing P.L.1983, c.230 (C.58:11-64 et seq.), amending P.L.1974, c.169 and P.L.1972, c.42, creating a "Clean Water Enforcement Fund" and a "Wastewater Treatment Operators' Training Account" and making an appropriation.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 3 of P.L.1977, c.74 (C.58:10A-3) is amended to read as follows:

3. As used in this act, unless the context clearly requires a different meaning, the following words and terms shall have the following meanings:

a. "Administrator" means the Administrator of the United States Environmental Protection Agency or his authorized representative;

b. "Areawide plan" means any plan prepared pursuant to section 208 of the Federal Act;

c. "Commissioner" means the Commissioner of Environmental Protection or his authorized representative;

d. "Department" means the Department of Environmental Protection;

e. "Discharge" means [the] an intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the State [or], onto land or into wells from which it might flow or drain into said waters [, and shall include] or into waters or onto lands outside the jurisdiction of the State, which pollutant enters the waters of the State. "Discharge" includes the release of any pollutant into a municipal treatment works;

f. "Effluent limitation" means any restriction on quantities, quality, rates and concentration of chemical, physical, thermal, biological, and other constituents of pollutants established by permit, or imposed as an interim enforcement limit pursuant to an administrative order, including an administrative consent order;

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

g. "Federal Act" means the "Federal Water Pollution Control Act Amendments of 1972" (Public Law 92-500; 33 U.S.C. 1251 et seq.);

h. "Municipal treatment works" means the treatment works of any municipal, county, or State agency or any agency or subdivision created by one or more municipal, county or State governments and the treatment works of any public utility as defined in R.S.48:2-13;

i. "National Pollutant Discharge Elimination System" or "NPDES" means the national system for the issuance of permits under the Federal Act;

j. "New Jersey Pollutant Discharge Elimination System" or "NJPDES" means the New Jersey system for the issuance of permits under this act;

k. "Permit" means [an] a NJPDES permit issued pursuant to section 6 of this act. "Permit" includes a letter of agreement entered into between a delegated local agency and a user of its municipal treatment works, setting effluent limitations and other conditions on the user of the agency's municipal treatment works;

l. "Person" means any individual, corporation, company, partnership, firm, association, owner or operator of a treatment works, political subdivision of this State and any state or interstate agency. "Person" shall also mean any responsible corporate official for the purpose of enforcement action under section 10 of this act;

m. "Point source" means any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged;

n. "Pollutant" means any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, grease, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, thermal waste, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal or agricultural waste or other residue discharged into the waters of the State. "Pollutant" includes both hazardous and nonhazardous pollutants;

o. "Pretreatment standards" means any restriction on quantities, quality, rates, or concentrations of pollutants discharged into municipal or privately owned treatment works adopted pursuant to P.L.1972, c.42 (C.58:11-49 et seq.);

p. "Schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with water quality standards, an effluent limitation or other limitation, prohibition or standard;

q. "Substantial modification of a permit" means any significant change in any effluent limitation, schedule of

compliance, compliance monitoring requirement, or any other provision in any permit which permits, allows, or requires more or less stringent or more or less timely compliance by the permittee;

r. "Toxic pollutant" means [those pollutants, or combinations] any pollutant identified pursuant to the federal act, or any pollutant or combination of pollutants, including disease causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly or indirectly by ingestion through food chains, will, on the basis of information available to the commissioner, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformation, in such organisms or their offspring;

s. "Treatment works" means any device or systems, whether public or private, used in the storage, treatment, recycling, or reclamation of municipal or industrial waste of a liquid nature including intercepting sewers, outfall sewers, sewage collection systems, cooling towers and ponds, pumping, power and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any other works including sites for the treatment process or for ultimate disposal of residues resulting from such treatment. [Additional, "treatment works" means] "Treatment works" includes any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of pollutants, including storm water runoff, or industrial waste in combined or separate storm water and sanitary sewer systems;

t. "Waters of the State" means the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this State or subject to its jurisdiction;

u. "Hazardous pollutant" means:

(1) Any toxic pollutant;

(2) Any substance regulated as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, Pub.L.92-516 (7 U.S.C. § 136 et seq.);

(3) Any substance the use or manufacture of which is prohibited under the federal Toxic Substances Control Act, Pub.L.94-469 (15 U.S.C. 2601 et seq.);

(4) Any substance identified as a known carcinogen by the International Agency for Research on Cancer;

(5) Any hazardous waste as designated pursuant to section 3 of P.L.1981, c.279 (C.13:1E-51) or the "Resource Conservation and Recovery Act," Pub.L.94-580 (42 U.S.C. § 6901 et seq.); or

(6) Any hazardous substance as defined pursuant to section 3

of P.L.1976, c.141 (C.58:10-23.11b.);

v. "Serious violation" means an exceedance of an effluent limitation for a discharge point source set forth in a permit, administrative order, or administrative consent agreement, including interim enforcement limits, by 20 percent or more for a hazardous pollutant, or by 40 percent or more for a non-hazardous pollutant, calculated on the basis of the monthly average for a pollutant for which the effluent limitation is expressed as a monthly average, or, in the case of an effluent limitation expressed as a daily maximum and without a monthly average, on the basis of the monthly average maximum of all daily test results for that pollutant in any month; in the case of an effluent limitation for a pollutant that is not measured by mass or concentration, the department shall prescribe an equivalent exceedance factor therefor. The department may utilize, on a case-by-case basis, a more stringent factor of exceedance to determine a serious violation if the department states the specific reasons therefor, which may include the potential for harm to human health or the environment. "Serious violation" shall not include a violation of a permit limitation for color;

w. "Significant noncomplier" means any person who commits a serious violation for the same hazardous pollutant or the same nonhazardous pollutant, at the same discharge point source, in any two months of any six month period, or who exceeds the monthly average or, in a case of a pollutant for which no monthly average has been established, the monthly average of the daily maximums for an effluent limitation for the same pollutant at the same discharge point source by any amount in any four months of any six month period, or who fails to submit a completed discharge monitoring report in any two months of any six month period. The department may utilize, on a case-by-case basis, a more stringent frequency or factor of exceedance to determine a significant noncomplier, if the department states the specific reasons therefor, which may include the potential for harm to human health or the environment;

x. "Local agency" means a political subdivision of the State, or an agency or instrumentality thereof, that owns or operates a municipal treatment works;

y. "Delegated local agency" means a local agency with an industrial pretreatment program approved by the department;

z. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with an effluent limitation because of an event beyond the reasonable control of the permittee, including fire, riot, sabotage, or a flood, storm event, natural cause, or other act of God, or other similar circumstance, which is the cause of the violation. "Upset" also includes noncompliance consequent to the performance of

maintenance operations for which a prior exception has been granted by the department or a delegated local agency.

aa. "Bypass" means the anticipated or unanticipated intentional diversion of waste streams from any portion of a treatment works;

bb. "Major facility" means any facility or activity classified as such by the Administrator of the United States Environmental Protection Agency, or his representative, in conjunction with the department, and includes industrial facilities and municipal treatment works;

cc. "Significant indirect user" means a discharger of industrial or other pollutants into a municipal treatment works, as defined by the department, including, but not limited to, industrial dischargers, but excluding the collection system of a municipal treatment works.

(cf: P.L.1977, c.74, s.3)

2. Section 4 of P.L.1977, c.74 (C.58:10A-4) is amended to read as follows:

4. The commissioner shall have power to prepare, adopt, amend, repeal and enforce, pursuant to the "Administrative [Procedures] Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), reasonable codes, rules and regulations to prevent, control or abate water pollution and to carry out the intent of this act, either throughout the State or in certain areas of the State affected by a particular water pollution problem. Such codes, rules and regulations may include, but shall not be limited to, provisions concerning:

a. The storage of any liquid or solid pollutant in a manner designed to keep it from entering the waters of the State;

b. The prior submission and approval of plans and specifications for the construction or modification of any treatment work or part thereof;

c. The classification of the surface and ground waters of the State and the determination of water quality standards for each such classification;

d. The limitation of effluents, including toxic effluents as indicated herein;

e. The determination of pretreatment standards;

f. The establishment of user charges and cost recovery requirements in conformance with the Federal Act;

g. The establishment of a civil penalty policy governing the uniform assessment of civil penalties in accordance with section 10 of P.L.1977, c.74 (C.58:10A-10).

(cf: P.L.1977, c.74, s.4)

3. Section 6 of P.L.1977, c.74 (C.58:10A-6) is amended to read as follows:

6. a. It shall be unlawful for any person to discharge any pollutant, except in conformity with a valid New Jersey Pollutant

Discharge Elimination System permit that has been issued by the commissioner pursuant to this act or a valid National [Pollution] Pollutant Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be.

b. It shall be unlawful for any person to build, install, modify or operate any facility for the collection, treatment or discharge of any pollutant, except after approval by the department pursuant to regulations adopted by the commissioner.

c. The commissioner is hereby authorized to grant, deny, modify, suspend, revoke, and reissue NJPDES permits in accordance with this act, and with regulations to be adopted by him. The commissioner may reissue, with or without modifications, an NPDES permit duly issued by the federal government as the NJPDES permit required by this act.

d. The commissioner may, by regulation, exempt the following categories of discharge, in whole or in part, from the requirement of obtaining a permit under this act; provided, however, that an exemption afforded under this section shall not limit the civil or criminal liability of any discharger nor exempt any discharger from approval or permit requirements under any other provision of law:

(1) Additions of sewage, industrial wastes or other materials into a publicly owned sewage treatment works which is regulated by pretreatment standards;

(2) Discharges of any pollutant from a marine vessel or other discharges incidental to the normal operation of marine vessels;

(3) Discharges from septic tanks, or other individual waste disposal systems, sanitary landfills, and other means of land disposal of wastes;

(4) Discharges of dredged or fill materials into waters for which the State could not be authorized to administer the section 404 program under section 404(g) of the "Federal Water Pollution Control Act Amendments of 1972," as amended by the "Clean Water Act of 1977" (33 U.S.C. § 1344) and implementing regulations;

(5) Nonpoint source discharges;

(6) Uncontrolled nonpoint source discharges composed entirely of storm water runoff when these discharges are uncontaminated by any industrial or commercial activity unless these particular storm water runoff discharges have been identified by the administrator or the department as a significant contributor of pollution;

(7) Discharges conforming to a national contingency plan for removal of oil and hazardous substances, published pursuant to section 311(c)(2) of the Federal Act.

e. The commissioner shall not issue any permit for:

(1) The discharge of any radiological, chemical or biological warfare agent or high-level radioactive waste into the waters of

this State;

(2) Any discharge which the United States Secretary of the Army, acting through the Chief of Engineers, finds would substantially impair anchorage or navigation;

(3) Any discharge to which the administrator has objected in writing pursuant to the Federal Act;

(4) Any discharge which conflicts with an areawide plan adopted pursuant to law.

f. A permit issued by the department or a delegated local agency, under this act shall require the permittee:

(1) To achieve effluent limitations based upon guidelines or standards established pursuant to the Federal Act or this act, together with such further discharge restrictions and safeguards against unauthorized discharge as may be necessary to meet water quality standards, areawide plans adopted pursuant to law, or other legally applicable requirements;

(2) Where appropriate, to meet schedules for compliance with the terms of the permit and interim deadlines for progress or reports of progress towards compliance;

(3) To insure that all discharges are consistent at all times with the terms and conditions of the permit and that no pollutant will be discharged more frequently than authorized or at a level in excess of that which is authorized by the permit;

(4) To submit application for a new permit in the event of any contemplated facility expansion or process modification that would result in new or increased discharges or, if these would not violate effluent limitations or other restrictions specified in the permit, to notify the commissioner, or delegated local agency, of such new or increased discharges;

(5) To install, use and maintain such monitoring equipment and methods, to sample in accordance with such methods, to maintain and retain such records of information from monitoring activities, and to submit to the commissioner, or to the delegated local agency, [such] reports of monitoring results [as he may require] for surface waters, as may be stipulated in the permit, or required by the commissioner or delegated local agency pursuant to paragraph (9) of this subsection, or as the commissioner or the delegated local agency may prescribe for ground water. Significant indirect users, major industrial dischargers, and local agencies, other than those discharging only stormwater or noncontact cooling water, shall, however, report their monitoring results for discharges to surface waters monthly to the commissioner, or the delegated local agency. Discharge monitoring reports for discharges to surface waters shall be signed by the highest ranking official having day-to-day managerial and operational responsibilities for the discharging facility, who may, in his absence, authorize another responsible high ranking official to sign a monthly monitoring report if a

report is required to be filed during that period of time. The highest ranking official shall, however, be liable in all instances for the accuracy of all the information provided in the monitoring report; provided, however, that the highest ranking official may file, within seven days of his return, amendments to the monitoring report to which he was not a signator. The filing of amendments to a monitoring report in accordance with this paragraph shall not be considered a late filing of a report for purposes of subsection d. of section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill), or for purposes of determining a significant noncomplier;

(6) At all times, to maintain in good working order and operate as effectively as possible, any facilities or systems of control installed to achieve compliance with the terms and conditions of the permit;

(7) To limit concentrations of heavy metals, pesticides, organic chemicals and other contaminants in the sludge in conformance with the land-based sludge management criteria established by the department in the Statewide Sludge Management Plan adopted pursuant to the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.) or established pursuant to the Federal Water Pollution Contral Act Amendments of 1972 (33 U.S.C. § 1251 et seq.), or any regulations adopted pursuant thereto;

(8) To report to the department or delegated local agency, as appropriate, any exceedance of an effluent limitation that causes injury to persons, or damage to the environment, or poses a threat to human health or the environment, within two hours of its occurrence, or of the permittee becoming aware of the occurrence. Within 24 hours thereof, or of an exceedance, or of becoming aware of an exceedance, of an effluent limitation for a toxic pollutant, a permittee shall provide the department or delegated local agency with such additional information on the discharge as may be required by the department or delegated local agency, including an estimate of the danger posed by the discharge to the environment, whether the discharge is continuing, and the measures taken, or being taken, to remediate the problem and any damage to the environment, and to avoid a repetition of the problem;

(9) Notwithstanding the reporting requirements stipulated in a permit for discharges to surface waters, a permittee shall be required to file monthly reports with the commissioner or delegated local agency if the permittee:

(a) in any month commits a serious violation or fails to submit a completed discharge monitoring report and does not contest, or unsuccessfully contests, the assessment of a civil administrative penalty therefor; or

(b) exceeds an effluent limitation for the same pollutant at

the same discharge point source by any amount for four out of six consecutive months.

The commissioner or delegated local agency may restore the reporting requirements stipulated in the permit if the permittee has not committed any of the violations identified in this paragraph for six consecutive months.

g. The commissioner and a local agency shall have a right of entry to all premises in which a discharge source is or might be located or in which monitoring equipment or records required by a permit are kept, for purposes of inspection, sampling, copying or photographing.

h. In addition, any permit issued for a discharge from a municipal treatment works shall require the permittee:

(1) To notify the commissioner or local agency in advance of the quality and quantity of all new introductions of pollutants into a facility and of any substantial change in the pollutants introduced into a facility by an existing user of the facility, except for such introductions of nonindustrial pollutants as the commissioner or local agency may exempt from this notification requirement when ample capacity remains in the facility to accommodate new inflows. [Such notifications] The notification shall estimate the effects of [such] the changes on the effluents to be discharged into the facility.

(2) To establish an effective regulatory program, alone or in conjunction with the operators of sewage collection systems, that will assure compliance and monitor progress toward compliance by industrial users of the facilities with user charge and cost recovery requirements of the Federal Act or State law and toxicity standards adopted pursuant to this act and pretreatment standards.

(3) As actual flows to the facility approach design flow or design loading limits, to submit to the commissioner or local agency for [his] approval, a program which the permittee and the persons responsible for building and maintaining the contributory collection system shall pursue in order to prevent overload of the facilities.

i. (1) All [owners of municipal treatment works are hereby authorized to] local agencies shall prescribe terms and conditions, consistent with applicable State and federal law, or requirements adopted pursuant thereto by the department, upon which pollutants may be introduced into [such] treatment works. [and to] , and shall have the authority to exercise the same right of entry, inspection, sampling, and copying, and to impose the same remedies, fines and penalties, and to recover costs and compensatory damages as authorized pursuant to subsection a. of section 10 of P.L.1977, c.74 (C.58:10A-10) and section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill), with respect to users of such works, as are vested in the commissioner

by this act, or by any other provision of State law, except that a local agency may not impose civil administrative penalties, and shall petition the county prosecutor or the Attorney General for a criminal prosecution under that section. Terms and conditions shall include limits for heavy metals, pesticides, organic chemicals and other contaminants in industrial wastewater discharges based upon the attainment of land-based sludge management criteria established by the department in the Statewide [Slude] Sludge Management Plan adopted pursuant to the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.) or established pursuant to the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1251 et seq.), or any regulations adopted pursuant thereto.

(2) Of the amount of any penalty assessed and collected pursuant to an action brought by a local agency in accordance with section 10 of P.L.1977, c.74 or section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill), 10% shall be deposited in the "Wastewater Treatment Operators' Training Account," established in accordance with section 13 of P.L. , c. (C.) (pending in the Legislature as this bill), and used to finance the cost of training operators of municipal treatment works. The remainder shall be used by the local agency solely for enforcement purposes, and for upgrading municipal treatment works.

j. In reviewing permits submitted in compliance with this act and in determining conditions under which such permits may be approved, the commissioner shall encourage the development of comprehensive regional sewerage planning or facilities, which serve the needs of the regional community [and which], conform to the adopted area-wide water quality management plan for that region, and protect the needs of the regional community for water quality, aquifer storage, aquifer recharge, and dry weather based stream flows.

k. No permit may be issued, renewed, or modified by the department or a delegated local agency so as to relax any water quality standard or effluent limitation until the applicant, or permit holder, as the case may be, has paid all fees, penalties or fines due and owing pursuant to P.L.1977, c.74, or has entered into an agreement with the department establishing a payment schedule therefor; except that if a penalty or fine is contested, the applicant or permit holder shall satisfy the provisions of this section by posting financial security as required pursuant to paragraph (5) of subsection d. of section 10 of P.L.1977, c.74 (C.58:10A-10). The provisions of this subsection with respect to penalties or fines shall not apply to a local agency contesting a penalty or fine.

l. Each permitted facility or municipal treatment works, other than one discharging only stormwater or non-contact cooling

water, shall be inspected by the department at least once a year; except that each permitted facility discharging into the municipal treatment works of a delegated local agency, other than a facility discharging only stormwater or non-contact cooling water, shall be inspected by the delegated local agency at least once a year. Except as hereinafter provided, an inspection required under this subsection shall be conducted within six months following a permittee's submission of an application for a permit, permit renewal, or, in the case of a new facility or municipal treatment works, issuance of a permit therefor, except that if for any reason, a scheduled inspection cannot be made the inspection shall be rescheduled to be performed within 30 days of the originally scheduled inspection or, in the case of a temporary shutdown, of resumed operation. Exemption of stormwater facilities from the provisions of this paragraph shall not apply to any permitted facility or municipal treatment works discharging or receiving stormwater runoff having come into contact with a hazardous discharge site on the federal National Priorities List adopted by the United States Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act," Pub.L.96-510 (42 U.S.C.A. § 9601 et seq.), or any other hazardous discharge site included by the department on the master list for hazardous discharge site cleanups adopted pursuant to section 2 of P.L.1982, c.202 (C.58:10-23.16). Inspections shall include:

(1) A representative sampling of the effluent for each permitted facility or municipal treatment works, except that in the case of facilities or works that are not major facilities or significant indirect users, sampling pursuant to this paragraph shall be conducted at least once every three years;

(2) An analysis of all collected samples by a State owned and operated laboratory, or a certified laboratory other than one that has been or is being used by the permittee, or that is directly or indirectly owned, operated or managed by the permittee;

(3) An evaluation of the maintenance record of the permittee's treatment equipment;

(4) An evaluation of the permittee's sampling techniques;

(5) A random check of written summaries of test results, prepared by the certified laboratory providing the test results, for the immediately preceding 12-month period, signed by a responsible official of the certified laboratory, certifying the accuracy of the test results; and

(6) An inspection of the permittee's sample storage facilities and techniques if the sampling is normally performed by the permittee.

The department may inspect a facility required to be inspected by a delegated local agency pursuant to this subsection. Nothing in this subsection shall require the department to conduct more

than one inspection per year.

A delegated local agency shall not be required to conduct annual inspections pursuant to this subsection until the first day of the 7th month after the effective date of this act.

m. The facility or municipal treatment works of a permittee identified as a significant noncomplier shall be subject to an inspection by the department, or the delegated local agency, as the case may be, which inspection shall be in addition to the requirements of subsection l. of this section. The inspection shall be conducted within 30 days of submission of the discharge monitoring report that initially results in the permittee being identified as a significant noncomplier. The inspection shall include a random check of written summaries of test results, prepared by the certified laboratory providing the test results, for the immediately preceding 12-month period, signed by a responsible official of the certified laboratory, certifying the accuracy of the test results. A copy of each summary shall be maintained by the permittee. The inspection shall be for the purpose of determining compliance. The department or delegated local agency is required to conduct only one inspection per year pursuant to this subsection, and is not required to make an inspection hereunder if an inspection has been made pursuant to subsection l. of this section within six months of the period within which an inspection is required to be conducted under this subsection.

n. To assist the commissioner in assessing a municipal treatment works' NJPDES permit in accordance with paragraph (3) of subsection b. of section 7 of P.L.1977, c.74 (C.58:10A-7), a delegated local agency shall perform a complete analysis that includes a complete priority pollutant analysis of the discharge from, and inflow to, the municipal treatment works. The analysis shall be performed by a delegated local agency as often as the priority pollutant scan is required under the permit, but not less than once a year, and shall be based upon data acquired in the priority pollutant scan and from applicable sludge quality analysis reports. The results of the analysis shall be included in a report to be attached to the annual report required to be submitted to the commissioner by the delegated local agency.

o. Except as otherwise provided in section 3 of P.L.1963, c.73 (C.47:1A-3), any records, reports or other information obtained by the commissioner or a local agency pursuant to this section or section 5 of P.L.1972, c.42 (C.58:11-53), including any correspondance relating thereto, shall be available to the public; however, upon a showing satisfactory to the commissioner by any person that the making public of any record, report or information, or a part thereof, other than effluent data, would divulge methods or processes entitled to protection as trade secrets, the commissioner or local agency shall consider such

record, report, or information, or part thereof, to be confidential, and access thereto shall be limited to authorized officers or employees of the department, the local agency, and the federal government.

(cf: P.L.1988, c.56, s.7)

4. Section 7 of P.L.1977, c.74 (C.58:10A-7) is amended to read as follows:

7. a. All permits issued under this act shall be for fixed terms not to exceed 5 years. Any permittee who wishes to continue discharging after the expiration date of his permit must file for a new permit at least 180 days prior to that date.

b. (1) The commissioner may modify, suspend, or revoke a permit in whole or in part during its term for cause, including but not limited to the following:

[(1)] (a) Violation of any term or condition of the permit;

[(2)] (b) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts[;].

[(3)] (2) If a toxic effluent limitation or prohibition, including any schedule of compliance specified in such effluent limitation or prohibition, is established under section 307(a) of the Federal Act for a toxic pollutant which is more stringent than any limitations upon such pollutant in an existing permit, the commissioner shall revise or modify the permit in accordance with the toxic effluent limitation or prohibition and so notify the permittee.

(3) The department shall include in a permit for a delegated local agency effluent limits for all pollutants listed under the United States Environmental Protection Agency's Categorical Pretreatment Standards, adopted pursuant to 33 U.S.C. § 1317, and such other pollutants for which effluent limits have been established for a permittee discharging into the municipal treatment works of the delegated local agency, except those categorical or other pollutants that the delegated local agency demonstrates to the department are not discharged above detectable levels by the municipal treatment works. The department, by permit, may authorize the use by a delegated local agency of surrogate parameters for categorical and other pollutants discharged from a municipal treatment works, except that if a surrogate parameter is exceeded, the department shall require effluent limits for each categorical or other pollutant for which the surrogate parameter was used, for such period of time as may be determined by the department.

c. Notice of every proposed suspension, revocation or renewal, or substantial modification of a permit and opportunity for public hearing thereupon, shall be afforded in the same manner as with respect to original permit applications as provided for in this act. In any event notice of all modifications to a discharge permit shall be published in the [New Jersey Register] DEP Bulletin.

d. [Every final] A determination [of the commissioner] to grant, deny, modify, suspend, or revoke a permit shall constitute [an administrative adjudication] a contested case under the "Administrative [Procedures] Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.)[, which provides the]. The permittee, or any other person considered a party to the action, shall have the opportunity to contest the [final] determination in [a] an administrative hearing. The administrative law judge, or the commissioner, if the commissioner decides to conduct the hearing, shall find whether a person other than the permittee is a party to the action. A person shall be considered to be a party to action only if the person's objections to the action to grant, deny, modify, suspend, or revoke a permit were raised by that person in the hearing held pursuant to section 9 of P.L.1977, c.74 (C.58:10A-9), and relate to a significant issue of law or fact that is likely to have a bearing on the determination, or, if no hearing was held, the objections were raised in a written submission and the objection relates to a significant issue of law or fact that is likely to have a bearing on the determination.

(cf: P.L.1977, c.74, s.7)

5. Section 10 of P.L.1977, c.74 (C.58:10A-10) is amended to read as follows:

10. a. [Whenever, on the basis of any information available to him,] Except as otherwise provided in subsections b., c., and d. of section 6 of P.L. , c. (C.)(pending in the Legislature as this bill), whenever the commissioner finds that any person is in violation of any provision of this act, [or any rule, regulation, water quality standard, effluent limitation, or, permit issued pursuant to this act,] he shall:

(1) Issue a notice of violation or an order requiring any such person to comply in accordance with subsection b. of this section; or

(2) Bring a civil action in accordance with subsection c. of this section; or

(3) Levy a civil administrative penalty in accordance with subsection d. of this section; or

(4) Bring an action for a civil penalty in accordance with subsection e. of this section; or

(5) Petition the Attorney General to bring a criminal action in accordance with subsection f. of this section.

Use of any of the remedies specified under this section shall not preclude use of any other remedy specified.

In the case of one or more pollutants for which interim enforcement limits have been established pursuant to an administrative order, including an administrative consent order, by the department or a local agency, the permittee shall be liable for the enforcement limits stipulated therein.

As used in this section, "violation of the provisions of this act"

or "violation of this act" includes a violation of any rule or regulation, water quality standard, effluent limitation or other condition of a permit, or order promulgated, issued, or entered into pursuant to this act.

b. [Whenever, on the basis of any information available to him,] Except as otherwise provided in subsections b., c., and d. of section 6 of P.L. , c. (C.)(pending in the Legislature as this bill), whenever the commissioner finds that any person is in violation of any provision of this act, [or of any rule, regulation, water quality standard, effluent limitation or permit issued pursuant to this act,] he [may issue] shall utilize one or more of the remedies available under subsection a. of this section. If the commissioner elects to issue a notice of violation, the commissioner shall, if necessary, determine, within three months of the date of issuance of the notice, what steps have been taken to comply with the notice. If the commissioner determines that the permittee has not taken reasonable steps to comply with the notice, the commissioner shall issue an order (1) specifying the provision or provisions of this act, or the rule, regulation, water quality standard, effluent limitation, or permit of which he is in violation, (2) citing the action which caused such violation, (3) requiring compliance with such provision or provisions, and (4) giving notice to the person of his right to a hearing on the matters contained in the order. Nothing herein shall be construed to limit the authority of the commissioner to issue an order for a violation without prior issuance of a notice of violation.

c. The commissioner is authorized to commence a civil action in Superior Court for appropriate relief for any violation of this act or of a permit issued hereunder. Such relief may include, singly or in combination:

(1) A temporary or permanent injunction;

(2) Assessment of the violator for the reasonable costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and litigating the case under this subsection;

(3) Assessment of the violator for any reasonable cost incurred by the State in removing, correcting or terminating the adverse effects upon water quality resulting from any unauthorized discharge of pollutants for which the action under this subsection may have been brought;

(4) Assessment against the violator of compensatory damages for any loss or destruction of wildlife, fish or aquatic life, or other natural resources, and for any other actual damages caused by an unauthorized discharge;

(5) Assessment against a violator of the actual amount of any economic benefits accruing to the violator from a violation. Economic benefits may include the amount of any savings realized from avoided capital or noncapital costs resulting from

the violation; the return earned or that may be earned on the amount of avoided costs; any benefits accruing to the violator as a result of a competitive market advantage enjoyed by reason of the violation; or any other benefits resulting from the violation.

Assessments under paragraph (4) of this subsection shall be paid to the State Treasurer, except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized discharge. Assessments pursuant to actions brought by the commissioner under paragraphs (2), (3) and (5) of this subsection shall be paid to the "Clean Water Enforcement Fund," established pursuant to section 12 of P.L. , c. (C.) (pending in the Legislature as this bill).

Upon an appropriate finding, the commissioner, by administrative order, may assess a violator for costs authorized pursuant to paragraphs (2) and (3) of this subsection;

d. (1) (a) The commissioner is authorized to assess, in accordance with a uniform policy adopted therefor, a civil administrative penalty of not more than $50,000.00 for each violation and each day during which such violation continues shall constitute an additional, separate, and distinct offense. Any amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, and duration. The commissioner shall adopt, by regulation, a uniform assessment of civil penalties policy within six months of the effective date of P.L. , c. (C.) (pending in the Legislature as this bill).

(b) In adopting rules for a uniform penalty policy for determining the amount of a penalty to be assessed, the commissioner shall take into account the type, seriousness, including extent, toxicity, and frequency of a violation based upon the harm to public health or the environment resulting from the violation, the economic benefits from the violation gained by the violator, the degree of cooperation or recalcitrance of the violator in remedying the violation, any measures taken by the violator to avoid a repetition of the violation, any unusual or extraordinary costs directly or indirectly imposed on the public by the violation other than costs recoverable pursuant to paragraph (3) or (4) of subsection c. of this section, and any other pertinent factors that the commissioner determines measure the seriousness or frequency of the violation, or conduct of the violator.

(2) No assessment shall be levied pursuant to this section until after the discharger has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, regulation, order or permit condition violated; a concise statement of the facts alleged to constitute a violation; a statement of the amount of the civil penalties to be

imposed: and a statement of the party's right to a hearing. The ordered party shall have 20 days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, then the notice shall become a final order after the expiration of the 20-day period. Payment of the assessment is due when a final order is issued or the notice becomes a final order.

(3) If a civil administrative penalty imposed pursuant to this subsection is not paid within 30 days of the date that the penalty is due and owing, and the penalty is not contested by the person against whom the penalty has been assessed, or the person fails to make a payment pursuant to a payment schedule entered into with the department, an interest charge shall accrue on the amount of the penalty from the 30th date the penalty was due and owing. The rate of interest shall be that established by the New Jersey Supreme Court for interest rates on judgments, as set forth in the Rules Governing the Courts of the State of New Jersey.

(4) The authority to levy an administrative [order] penalty is in addition to all other enforcement provisions in this act, and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. Any civil penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation, except that in the case of a violator other than a local agency the amount compromised shall not be more than 50% of the assessed penalty, but in no instance shall the amount of that compromised penalty be less than the statutory minimum amount, if applicable, prescribed in section 6 of P.L.1989, c. (C.)(pending in the Legislature as this bill). In the case of a violator who is a local agency, for a first violation the amount compromised shall be at the discretion of the department, for a second violation the amount compromised shall not be more than 75% of the assessed penalty, and for a third and subsequent violation the amount compromised shall not be more than 50% of the assessed penalty. In no instance shall the amount of a compromised penalty assessed against a local agency be less than the statutory minimum amount, if applicable, prescribed in section 6 of P.L. 1989, c. (C.)(pending in the Legislature as this bill). The Commissioner shall not compromise the amount of any component of an administrative penalty which represents the economic benefit gained by the violator from the violation.

(5) A person, other than a local agency, appealing a penalty assessed in accordance with this subsection, whether contested as a contested case pursuant to P.L.1968, c.410 (C.52:14B-1 et seq.) or by appeal to a court of competent jurisdiction, shall, as a condition of filing the appeal, post with the commissioner a refundable bond, or other security approved by the commissioner, in the amount of the civil administrative penalty assessed. If the department is the prevailing party, the department shall also be entitled to a daily interest charge on the amount of the judgment from the date of the posting of the security with the commissioner and until paid in full. The rate of interest shall be that established by the New Jersey Supreme Court for interest rates on judgments, as set forth in the Rules Governing the Courts of the State of New Jersey.

(6) A civil administrative penalty imposed pursuant to a final order:

(a) may be collected or enforced by summary proceedings in a court of competent jurisdiction in accordance with "the penalty enforcement law," N.J.S.2A:58-1 et seq.; or

(b) shall constitute a debt of the violator or discharger and the civil administrative penalty may be docketed with the clerk of the Superior Court, and shall have the same standing as any judgment docketed pursuant to N.J.S.2A:16-1; except that no lien shall attach to the real property of a violator pursuant to this subsection if the violator posts a refundable bond or other security with the commissioner pursuant to an appeal of a final order to the Appellate Division of the Superior Court. No lien shall attach to the property of a local agency.

(7) The commissioner shall refer to the Attorney General and the county prosecutor of the county in which the violations occurred the record of violations of any permittee determined to be a significant noncomplier.

e. Any person who violates this act or an administrative order issued pursuant to subsection b. or a court order issued pursuant to subsection c., or who fails to pay [an administrative assessment] a civil administrative penalty in full pursuant to subsection d., or to make a payment pursuant to a payment schedule entered into with the department, shall be subject upon order of a court to a civil penalty not to exceed $50,000.00 per day of such violation, and each day s continuance of the violation shall constitute a separate violation. Any penalty incurred under this subsection may be recovered with costs, and, if applicable, interest charges, in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). In addition to any civil penalties, costs or interest charges, the court, in accordance with paragraph (5) of subsection c. of this section, may assess against a violator the amount of any actual economic benefits accruing to the violator from the violation. The Superior

Court shall have jurisdiction to enforce "the penalty enforcement law" in conjunction with this act.

f. [Any person who willfully or negligently violates this act shall, upon conviction, be guilty of a crime of the fourth degree and shall be punished by fine of not less than $5,000.00 nor more than $50,000.00 per day of violation, or by imprisonment for not more than one year, or by both. Punishment for a second offense under this subsection shall be a fine of not less than $10,000.00 nor more than $100,000.00 per day of violation, or by imprisonment for not more than two years, or both.

Any person who knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to this act, shall upon conviction, be subject to a fine of not more than $20,000.00 or by imprisonment for not more than six months, or by both] (1)(a) Any person who purposely, knowingly, or recklessly violates this act, and the violation causes a significant adverse environmental effect, shall, upon conviction, be guilty of a crime of the second degree, and shall, notwithstanding the provisions of subsection a. of N.J.S.2C:43-3, be subject to a fine of not less than $25,000 nor more than $250,000 per day of violation, or by imprisonment, or by both.

(b) As used in this paragraph, a significant adverse environmental effect exists when an action or omission of the defendant causes: serious harm or damage to wildlife, freshwater or saltwater fish, any other aquatic or marine life, water fowl, or to their habitats, or to livestock, or agricultural crops; serious harm, or degradation of, any ground or surface waters used for drinking, agricultural, navigational, recreational, or industrial purposes; or any other serious articulable harm or damage to, or degradation of, the lands or waters of the State, including ocean waters subject to its jurisdiction pursuant to P.L.1988, c.61 (C.58:10A-47 et seq.).

(2) Any person who purposely, knowingly, or recklessly violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a monitoring report, or any portion thereof, required pursuant to this act, shall, upon conviction, be guilty of a crime of the third degree, and shall, notwithstanding the provisions of subsection b. of N.J.S. 2C:43-3, be subject to a fine of not less than $5,000 nor more than $75,000 per day of violation, or by imprisonment, or by both.

(3) Any person who negligently violates this act, including

making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a discharge monitoring report, or any portion thereof, required pursuant to this act, shall, upon conviction, be guilty of a crime of the fourth degree, and shall, notwithstanding the provisions of subsection b. of N.J.S. 2C:43-3, be subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment, or or by both.

(4) Any person who purposely or knowingly violates an effluent limitation or other condition of a permit, or who discharges without a permit, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, as defined in subsection b. of N.J.S.2C:11-1, shall, upon conviction, be guilty of a crime of the first degree, and shall, notwithstanding the provisions of subsection a. of N.J.S.2C:43-3, be subject of a fine of not less than $50,000 nor more than $250,000, or, in the case of a corporation, a fine of not less than $200,000 nor more than $1,000,000, or by imprisonment or by both.

g. All conveyances used or intended for use in the [willful] purposeful or knowing discharge, in violation of the provisions of P.L.1977, c.74 (C.58:10A-1 et seq.), of any pollutant or toxic pollutant are subject to forfeiture to the State pursuant to the provisions of P.L.1981, c.387 (C.13:1K-1 et seq.).

h. The penalty provisions of this section, as amended by P.L. , c. (C.) (pending in the Legislature as this bill), and of section 6 of that act, shall apply to violations occurring on or after the effective date of that act.

(cf: P.L.1986, c.170, s.3)

6. (New section) a. The provisions of section 10 of P.L.1977, c.74 (C.58:10A-10), or any rule or regulation adopted pursuant thereto to the contrary notwithstanding, the department shall assess, with no discretion, a mandatory minimum civil administative penalty for the violations enumerated in subsections b., c., and d. of this section.

b. The department shall assess a minimum mandatory civil adminstrative penalty of $1,000 against a violator for each serious violation.

c. The department shall assess a minimum mandatory civil administrative penalty of $5,000 against a violator for the violation that causes the violator to be, or to continue to be, a significant noncomplier.

d. The department shall assess a minimum mandatory civil administrative penalty of $100 for each effluent parameter omitted on a discharge monitoring report required to be

submitted to the department, and each day during which the effluent parameter information is overdue shall constitute an additional, separate, and distinct offense, except that in no instance shall the total civil administrative penalty assessed pursuant to this subsection exceed $50,000 per month for any one discharge monitoring report. The civil administrative penalty assessed pursuant to this subsection shall accrue as of the fifth day following the date on which the discharge monitoring report was due and shall continue to accrue for 30 days. The commissioner may continue to assess civil administrative penalties beyond the 30-day period until submission of the overdue discharge monitoring report or overdue information. A permittee may contest the assessment of the civil administrative penalty required to be assessed pursuant to this subsection by notifying the commissioner in writing, within 30 days of the date on which the effluent parameter information was required to be submitted to the department, of the existence of extenuating circumstances beyond the control of the permittee, including circumstances that prevented timely submission of the discharge monitoring report, or portion thereof, or, if the civil administrative penalty is imposed because of an inadvertent omission of one or more effluent parameters, the permittee may submit, without liability for a civil administrative penalty assessed pursuant to this subsection or subsection c. of this section, the omitted information within 10 days of receipt by the permittee of notice of omission of the parameter or parameters.

e. If a violator establishes, to the satisfaction of the department, that a single operational occurrence has resulted in the simultaneous violation of more than one pollutant parameter, the department may consider, for purposes of calculating the mandatory civil administrative penalties to be assessed pursuant to subsections b. and c. of this section, the violation of the interrelated permit parameters to be a single violation.

f. The requirement of the department to assess a minimum civil administrative penalty pursuant to this section shall in no way be construed to limit the authority of the department to assess a more stringent civil administrative penalty or civil penalty against a person pursuant to section 10 of P.L. 1977, c. 74 (C. 58:10A-10).

7. (New section) a. A person may be entitled to an affirmative defense to liability for an assessment of a civil administrative penalty pursuant to section 6 of P.L.1989, c. (C.)(pending in the Legislature as this bill) for a violation of an effluent limitation occurring as a result of an upset, or an anticipated or unanticipated bypass. A person shall be entitled to an affirmative defense only if, in the determination of the department or delegated local agency, the person satisfies the provisions of subsections b., c., or e., as applicable, of this

section.

b. A person asserting an upset as an affirmative defense pursuant to this section, except in the case of an approved maintenance operation, shall notify the department or the local agency of an upset within 24 hours of the occurrence, or of becoming aware of the occurrence, and, within five days thereof, shall submit written documentation, including properly signed, contemporaneous operating logs, or other relevant evidence, on the circumstances of the violation, and demonstrating, as applicable, that:

(1) the upset occurred, including the cause of the upset and, as necessary, the identity of the person causing the upset, except that, in the case of a treatment works, the local agency may certify that despite a good faith effort it is unable to identify the cause of the upset, or the person causing the upset;

(2) the permitted facility was at the time being properly operated;

(3) the person submitted notice of the upset as required pursuant to this section, or, in the case of an upset resulting from the performance by the permittee of maintenance operations, the permittee provided prior notice and received an approval therefor from, the department or the delegated local agency; and

(4) the person complied with any remedial measures required by the department or delegated local agency.

c. A person asserting an unanticipated bypass as an affirmative defense pursuant to this section shall notify the department or the local agency of the unanticipated bypass within 24 hours of its occurrence, and, within five days thereof, shall submit written documentation, including properly signed, contemporaneous operating logs, or other relevant evidence, on the circumstances of the violation, and demonstrating that:

(1) the unanticipated bypass occurred, including the circumstances leading to the bypass;

(2) the permitted facility was at the time being properly operated;

(3) the person submitted notice of the upset as required pursuant to this section; and

(4) the person complied with any remedial measures required by the department or delegated local agency;

(5) the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(6) there was no feasible alternative to the bypass such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of downtime, except that the provisions of this paragraph shall not apply to a bypass occurring during normal periods of equipment downtime or preventive maintenance if, on the basis of the reasonable engineering judgment of the department or delegated local

agency, back-up equipment should have been installed to avoid the need for a bypass.

d. Nothing contained in subsections b. or c. of this section shall be construed to limit the requirement to comply with the provisions of paragraph (8) of subsection f. of section 6 of P.L.1977, c.74 (C.58: 10A-6).

e. A person may assert an anticipated bypass as an affirmative defense pursuant to this section only if the person provided prior notice to the department or delegated local agency, if possible, at least 10 days prior to the date of the bypass, and the department or delegated local agency approved the by-pass, and if the person is able to demonstrate that:

(1) the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

(2) there was no feasible alternative to the bypass such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of downtime, except that the provisions of this paragraph shall not apply to a bypass occurring during normal periods of equipment downtime or preventive maintenance if, on the basis of the reasonable engineering judgment of the department or delegated local agency, back-up equipment should have been installed to avoid the need for a bypass.

f. A determination by the department on a claim that a violation of an effluent limitation was caused by an upset or a bypass shall be considered final agency action on the matter for the purposes of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and shall be subject only to review by a court of competent jurisdiction.

g. An assertion of an upset or bypass as an affirmative defense pursuant to this section may not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

h. If the department determines, pursuant to the provisions of this section, that a violation of an effluent limitation was caused by an upset or a bypass, the commissioner shall waive any civil administrative penalty required to be assessed pursuant to section 6 of P.L.1989, c. (C.)(pending in the Legislature as this bill), and the violation shall not be considered a serious violation or violation causing a person to be designated a significant noncomplier.

i. The affirmative defense for upset and bypass provided in this section shall only apply to the imposition of mandatory penalties pursuant to section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill) for serious violations and for determining a significant noncomplier. Nothing in this act shall be construed to limit the authority of the department, or a

delegated local agency, to adopt regulations or permit conditions that include or do not include an upset or a bypass, using different standards, as a defense for any other exceedance of an effluent limitation.

8. (New section) a. Every schedule of compliance shall require the permittee to demonstrate to the commissioner the financial assurance, including the posting of a bond or other security approved by the commissioner, necessary to carry out the remedial measures required by the schedule of compliance; except that a local agency shall not be required to post financial security as a condition of a schedule of compliance.

b. The department or a delegated local agency shall afford an opportunity to the public to comment on a proposed administrative consent order prior to final adoption if the administrative consent order would establish interim enforcement limits that would relax effluent limitations established in a permit or a prior administrative order. The department or a delegated local agency shall provide public notice of the proposed administrative consent order, and announce the length of the comment period, which shall be not less than 30 days, commencing from the date of publication of the notice. A notice shall also include a summary statement describing the nature of the violation necessitating the administrative consent order and its terms or conditions; shall specify how additional information on the administrative consent order may be obtained; and shall identify to whom written comments are to be submitted. At least three days prior to publication of the notice, a written notice, containing the same information to be provided in the published notice, shall be mailed to the mayor or chief executive officer and governing body of the municipality and county in which the violation occurred, and to any other interested persons, including any other governmental agencies. The department or delegated local agency shall consider the written comments received during the comment period prior to final adoption of the administrative consent order. Not later than the date that final action is taken on the proposed order, the department or delegated agency shall notify each person or group having submitted written comments of the main provisions of the approved administrative consent order and respond to the comments received therefrom.

c. The commissioner or delegated local agency, on his or its own initiative or at the request of any person submitting written comments pursuant to subsection b. of this section, may hold a public hearing on a proposed administrative order or administrative consent order, prior to final adoption if the order would establish interim enforcement limits that would relax for more than 24 months effluent limitations established in a permit or a prior administrative order or administrative consent order.

Public notice for the public hearing to be held pursuant to this subsection shall be published not more than 30 and not less than 15 days prior to the holding of the hearing. The hearing shall be held in the municipality in which the violation, necessitating the order, occurred. The department may recover all reasonable costs directly incurred in scheduling and holding the public hearing from the person requesting or requiring the interim enforcement limits.

9. (New section) a. On or before March 15, 1991, and annually thereafter, the department shall prepare a report on implementation and enforcement actions taken during the preceeding calendar year by the department and delegated local agencies pursuant to P.L.1977, c.74. Information in the report shall be compiled so as to distinguish, as applicable: enforcement actions taken by the department from those of delegated local agencies; violations of, and enforcement actions against, publicly owned treatment works from those of, or against, other permitted facilities; violations of effluent limitations from reporting violations--including discharging monitoring reports, compliance schedule progress reports, and pretreatment reports--and other violations; and violations of effluent limitations for hazardous pollutants from those for nonhazardous pollutants. The report shall be transmitted to the Governor, the members of the Legislature, the Assembly Environment Quality Committee and the Senate Energy and Environment Committee, or their successors, and to the Office of Legislative Services not later than March 31 of each year.

b. Within 30 days of publication of the report pursuant to this section, the commissioner shall transmit a written notice to at least one newspaper in each county, with circulation throughout that county which shall:

(1) Identify the owner, trade name and location of all facilities listed as significant noncompliers;

(2) Identify all of the significant noncompliers who have been assessed penalties pursuant to section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill), the amount of the penalties assessed against, and the amount paid by, each significant noncomplier;

(3) Indicate the availability of the annual reports required under this section, and the address and phone number for securing copies.

10. (New section) a. The annual report provided pursuant to section 9 of P.L. , c. (C.) (pending in the Legislature as this bill) shall include, but need not be limited to, the following information for the preceding calendar year:

(1) the number of facilities permitted by the department or delegated local agencies pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.) as of the end of the calendar year, by surface water

discharge permits;

(2) the number of new permits or permit renewals issued;

(3) the number of permit approvals contested by a permittee or other party;

(4) the number of permit modifications, other than permit renewals;

(5) the number of schedules of compliance adopted pursuant to administrative orders or administrative consent agreements involving interim enforcement limits that relax permit limitations;

(6) the number of facilities, including publicly owned treatment works, inspected at least once by the department or local agencies;

(7) the number of enforcement actions resulting from facility inspections;

(8) the number of actual permit violations;

(9) the number of actual effluent violations constituting serious violations, including violations that are being contested;

(10) the number of upsets or bypasses granted pursuant to section 7 of P.L.1989, c. (C.) (pending in the Legislature as this bill) that involved a serious violation;

(11) the number of permittees qualifying as significant noncompliers, including permittees contesting such designation;

(12) the number of unpermitted discharges;

(13) the number of pass throughs of pollutants;

(14) the number of enforcement orders--administrative and judicial--issued for violations;

(15) the number of violations for which civil penalties or civil administrative penalties have been assessed;

(16) the number of violations of administrative orders or administrative consent orders, including violations of interim enforcement limits, or of schedule of compliance milestones for starting or completing construction, or for failing to attain full compliance;

(17) the number of violations of schedules of compliance milestones for starting or completing construction, or attaining full compliance, that are out of compliance by 90 days or more from the date established in the compliance schedule;

(18) the dollar amount of all assessed civil penalties and civil administrative penalties;

(19) the dollar amount of enforcement costs recovered in a civil action or civil administrative action from a violator;

(20) the dollar amount of civil administrative penalties and civil penalties collected, including penalties for which a penalty schedule has been agreed to by the violator;

(21) The specific purposes for which penalty monies collected have been expended, displayed in line-item format by type of expenditure and including, but not limited to, position numbers

and titles funded in whole or in part from these penalty monies; and

(22) the number of criminal actions filed by the Attorney General or county prosecutors pursuant to section 10 of P.L.1977, c.74 (C.58:10A-10).

b. In addition to the information required pursuant to subsection a. of this section, the report shall:

(1) list the trade name of each permittee determined to be a significant noncomplier by the department or delegated local agency, and the address and permit number of the facility at which the violations occurred, and provide a brief description and the date of each violation, and the date that the violation was resolved, as well as the total number of violations committed by the permittee during the year;

(2) list the trade name of each permittee who is at least six months behind in the construction phase of a compliance schedule, as well as the address and permit number of the facility, and provide a brief description of the conditions violated and the cause of delay;

(3) list the trade name, address and permit number, of each permittee who has been convicted of criminal conduct pursuant to subsection f. of section 10 of P.L.1977, c.74 (C.58:10A-10), or who has had any officer or employee of the convicted thereunder, and provide a brief description and the date of the violation or violations for which convicted;

(4) list the name and location of any local agency that has failed to file with the department information required by section 11 of P.L.1989, c. (C.)(pending in the Legislature as this bill); and

(5) provide a summary assessment of the water quality of surface and ground waters affected by discharges subject to regulation pursuant to P.L.1977, c.74.

c. The department may include in the report any other information it determines would provide a fuller profile of the implementation and enforcement of P.L.1977, c.74. The department shall also include in the report any information that may be requested, in writing, not later than November 30th of the preceding year, for inclusion in the annual report, by the Assembly Environmental Quality Committee or the Senate Energy and Environment Committee, or their successors.

11. (New section) The department shall adopt guidelines to be utilized by delegated local agencies, the Attorney General and county prosecutors in providing information to the department for inclusion in the report to be prepared in accordance with section 10 of this act, and prescribing the format in which the information is to be provided. Every delegated local agency, the Attorney General, and each county prosecutor shall file with the department, not later than February 1 of each year, such

information and in such form as may be required by the department. In the event that information required to be reported pursuant to this section is also required to be reported to the department within the immediately preceeding 12 month period pursuant to another law, rule, regulation, or permit requirement, to the extent that identical information is required to be reported, the local agency shall be required only to resubmit the information that was previously reported to the department.

12. (New section) There is created, in the Department of Environmental Protection, a special nonlapsing fund, to be known as the "Clean Water Enforcement Fund." Except as otherwise provided in P.L.1989, c.122, all monies from penalties, fines, or recoveries of costs or improper economic benefits collected by the department pursuant to section 10 of P.L.1977, c.74 (C.58:10A-10) on and after the effective date of this section, or section 6 of P.L.1989, c. (C.) (pending in the Legislature as this bill) shall be deposited in the fund. Unless otherwise specifically provided by law, monies in the fund shall be utilized exclusively by the department for enforcement and implementation of the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.) and P.L.1989, c. (C.) (pending in the Legislature as this bill). Any unobligated monies in the fund at the end of each fiscal year or monies not required for enforcement purposes in the next fiscal year shall be transferred to the "New Jersey Wastewater Treatment Trust," established pursuant to P.L.1985, c.334 (C.58:11B-1 et seq.), for use in accordance with the provisions of that act.

13. (New section) There is created in the Department of Environmental Protection a special nonlapsing account, to be known as the "Wastewater Treatment Operators' Training Account." Monies deposited in the account shall be used to provide training, including continuing education, courses for wasterwater treatment operators. A court shall order to be deposited into the account 10% of the amount of any penalty assessed and collected in an action brought by a local agency pursuant to section 10 of P.L.1977, c.74 (C.58:10A-10) or section 6 of P.L. , c. (C.)(pending in the Legislature as this bill), or by a public entity pursuant to section 7 of P.L.1972, c.42 (C.58:11-55).

14. (New section) There is established, pursuant to P.L.1983, c.230 (C.58:11-64 et seq.), in the Department of Environmental Protection an Advisory Committee on Water Supply and Wastewater Licensed Operator Training. Committee members shall be appointed by the commissioner for three-year terms as follows: four members who shall be representatives of the department; two members who shall be representatives selected from a list prepared by the New Jersey Section American Water

Works Association: one member who shall be a licensed operator: two members of the Water Pollution Control Association: two members who shall be selected from a list prepared by the Authorities Association of New Jersey, one of whom shall be from a water authority, and one from a wastewater treatment authority; one member who shall be selected from a list prepared by the New Jersey Business and Industry Council; three members who shall be selected from a list prepared by educational institutions in the State conducting courses in water supply or wastewater treatment operations, or which conducted an appropriate course in the immediately preceding academic year, one of whom shall be the Director of the Office of Continuing Professional Education at Cook College, the State University of Rutgers; and two members who shall be selected from environmental groups in the State actively concerned or involved in water quality or wastewater treatment. Vacancies shall be filled in the same manner as the original appointment for the unexpired term.

The advisory committee shall meet at least once a year, and shall organize itself in such manner and hold its meetings in such places as it deems most suitable. The department shall provide staff assistance to the advisory committee, to the extent that monies are available therefor.

The advisory committee shall advise the department on the training and licensing of water supply and wastewater treatment operators and on related matters, or on any other matter referred to it by the department. The advisory committee shall review the training programs for, and and identify the training needs of, water supply and wastewater treatment operators, and shall approve the annual allocations of monies for wastewater treatment operators' training programs from sums available in the "Wastewater Treatment Operators' Training Account," established pursuant to section 13 of P.L. , c. (C.) (pending in the Legislature as this bill).

15. (New section) a. The department may request that any person who the department has reason to believe has, or may have, information relevant to a discharge or potential discharge of a pollutant, including, but not limited to, any person having generated, treated, transported, stored, or disposed of the pollutant, or any person having arranged for the transportation, storage, treatment or disposal of the pollutant, shall provide, upon receipt of written notice therefor, the following information to the department:

(1) The nature, extent, source, and location of the discharge, or potential discharge;

(2) Identification of the nature, type, quantity, source, and location of the pollutant or pollutants;

(3) The identity of, and other relevant information concerning,

the generator or transporter of the pollutant, or any other person subject to liability for the discharge or potential discharge:

(4) The ability of any person liable, or potentially liable, for the discharge, or potential discharge, to pay for, or perform, the cleanup and removal, including the availibility of appropriate insurance coverage.

Information requested by the department shall be provided in the form and manner prescribed by the department, which may include documents or information in whatever form stored or recorded.

b. The commissioner may issue subpoenas requiring attendance and testimony under oath of witnesses before, or the production of documents or information, in whatever form stored or recorded, to him or to a representative designated by the commissioner. Service of a subpoena shall be by certified mail or personal service. Any person who fails to appear, give testimony, or produce documents in response to a subpoena issued pursuant to this subsection, shall be subject to the penalty provisions of section 10 of P.L.1977, c.74 (C.58:10A-10). Any person who, having been sworn, knowingly gives false testimony or knowingly gives false documents or information to the department is guilty of perjury and is subject to the penalty provisions of section 10 of P.L.1977, c.74.

c. A person receiving a request for information made pursuant to subsection a. of this section, or to a subpoena issued pursuant to subsection b. of this section, shall:

(1) be required to conduct a diligent search of all documents in his possession, custody or control, and to make reasonable inquiries of present and past employees who may have knowledge or documents relevant thereto;

(2) have a continuing obligation to supplement the information if additional relevant information is discovered, or if it is determined that the information previously provided was false, inaccurate or misleading; and

(3) grant the department access, at reasonable times, to any vessel, facility, property or location to inspect and copy all relevant documents or, at the department s request, copy and furnish to the department all such documents.

d. No person may destroy any records relating to a discharge or potential discharge to surface water within five years of the discharge, or to a discharge or potential discharge to ground water at any time without the prior written permission of the commissioner.

16. Section 4 of P.L.1974, c.169 (C.2A:35A-4) is amended to read as follows:

4. a. Any person may [maintain an] commence a civil action in a court of competent jurisdiction against any other person [to enforce, or to restrain the] alleged to be in violation of, any

statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law. The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.

b. Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may [maintain an] commence a civil action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

c. The court may, on the motion of any party, or on its own motion, dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit.

(cf: P.L.1974, c.169, s.4)

17. Section 10 of P.L.1974, c.169 (C.2A:35A-10) is amended to read as follows:

10. a. In any action under this act the court may in appropriate cases award to the prevailing party reasonable counsel and expert witness fees [, but not exceeding a total of $10,000.00], but not to exceed a total of $50,000 in an action brought against a local agency, where the prevailing party achieved reasonable success on the merits. The fees shall be based on the number of hours reasonably spent and a reasonable hourly rate for the counsel or expert in the action taking into account the prevailing rate in the venue of the action and the skill and experience of the counsel or expert.

b. The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.

c. An action commenced pursuant to the provisions of this act may not be dismissed without the express consent of the court in which the action was filed.

d. As used in this section "local agency" means a political subdivision of the State or an agency or instrumentality thereof, that owns or operates a municipal treatment works; "treatment works" means any device or systems, whether public or private, used in the storage, treatment, recycling, or reclamation of municipal or industrial waste of a liquid nature including intercepting sewers, outfall sewers, sewage collection systems, cooling towers and ponds, pumping, power and other equipment and their appurtenances; extensions, improvements, remodeling,

additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any other works including sites for the treatment process or for ultimate disposal of residues resulting from such treatment. "Treatment works" includes any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of pollutants, including storm water runoff, or industrial waste in combined or separate storm water and sanitary sewer systems; and "municipal treatment works" means the treatment works of any municipal, county, or State agency or any agency or subdivision created by one or more municipal, county or State governments and the treatment works of any public utility as defined in R.S.48:2-13.

(cf: P.L.1985, c.531, s.1)

18. Section 7 of P.L.1972, c.42 (C.58:11-55) is amended to read as follows:

7. a. Any person, corporation, or municipality who shall violate any of the provisions of this act or any rules or regulations promulgated thereunder shall be [liable to a penalty of not more $50,000.00] subject to the applicable provisions of section 10 of P.L.1977, c.74 (C.58:10A-10) and section 6 of P.L. , c. (C.)(pending in the Legislature as this bill), to be collected in a civil action by a summary proceeding under "the penalty enforcement law" (N.J.S.2A:58-1 et seq.), or in any case before a court of competent jurisdiction wherein injunctive relief has been requested. The Superior Court shall have jurisdiction to enforce "the penalty enforcement law". [If the violation is of a continuing nature each day during which it continues shall constitute an additional separate and distinct violation.]

b. A public entity operating and controlling a public sewage treatment plant [may] shall, in accordance with subsection a. of this section, enforce any applicable pretreatment standard adopted by [the commissioner pursuant to section 3 of P.L.1972, c.42 (C.58:11-51), or by] the public entity pursuant to section 9 of P.L.1972, c.42 (C.58:11-57), or [may] shall obtain injunctive relief against a violation or threatened violation of a pretreatment standard. A public entity operating and controlling a public sewage treatment plant with pretreatment standards adopted by the commissioner pursuant to section 3 of P.L.1972, c.42 (C.58:11-51), may enforce applicable pretreatment standards in accordance with subsection a. of this section, or obtain injunctive relief as provided in this subsection. The action shall be brought in the name of the local public entity. Of the amount of any penalty assessed and collected pursuant to subsection a. of this section, 10% shall be deposited in the "Wastewater Treatment Operators Training Account," established in accordance with section 13 of P.L. , c. (C.) (pending in the Legislature as this bill), and used to finance the cost of training operators of

public sewage treatment plants. The remainder shall be used by the local agency solely for enforcement purposes, and for upgrading treatment works.

(cf: P.L.1988, c.170, s.2)

19. There is appropriated from the General Fund to the Department of Environmental Protection the sum of $750,000 to effectuate the purposes of this act.

20. This act shall take effect 12 months following enactment, except that section 12 shall take effect immediately. The Department of Environmental Protection shall take any administrative actions prior to the effective date of this act necessary to implement the provisions of this on and after the effective date.

STATEMENT

This bill would strengthen the enforcement of the State's water pollution control and prevention program by requiring the Department of Environmental Protection (DEP) to impose mandatory minimum penalties for certain violations, by increasing other enforcement responsibilities of DEP, by requiring stricter accountability on the part of both public and private holders of water pollution control permits, by requiring publicly-owned treatment works to improve their operations, particularly with respect to monitoring and treating hazardous pollutants discharged into those works by industries, by providing for enhanced citizen participation in water pollution prevention and enforcement activities, and by setting out specific gradations of penalties for criminal violations of the State's water pollution laws.

The core of the bill consists of amendments and supplementary sections to the "Water Pollution Control Act," P.L. 1977, c. 74 (C.58:10A-1 et seq.), the State law under which DEP implements the requirements of the federal Clean Water Act. Under federal and State law, any person discharging an effluent into the surface or groundwaters of the State is required to apply for and obtain from DEP a New Jersey Pollutant Discharge Elimination System permit.

The bill contains a $750,000 appropriation from the General Fund to DEP to implement start-up activities related to an intensified State enforcement effort. The bill also establishes a "Clean Water Enforcement Fund" as a dedicated and revolving fund to be the depository of all penalties and fines collected by DEP under the "Water Pollution Control Act." These monies are to be used by DEP for enforcement of the act and any excess monies are to be transferred at the end of each fiscal year to the "Wastewater Treatment Trust Fund" for use by that fund. The

only exception to this dedication is a temporary one created by the annual appropriations act, P.L.1989, c.122, for the current fiscal year, by which certain penalty and fine revenues from the "Water Pollution Control Act" are deposited in the General Fund or earmarked for support of county environmental health activities and grants to local environmental commissions.

Finally, the bill establishes a "Wastewater Treatment Operators' Training Account" as a dedicated and revolving account as the depository of 10% of the penalty monies collected by local agencies under the "Water Pollution Control Act" and the pretreatment standards act, P.L.1972, c.42 (C.58:11-49 et seq.). These monies are for use in the training of wastewater treatment operators.

ENVIRONMENT

Provides for stricter enforcement of "Water Pollution Control Act," appropriates $750,000 to DEP.

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SENATOR RICHARD VAN WAGNER (Co-Chairman): May I have everyone's attention, please? We're about five minutes past 10. I have a list of people who have signed these sheets. What I have done is intersperse each person testifying so there will be one person in favor, one person against, one person in favor, one person against, so we can kind of balance the remarks.

We are going to be joined shortly by Assemblyman Robert Smith, who is my Co-Chairman at this hearing. We have just been joined by Mr. Arthur Albohn, who is a member of the Assembly Environment and Energy Committee. To his immediate left is Mr. John Spinello, who is a member of the Majority staff of the Assembly. To my far left is Ms. Pat Cane, who is a member of the Office of Legislative Services. To her right and my immediate left is Ms. Madelyn Rumowicz, who is a member of the Senate Majority staff. Sitting just directly behind me -- and this is not necessarily the way he normally sits -- is the chief staff person for the Senate Committee on Environmental Quality, Mr. Mark Connelly. Mr. Spiros Caramalis -- emptying his bag -- is also OLS staff. As we are joined by other members, I will just interrupt to introduce them.

The subject of today's hearing -- the Clean Water Enforcement Act -- was the subject of much heated debate during the last legislative session when I was the Senate sponsor of the bill. I am the Senate sponsor of the bill again in this session. This debate raised many interesting and important issues and policy considerations. Both the DEP, who will implement this legislation, and industry and the public wastewater treatment systems which will be required to comply with this legislation, have raised many valid and important issues.

Assemblyman Smith and I have seriously considered these concerns, and we feel that the bill we have introduced this session represents a reasoned response to these concerns.

The Senate passed the Clean Water Enforcement Act last session in essentially the same form we have before us today. Unfortunately, the Assembly, last session, approved a drastically changed and watered down version of the bill, which is why we must continue on and fight for this legislation in this session.

We think -- at least Mr. Smith and I think -- the action that was taken at the end of the last session sent the wrong signal to those who think they can pollute our waters with impunity.

The failure to enact this legislation last year resulted in the State not having access to the increased criminal penalties included in the legislation for willful violations of the State's clean water laws. In my own opinion, based on the information these Committees have gathered on the Exxon oil pipeline leak, there is a good chance that Exxon would have been liable for the increased criminal penalties contained in this legislation.

While the legislation introduced in this session addresses several key points made by the critics of the legislation last session, this session's version retains the core provisions of the legislation, which: 1) require DEP to impose a mandatory minimum penalty of $1000 against the discharger when an effluent limitation in the permit is violated by 20% or more in the case of a hazardous pollutant, or by 40% or more in the case of a nonhazardous pollutant, violations defined in the bill as serious violations; and 2), require DEP to impose a mandatory minimum penalty of $5000 against the person guilty of two identical serious violations in any six-month period; guilty of a violation of an effluent limitation by any amount four times in any six-month period; or who fails to submit a discharge report for any two months of any six-month period, be fined as a significant noncomplier.

Many have strongly and sincerely opposed these provisions, arguing that the percentage thresholds were arbitrary, and that the imposition of mandatory penalties based on percentage triggers was unprecedented.

After careful consideration of these criticisms, I believe that the concept of mandatory minimum penalties triggered by a percentage violation of a permit limitation, while still controversial, is justifiable. The 20% and 40% thresholds are not arbitrary. They were established by the United States Environmental Protection Agency by regulation in 1985, to track noncompliance with water pollution permit limitations. EPA considers the 20% and 40% exceedance of a permit limit to be significant noncompliance, and requires the states to compile and submit to EPA quarterly lists of all significant noncompliers.

It is also EPA and DEP policy that well-run plants will be able to easily stay within their permit limits, and that 20% or 40% exceedances are usually signals of improper or inefficient plant operation.

There is also precedent for using percentage thresholds as the basis for the imposition of penalties. In August of 1988, DEP adopted regulations establishing a sliding penalty schedule based on the percentage by which a permit limitation is violated and the conduct of the violator. Under DEP's regulatory scheme, a permit violation of 20% for a hazardous pollutant or 40% for a nonhazardous pollutant would result in the imposition of a penalty of $1700, with the discretion to compromise the penalty to no lower than $1000. Thus, the only major difference between DEP's existing penalty scheme and the minimum mandatory penalty provision in the legislation, is that under current regulations the penalty schedule is activated at DEP's discretion, and under this bill, DEP would be required to assess the minimum penalty.

Some may argue-- That's it! (referring to school bell which goes off periodically) Some may argue that this constitutes a catastrophic loss of discretion for DEP. I would argue that instead, it constitutes the next logical progression in the new regulatory approach which DEP itself began last year.

Most of us here today know what this bill does. Those who support it know what we mean by that support. But, speaking for myself, I would like to state two things that support for this bill does not mean: Support for this bill does not mean that the Legislature doubts the integrity or competence of DEP officials. As a person elected to public office, I know it is the Department of Environmental Protection which bears the day-in and day-out responsibility and duty to enforce the State's environmental laws. Contrary to what some may say, I do not see this bill in a negative sense as a criticism of DEP's enforcement record, and I would urge those who do, to walk a mile in DEP's shoes.

Support for this bill also does not mean that the Legislature is doubting the integrity or competence of the many public officials who operate the State's public wastewater treatment systems. These officials provide an absolutely necessary and basic public service, and they seldom receive the recognition that they deserve. Indeed, our public wastewater treatment systems are usually underfunded and overcriticized when they fail to perform up to our expectations.

The legislation does mean that we are serious about preserving the water quality of this State, and that we are serious about penalizing those who violate their permits. I intend that in this session, the Legislature and the Governor will send the correct message to those who pollute our waters.

I would like to add parenthetically, if I might, that I have been in contact over the last two weeks, as has Assemblyman Smith, with both the Department of Environmental Protection and the Governor's Office. The Governor has read

this bill; he has read it several times. He understands it; he knows what is in it. It was indicated to me as late as yesterday that both the Governor and DEP do, in fact, support the substance of this bill. It has been reported to me in that fashion.

For those who are -- just anticipating some questions that might arise -- waiting to know when, in fact, the Committees in each house will take the bill up for voting session purposes, I would expect that we would begin the markup and the consideration of this bill for release to the Senate and the Assembly sometime in early March, with the expectation that we will have the bill on the Governor's desk sometime in late March, with his expected approval -- and I don't like to speak for Governors -- but his anticipated approval coming sometime in, probably April.

I would like to begin now with Julian Capik, representing the Middlesex County Environmental Coalition. Mr. Capik is from 76 Roosevelt Boulevard, Parlin, New Jersey. Mr. Capik?

J U L I A N C A P I K: Thank you, Mr. Chairman, and thank you, members of the Committee. My name is Julian Capik. I reside at 76 Roosevelt Boulevard in Parlin, New Jersey. I am a member of the Middlesex County Environmental Coalition.

SENATOR VAN WAGNER: Before you continue, I would like to introduce Mr. Neil Cohen. Assemblyman Cohen is from Union County. He has just joined us, and he is also a member of the Assembly Energy and Environment Committee. Mr. Capik, please?

MR. CAPIK: Mr. Chairman, in today's The Home News, of New Brunswick, there is a timely headline. This shows a picture of birds, and the caption over the birds says, "Disappearing Birds." Alongside the birds, there is another big caption which says, "Cancer Care Will Get $3.5 Million." Where the caption says, "Disappearing Birds--" If we continue on the path which we are going down now, this caption some day may very well read, "Disappearing Human Beings."

Dead birds along the Arthur Kill River after the Exxon oil spill in January, thousands of dead fish off Long Island Sound in 1988, the devastated clamming industry in New Jersey, and the dead dolphin and trash along New Jersey beaches should be reminders that our polluted waters may pose a health risk which may be getting out of control.

I would like to address an area before this Committee which may shed some light on how pollution gets into our potable water and our marine food chain. Middlesex County is the home of the Edgeboro Landfill, which borders two rivers, wetlands, and sits over a major aquifer which supplies potable water to a large area of Middlesex County residents and industry. Across the Raritan River are closed dumps which are already on the Superfund Site List. Because of their location, all of these dumps pose a pollution threat to our marine food chain and potable water supply.

Although the Edgeboro Landfill is specifically prohibited from accepting chemical waste, oil spill cleanup waste, sewage sludge, or sludge of any kind, this type of waste was dumped there. The public record shows that the New Jersey Department of Environmental Protection allowed itself discretionary power to override the permit, and letters and manifests attest to the fact that in the past, the New Jersey Department of Environmental Protection directed prohibited waste to this dump.

One of the things you mentioned, Mr. Chairman, was the discretionary powers of DEP. This is a sore point, because when they have discretionary powers, they override. Now, the practice of permit bypassing by DEP can be compared to the recent ignoring and overriding of spill alarms at the Exxon Refinery. On February 12, 1990, yesterday, The Star-Ledger, of Newark, printed an article by Art Carlton (phonetic spelling) stating that, "Mercury emissions at the Warren County incinerator exceeded limits." This mercury is a tricky

chemical. It vaporizes at 400 degrees, and it is a heavy chemical when it cools. It is up and down the scale. So, at 400 degrees it gets into the atmosphere. It cools quickly and drops into our water streams, causing pollution. Now, the mercury emissions at the Warren County incinerator exceeded limits.

In other news articles, reporters wrote that in Minnesota, mercury levels from incinerators were so high that fish advisories had to be issued around Lake Superior. Recently I saw a news broadcast on TV which showed fishermen around Lake Superior catching fish, and then giving their fish to people who were willing to accept the risk. They wouldn't take in their own catch.

High mercury levels in incinerators should be another area of concern, because if it is not getting into the atmosphere, then it will get into the ash. In a copyright article in The Press, of Atlantic City, this past spring, sludge from an Atlantic City county incinerator leached from landfills into adjacent wetlands. This is a chain that we have to be concerned about.

It is important to relate this at this time because the New Jersey DEP is again seeking ways to dump hazardous waste into sensitive landfills, this time by changing the classification of hazardous ash to "special waste." As one environmentalist aptly put it, "This is a linguistic detoxification."

If we are to suceed in cleaning our water, then we need a meaningful Clean Water Enforcement Act. An Act without mandatory penalties is no Act. We have to take action to stop the people who are supposed to protect the environment from making it easier for the polluters to pollute.

I have attached some information from public files which collaborates some of the statements which I have made. Please do not water down any provision for penalties in the Clean Water Enforcement Act.

I would like to read a sample -- just one sample letter. This letter is from the Department of Environmental Protection to Edgeboro Disposal, Inc. in East Brunswick. It says: "Gentlemen: This is to advise you that your landfill facility, along with nine other sites in the State, has been designated as a disposal point for emergency cleanup of oil spill debris. Acceptance of these wastes will be required when you are so requested by Mr. Karl Birns or his designee of the Bureau of Water Pollution Control. This Bureau is in charge of oil spill cleanup.

"If your current tariff on file with the Public Utilities Commission does not reflect this type of service, you should immediately file for this service in accordance with the rules and regulations of this agency.

"Your cooperation will be appreciated in helping to solve these emergency situations."

It is this discretionary power which is of very grave concern, because through the past discretionary power which DEP used, we have seen millions of gallons-- This is on the public record. We have seen millions of gallons of sewage sludge dumped at this landfill. We have seen such things as formaldehyde. In their test samples of the wells, we have seen such things as benzine, which is a carcinogen. All of this is being dumped where a landfill should not even be, on the banks of rivers, because when it leaches, it leaches into the river.

Now, I am concerned about where the Exxon oil spill cleanup material will go, because if this material goes into a landfill which borders a river, then everything that they cleaned up has the potential of going right back into the river, and going back into the ocean, and killing our marine life.

So, I would urge this Committee to not water down this bill. I thank you, gentlemen.

SENATOR VAN WAGNER: Thank you, Mr. Capik. Are there any questions from the Committee? (no response)

I would like to call now, Mr. Al Pagano -- I should say, Dr. Al Pagano -- and Mr. John Keith, of the Chemical Industry Council and the New Jersey Business and Industry Association. Dr. Pagano or Mr. Keith?

D R. A L F R E D P A G A N O: Dr. Pagano. My name is Alfred Pagano. I am the Environmental Affairs Manager for DuPont's Chambers Works, and I am here today testifying on behalf of DuPont and the Chemical Industry Council. My background includes a bachelor's degree from Cornell University, a master's degree from Columbia, and a Ph.D. in Organic Chemistry from Ohio State. For the past 10 years I have been engaged on an everyday basis with environmental activities at the DuPont Chambers Works plant, including industrial wastewater treatment.

Because of the scientific and technical nature of this proposed legislation, it is important to look hard at the technical issues encompassed in the amended Assembly version -- A-8381 (sic) -- which you described earlier, Senator.

Very specifically, the definition of a "significant noncomplier" is a very technical issue and needs to be based on scientific fact and information. It cannot be dealt with in simple terms. Not all parameters that are looked at in a permit are treated equally. For example, toxic parameter limits are, in fact, set about 1000 times more stringently than nontoxic parameters in water discharge permits. The Federal definitions of "significant noncompliance," as the Department of Environmental Protection indicated earlier, are only a guide used to determine if a permit has been met, and not whether there has ever been any true environmental impact to a receiving water body.

The most significant concern with the unamended definition is with respect to toxic organic parameters; that is, organic "priority pollutants." Measurement of a single sample for the basic parameters can cost between $700 and $1400

per sample. Normal laboratory turnaround time can be about three to five weeks, because there is a large increase in the amount of samples that are being requested. Thus, a permittee who samples once a week, rather than once a month, or once a quarter, as are the common permit sampling frequencies, will incur expenses of close to $35,000 to $40,000 a year higher, simply to avoid an improper label as a serious violator or a significant noncomplier.

Not only will large facilites be affected, but this bill will also address itself to those indirect discharges to POTWs -- all those publicly owned treatment works. A dry cleaning establishemnt, for example, may have a pretreatment limit for a common dry cleaning fluid -- for example, trichloroethylene -- or a small paint shop may have a limit for phenol, a component of turpentine, and the same component that is in Chloroseptic, an over-the-counter mouth spray. These are establishments that will face the $35,000 to $40,000 a year in extra costs.

The definition in the amended Assembly version of this legislation has been consistent from the very start of the Assembly and Senate deliberations, and there has never been any argument by any of the interested parties that this definition is either not good science, or that it has not been based on a good, sound technical basis. There have been other arguments with it.

The unamended definition of the bill for many pollutants is that 20% exceedance of a permit limit is significant. The basic problem remains that 20% is not a significantt variance when looking at permit limits based on extremely small part-per-billion measurements. An example of a part-per-billion measurement is that one part per billion is equivalent to one second in 30 years. Is 1.2 seconds significant? I doubt that. For a law or regulation to effectively function, it must be based on reality. Since this

bill is addressing issues of science, it must be based on the realities of science. It is neither good science nor realistic to attach significance to a 20% variance of a measurement of a quantity at a part-per-billion level. The unamended version of the bill does not take into account the limitation of analytical science and the variability of text results.

Due to unavoidable inaccuracies in test methods, test results can indicate a permit violation when none actually exist. The unamended version does not make allowances for this problem, even though it is quite common, particularly when permit limits are set at the part-per-billion level.

The existence of measurement tolerance and performance variabilty will not go away simply because this bill is made law. These principles are well described in many technical papers that have been well regarded in the scientific community.

This bill does not address the major cause of most water pollution problems in the State of New Jersey. According to the New Jersey DEP and respected independent experts, the major cause of water quality problems in New Jersey today is non-point source, such as storm water runoff from roads and developed areas, sewer overflows, septic tanks, and the use of fertilizers and pesticides. In fact, all of the beach closings this past summer were attributed to non-point sources, not point sources. If all permit limitations addressed by this bill were to cease today, the quality of New Jersey waters would not change significantly, because of these non-point sources.

This bill also limits New Jersey DEP's ability to use their resources to address the big problems first. Such misuse of money and manpower can only slow down progress towards eventually cleaner water.

This bill will actually slow down compliance actions by increasing litigation. It removes the DEP's flexibility to negotiate.

This bill will substantially increase the costs for running public sewerage authorities, as well as local taxes. High mandatory fines take money away from sewerage authorities, when what is really needed is more money to correct the problems.

Costs will also increase for the New Jersey DEP as a result of this bill, but sufficient funding is not currently provided. In spite of DEP's support for this bill, their own estimate is that the increased costs to implement this bill would approach $6 million.

This bill could scare good people away from the water pollution control field, and there is already a shortage of qualified operators and managers for sewerage treatment plants.

In closing, I know it is hard not to support a bill with the title, "Clean Water Enforcement Act," but please ask yourselves these questions:

1) What scientific basis was used to develop the definition of "significant noncomplier"?

2) What are the most significant problems affecting water quality in New Jersey?

A) Does the bill address non-point source pollution?

B) Does this bill address combined sewer overflows?

C) Does this bill address floatables or medical waste on beaches?

D) Or, will this bill divert the resources from these vital areas by making DEP focus on the smaller, insignificant portion of the problem?

Thank you.

SENATOR VAN WAGNER: Are there any questions from the Committee? (no response) Thank you, Dr. Pagano.

You're Mr. Keith?

J O H N K E I T H: Yes. Good morning. My name is John Keith. I am Manager for Environmental Affairs for Hoffman-LaRoche. I am Chairman of the Environmental Quality Committee for the New Jersey Business and Industry Association. I have been a professional in the environmental field since 1971, holding degrees in civil and environmental engineering at the master's level from the University of Michigan and NJIT.

I am here today to say at the outset that the business and industry community is in favor of clean water and in favor of strong enforcement of our clean water permits and clean water regulations. I think the issue we are facing today is one of perception. There is a perception that DEP is not enforcing permit limits stringently, and there is a perception that it is permit violations that are causing clean water problems in the State. As you heard Dr. Pagano state, I think the scientific evidence demonstrates that permit violations are not the cause of the bulk of clean water problems in New Jersey. If all permit violations were to cease, we would not see any significant change in water quality.

SENATOR VAN WAGNER: Who said that, sir? Excuse me, I didn't hear you. Where was that statement from?

MR. KEITH: You just heard Dr. Pagano state that if all permit violations were to cease tomorrow, we would not see any significant change in water quality. That is an accurate statement. The DEP will support that. But, be that as it may, this bill is about enforcement. If it is not going to address clean water specifically, then let's talk about the issue of enforcement.

While the business and industry community does not agree that DEP is lax in enforcing the regulations and permits, we can support some sort of law that removes part of the discretion from DEP and how they enforce. The bill before us-- We think there are about three issues which we need to address to make a workable bill. Those three issues are:

First, adequate protection for permittees, so they are not penalized for problems that are caused by circumstances beyond their control. We think that is a basic principle of law.

SENATOR VAN WAGNER: It's in the bill, sir.

MR. KEITH: We would submit that part of it has been put into the bill in the long process of negotiation, but there are still a few other changes that need to be added in to fully protect the permittees from being penalized for circumstances beyond their control. I will get back to that in a moment. I do have a specific suggestion.

SENATOR VAN WAGNER: Okay.

MR. KEITH: The second point that needs to be raised in the current bill is equal protection for all permittees. Right now the bill as it stands has variations in required enforcement or discretion as it applies to public authorities versus private entities. We believe that this double standard -- one for public authorities and one for private entities -- is not equitable and not reasonable.

The third issue is, we believe that in order for this bill to work there has to be adequate funding for it. Seven hundred and fifty thousand dollars is proposed. DEP is suggesting that we need something like $6 million. We also need to take into consideration that costs for public authorities are going to increase substantially as part of this bill. Our municipalities are already complaining that, because of State-required laws, taxes are going up substantially. I think we need to have some sort of consideration of how local authorities are going to fund this and what the impact will be on the taxpayers.

Specific proposals that I would like to make today: First, with regard to the issue of unfairly penalizing people for circumstances beyond their control, we are suggesting a change in the definition of serious violation and significant

noncomplier, and I would like to read it to you. We would like one additional statement within those definitions, and it says: "Where there is a substantial basis to believe that the apparent exceedance of a permit limitation has occurred due to exceptional circumstances not related to the discharge of a pollutant in excess of permit limits, the Department may waive the definition of serious violation. Exceptional circumstances may include unanticipated test interferences, sample contamination, analytical defects or procedural deficiencies in sampling, or other circumstances of a similar nature beyond the control of the permittee."

What this additional statement would do-- It would basically say: "If the person doing the sample-- If the DEP or the POTW incorrectly sampled" -- they made a mistake, they didn't follow the correct procedures, if there was a problem in the laboratory, if there was contamination of the glassware during the testing -- "then the permittee would not be held responsible for that apparent violation, which may not, in fact, have existed." That is the extent of it. As opposed to the definitions that have been put forward by those people opposing this bill before, we think this is a reasonable compromise; a position that says, "Don't hold a permittee responsible for sampling problems beyond their control, that occurred in the laboratory, that occurred because the field inspector who took the sample found a problem" -- things like that.

I have 10 copies of this here. I would like to give them to the--

SENATOR VAN WAGNER: If you would, sir, yes, please.

Also, if anyone who has come in has not signed up and wishes to address the Committee, we have slips here. You can walk up front here and take them. Pretend the stage isn't here. Just walk up any time you want and get the slips to sign up to speak.

Sir, please?

MR. KEITH: The second question of equity relates to when the bill would take effect. Is this thing working? (referring to microphone) We would like-- That's the one that works.

SENATOR VAN WAGNER: Sir, one mike -- just so you are aware of it logistically -- is to record you for the record, and the other is so that people can hear you. So you are kind of speaking into two mikes. It's a little tricky.

MR. KEITH: Okay, thank you. The other question with regard to equity relates to, when will this bill take effect? We have proposed in the past, and it was incorporated into the amendments on the Assembly side, a provision that says the penalty provisions of the Act would not take effect until permittees who have existing permits or consent orders had an opportunity to reconsider those permit limitations. It was suggested that a two-year time limit be put on that, that would state that any new permits received -- or issued from here on in-- This Act would take effect immediately, but for existing permittees or consent orders there would be a holding period of two years, during which time permittees would have an opportunity to appeal existing permit limits.

Several comments with regard to this, because there is a lot of misunderstanding as to exactly what this involves. The first comment is: You have to recognize that virtually every major discharger in the State will have its permit renewed in the next two years anyway, and that these permit limitations are going to be renegotiated within the next two years anyway, and will take into account any provisions of this Act. So, we are not asking for a blanket amendment -- grandfathering -- because this is going to happen anyway.

The second misunderstanding with regard to this request for a two-year hold on enforcement for existing permittees is, somehow or other DEP is not enforcing current permits, and this would allow them to continue not enforcing

current permits; that there was some sort of deal struck between permittees and DEP not to enforce violations. That is not the case. Permits are enforced. The limits are limits. They must not be violated, and there was no deal struck with DEP. The only thing there is discretion within DEP, so that when it sees a violation it can determine whether this is significant, whether it is contributing harm to the environment, or whether this was the sort of error that could go under the category of Murphy's Law; that despite the best efforts of all the people involved, despite adequate funding, and despite proper operation, sometimes things do go wrong. And, if they do go wrong, if they are significant and they were preventable, we certainly should penalize them and take full enforcement action. But if there was not a circumstance where environmental harm was done, DEP can use its discretion to use its resources in other ways.

With regard to the equal treatment, I believe you are aware of the two areas in the bill where there is a difference in how public authorities are treated versus private entities. That relates to the ability to compromise penalties, and a cap on legal fees for third-party suits. We believe the language that restricts that cap on legal fees should not relate only to public authorities, but to be equitable, it should relate to all permittees.

Finally, with regard to funding, we recommend that rather than $750,000, that $6 million be appropriated as part of this bill. We recognize the funding crisis in the State of New Jersey, but if we are serious about being able to implement this bill, we believe that funding must be forthcoming.

Thank you.

SENATOR VAN WAGNER: Thank you. Are there any questions from the Committee? (no response) Thank you, sir.

MR. KEITH: I have copies of suggested language changes which relate to this two-year abeyance period, and I would like to leave that with the Committee also.

SENATOR VAN WAGNER: Yes, by all means, please. Thank you.

I would like to call now Ms. Jeannie Jenkins, of the New Jersey Public Interest Research Group.

J E A N N I E J E N K I N S: Good morning. My name is Jeannie Jenkins. I am a biologist with the New Jersey Public Interest Research Group. New Jersey PIRG is a nonpartisan environmental and consumer research and advocacy organization with 70,000 members statewide. I appreciate the opportunity to testify today on the Clean Water Enforcement Act.

New Jersey PIRG strongly supports this bill. The Clean Water Enforcement Act addresses many of the problems that currently plague water enforcement efforts in this State. The bill is designed to bring industrial and municipal facilities into compliance quickly, rather than waiting for years before addressing significant violations of the Clean Water Act.

The bill also contains strong penalties, including criminal penalties, for those facilities that choose not to comply with the law. There are probably some who would argue that no one chooses to be in violation of the law, but the opposition that this bill has shows that some facilities do make just this choice. If enforcement is not a high priority in the State, then industrial facilities that choose to comply with the law are at an economic disadvantage. They cannot sell their products as cheaply. They spend money on pollution control equipment, rather than putting that money elsewhere. We need to make sure that in the short run, not just the long run, facilities that are complying with the Clean Water Act are in an economically advantageous position.

New Jersey has a serious problem with noncompliance and water pollution. The DEP's most recent reports to EPA on major facilities violating the Clean Water Act indicate that over 80% of both industrial and municipal facilities in this State are in significant violation of their permits. This is

clearly a problem, but certainly not all of these facilities are violators because they don't care. The bill specifically includes provisions for facilities that have not come into compliance yet, but which want to do so. The bill allows a violating facility to sit down with DEP and work out a schedule or a timetable for compliance. The bill does not put any limit on the number of months or years that the plant can take to upgrade to meet their permit limits. This is especially important for municipal facilities, which almost universally do not have a lot of money, but which do take great pride in their work.

DEP is given the discretion to temporarily relax, or make less stringent the facility's discharge limit, so that the plant is not in violation while it is making these upgrades. The only obligation the sewage treatment plant has during this period is to meet the timetable that they have agreed to with the DEP. The bill gives citizens the right to comment when these permit limits are relaxed, but in the end, again it is the Department's discretion to decide what these limits will be.

The compliance schedule solved part of the money problems that municipalities have in upgrading their facilities, but clearly it does not solve all of the problems. Municipalities still have to come up with the money to finance the upgrades. This is not a new problem. The Clean Water Act has been in existence for 18 years. The Clean Water Act required compliance with the permits 18 years ago. All the Clean Water Enforcement Act does is give added incentive to bring municipal and industrial facilities into compliance. It does not change the permits. It does not change the validity of the permit limits.

But the question really isn't whether sewage treatment plants have the money to comply with their permits. It is really whether they want to put their money into pollution prevention or in cleanup costs. I'm sure everyone here is

aware that it is always less expensive to put in pollution control equipment than it is to clean up after the damage is done. If we fail to treat our wastewater adequately when it comes out of the sewage treatment plant, we are going to pay for it somewhere else, such as in having to pay to treat drinking water so that it is potable.

Municipalities are not being asked to do anything different than what they have already been required to do under the Clean Water Act. An audit of the DEP released by the EPA Inspector General's Office this fall, charges that inadequate and ineffective enforcement by DEP has contributed to noncompliance in the State. The audit found that part of the reason that 114 of our sewage treatment plants failed to meet the July 1988 Federal deadline that all sewage treatment plants have adequate treatment of wastewater, was that DEP didn't take the deadlines seriously until just a few months before July 1988, and that had DEP began negotiating with sewage treatment plants several years before when they were supposed to be doing that, we would not have had such a serious problem when the deadline hit.

The EPA audit also faulted DEP for failing to take timely, appropriate, or effective action in nine of the ten cases that it reviewed. EPA found that DEP did not escalate its level of enforcement activity when noncompliance continued, and that DEP compromised penalties so much that the fines were not economic disincentives, and that, in fact, they were not deterrents to violations of the Clean Water Act.

This bill does require DEP to escalate its actions when noncompliance continues, and it does put limits on the ability of DEP to compromise penalties to zero. EPA made several recommendations on changes in enforcement practices for the Department, all of which are in this bill. EPA strongly recommended that when setting a fine, DEP include the economic benefit that an industrial facility gained by not complying

with the law; that they should specifically look at whether the industrial facility had lower operating costs because it wasn't putting in pollution control equipment, whether they had a competitive edge in the market, and how much interest accrued on the money that would have gone into pollution control equipment.

Further, the EPA suggested that the part of a fine that represents economic gain to an industrial violator not be compromised at all, and that has been added in the bill, and we are very happy to see that.

In addition, the EPA suggested that penalties not be compromised by more than 20% -- that the noneconomic gain portion of the penalty not be compromised by more than 20%. This bill is weak in this area because this bill allows compromises up to 50%.

The bill also includes some considerations to municipalities with regard to fines. In addition to allowing the less stringent discharge limits during the compliance schedule period, the bill also allows DEP the discretion to compromise the first fine to a municipality by as much as it wishes above the statutory minimum. The second fine can be compromised 75%, and by the time the third fine comes, one would hope that the director of the sewage treatment plant is in DEP's office talking to them about what kind of compliance schedule they need to be put on. If they are not, then at that point the fines cannot be compromised more than 50%, the same as for an industrial facility.

But what if tomorrow our new administration and our new DEP solved all of our enforcement problems; we had compliance with direct dischargers -- by all direct dischargers, and the DEP's enforcement model was perfect? We would still need the Clean Water Enforcement Act. The bulk of this 40-page bill strengthens the rights of sewage treatment plants to control toxic discharges to the sewers; it

strengthens the DEP's right to obtain information from permitted facilities; and it enhances citizens' rights.

The reason that industry is out here in such force fighting this bill so hard is severalfold. The bill makes the permits important for the first time. Second, the bill gives sewage treatment plants new tools to limit the flow of toxic pollutants into the sewers. Forty percent of all the toxic pollutants regulated under the Federal Right to Know Program are dumped down the sewers in New Jersey. If one looks just at known and suspected carcinogens, mutagens, and teratogens -- substances which cause birth defects -- that are discharged to the sewers, over half of the substances reported on the Right to Know forms are going down the sewers.

Sewage treatment plants do not even have the right to request that industrial facilities put in monitoring equipment to tell them what is being dumped down the sewers. They frequently have trouble getting inside a facility to take samples or to inspect equipment. And sewage treatment plants, in many cases, do not have the right to disconnect a polluter, even if they are flagrantly violating the law. This bill gives sewage treatment plants all of these rights. It also gives the 22 largest sewage treatment plants that receive the bulk of industrial waste a critical tool in limiting toxics into the sewage treatment plants.

For the first time, sewage treatment plants will have provisions in their own discharge permits that limit the amounts of toxic substances that can be in the treated wastewater leaving the sewage treatment plant and going into our rivers and streams. Sewage treatment plants can't treat industrial waste. Therefore, they have to turn around to their industrial users and say, "Look, we are going to be fined if these things are found in our effluent. Therefore, you have to pretreat your waste before you put it down our sewers." This is perhaps the most powerful element of the bill. I think the

reason that Mr. Keith from Hoffman-LaRoche testified today-- His facility discharges into Passaic Valley. All of the industrial facilities that are discharging to the sewers in the State are going to have a very different world to contend with if this bill becomes reality. All of a sudden they are going to be regulated.

In a study that New Jersey PIRG will release shortly, we have been examining Right to Know data for some of the largest industrial facilities discharging into the sewage treatment plants. We looked at not only the types of Right to Know toxics that were discharged, but also the toxic substances that were specifically addressed in the Clean Water Act -- the priority pollutants. We compared the reports on the discharges of Right-to-Know materials into the sewage treatment plants that are submitted by industry with the permits that are written by the sewage treatment plants, to determine whether the substances that industry is saying they are discharging down the sewers are being regulated.

What we found was that: First, the number of different toxic pollutants being discharged into sewers is very large. Second, it is very unusual for industrial facilities discharging into sewers to have any limits on the amounts of toxics that can be disposed of in municipally owned treatment works. In fact, with rare exception, the only time we saw limits on the amounts of toxics that could be discharged to the sewers, was if the EPA had set national categorical limits; in other words, if an industry was regulated under Federal guidelines for what they could discharge to the sewers.

Sewage treatment plants need this bill to give them a good reason to turn to their industrial users and say, "No more. The public is not going to pay to dispose of industry's toxic waste any more." The taxpayer doesn't want to pay high costs to dispose of sludge that is contaminated with heavy metals. They don't want air with high levels of vault organics

in it, and they don't want to have their rivers and streams polluted with hazardous waste that passes through sewage treatment plants because the industry is saving a buck.

The third reason that industry is fighting this bill so hard is that it expands citizens' rights. It allows citizens to be even more effective in keeping permits strong and in bringing citizen lawsuits against violating industries.

The Clean Water Enforcement Act gives citizens the right to comment on discharge limits any time they are weakened. This is of obvious importance. It also allows citizens to contest a permit that is issued, even though substantial issues in the permit still have not been addressed. Industry already has this right. If a permit is issued and they don't like it, they can go in and ask for an adjudicatory hearing. Citizens in almost every state in the nation except New Jersey have this right. Other states that allow citizens to participate in third-party adjudicatory hearings include: Pennsylvania, Virginia, Texas, Louisiana, Colorado, Massachusetts, Florida, New York, and Tennessee. The public needs to be able to fight for strong permits every time industry argues for weakened permits.

Finally, the Clean Water Enforcement Act gives citizens the right to take action against industrial facilities that are violating for long periods of time. It allows for citizen suits. There may be no need to bring citizen suits after the Clean Water Enforcement Act is in place, because violations of the Act will then be dealt with in a timely and appropriate manner. However, the knowledge that citizen suits can be brought is another powerful tool and a powerful incentive to bring violating facilities into compliance. In the last year alone, 60-day notices of intent to sue have resulted in DEP assessing between $3 million and $10 million against industrial violators. Congress, in reauthorizing the Clean Water Act in 1987, specifically addressed the use of

citizen suits, first pioneered by the National Sierra Club, and now used across the country. They looked at the settlements resulting from these suits and the EPA and judicial oversight of these settlements and decided that they were a very useful tool, and encouraged their continuing use.

As I am sure you are aware, the Clean Water Act Permitting Program is a self-funded Program. It is paid for by its users. The amount you pay is based on how much wastewater you are discharging into rivers and streams and the toxicity of your wastewater. This bill, for the first time, allows agencies -- regulatory agencies -- that assess penalties to keep penalties after they are assessed. So, if DEP assesses a penalty against a violating facility, the money goes back to DEP and into a special Clean Water Enforcement fund or account to aid in enforcement measures. If a municipality assesses a penalty against an industrial user, that money goes back to the municipality for use at the sewage treatment plant, with the exception of 10% of it, which goes to a wastewater treatment operators' fund.

We are also very happy to see that leftover moneys in the Clean Water Enforcement account will go to the Wastewater Treatment Trust Fund, if that money is not needed by DEP in the following year. We think all those things are very good and bring additional money to DEP and to the municipalities to keep strong enforcement and to keep facilities in compliance.

There is one change in the bill that we would really like you to look at, though. Originally, the Clean Water Enforcement Act contained civil administrative penalty powers for sewage treatment plants for municipalities. That power was deleted from the current bill because you could not find, I think, an alternative to the Office of Administrative Law for appeals of the administrative penalty. The ability to administer administrative penalties is a very powerful tool, and one we would like municipalities to have, if it is at all

possible. We would really appreciate your looking to see if there is any way to give sewage treatment plants back this power.

Just to quickly respond to Mr. Keith from Hoffman-LaRoche on his suggested amendment to the definition of "serious violator" and "significant noncomplier," Mr. Keith's concern appears to be that a facility may be fined for a violation that was beyond its control. The bill contains language that says that DEP has the discretion not to assess even the mandatory minimum penalty, if the violation was beyond the control of the facility. In addition, there is an appeal procedure so that any fine that industry or a municipality feels is not warranted can be appealed.

This bill has been very controversial, I think mainly because it will be effective. In its simplest form, the Clean Water Enforcement Act mandates compliance with the Federal Clean Water Act passed in 1972. Eighteen years after the passage of the Clean Water Act, industry is still putting its energy into defeating the permitting program, instead of into appropriate pollution control equipment. This bill does not change what is in the permits; it just requires compliance with them.

Perhaps the most telling comment of all was one made by industry during the hundreds of hours of negotiations over this bill that has already occurred. Their comment was: "If the permit limits are going to be enforced, we are all going to ask for new permits." That was a threat. I think that when it becomes clear that for the first time these permits are going to mean something, 18 years down the road, we are taking a very significant step forward.

I thank you for holding this hearing today. I very much hope that this bill will become law as quickly as possible. Thank you.

SENATOR VAN WAGNER: Thank you, Jeannie. Are there any questions from the Committee? (no response)

I would like to call now Clare Schulzki, from the New Jersey State Chamber of Commerce. Clare, before you begin -- if you would just bear with me -- down on my far right is Assemblyman Tom Duch, who came in, and on my immediate right, the right arm of the Committee and my Co-Chairman, Assemblyman Bob Smith. Assemblyman, do you have a statement?

ASSEMBLYMAN ROBERT G. SMITH (Co-Chairman): Not at all. I am very much interested in the comments of the witnesses.

SENATOR VAN WAGNER: Okay. Clare?

C L A R E S C H U L Z K I: Good morning. My name is Clare Schulzki. I am here for the New Jersey State Chamber of Commerce. We would like to go on record saying that we oppose the Clean Water Enforcement Act, as it is currently written.

It does not address the major source of water pollution in New Jersey, specifically non-point source pollution, storm water runoff, and combined sewer overflow.

The bill also targets over 15% of industrial facilities and 75% of the POTWs and MUAs as "noncompliers," and issues fines and possible criminal prosecution. These fines would force towns to increase their property taxes.

We believe the bill would eliminate DEP's discretion in seeking compliance. We also believe that the measure is extremely costly. Right now, the State is in a severe financial situation. We would rather see that money made available for municipalities to upgrade their facilities, rather than to pay fines.

We support efforts to correct knowing and willing violators of State water permits. However, we believe that the Clean Water Enforcement Act, as it is currently written, would be ineffective in addressing and solving the real problems of water quality.

SENATOR VAN WAGNER: Thank you, Clare. Are there any questions? (no response) Thank you.

Our next witness will be Marie Curtis, from the New Jersey Environmental Lobby. Ms. Curtis?

M A R I E A. C U R T I S: I have copies of my remarks, if the Committee would like to have them. Pat? (speaking to Committee Aide, who accepts copies and distributes them)

Good morning, members of the Committee. My name is Marie Curtis, and I am the Legislative Representative for the New Jersey Environmental Lobby. We are here today to register our strong support for Senate Bill No. 2188 and Assembly Bill No. 2, the Clean Water Enforcement Act. The continued degradation of New Jersey's water and waterways despite permitting requirements and protective legislation can no longer be tolerated. We must enforce and strengthen those laws, and the time to do so is now.

The bill before us today is the product of months of refinement. While it aims at careless or deliberate polluters in the State, every effort is made to protect those who may well be the victims of an accident or the irresponsible actions of others. The bill very specifically spells out the affirmative defense mechanisms of "upset" and "bypass." It also empowers local authorities to seek out those who are either illegally discharging into public treatment works or who are exceeding permit levels to do same. It further allows any fines or penalties resulting from such local action to be utilized by that agency in improving the facility. Local treatment authorities have, in many instances, been forced to bear the responsibility and the cost of industrial wastewater cleanup. Now they will have the means to identify the source and to require cleanup or payment for same from those responsible.

Furthermore, the requirement that 10% of penalty moneys be paid into a Wastewater Treatment Operators' Training

Account seems to us to be a further assistance to local agencies and should assist in assuring that those in charge of such facilities are fully qualified and capable. New Jersey's citizens deserve that assurance, just as they deserve to know when additional effluents are to be discharged into their waterways. Again, the Act provides for public notice and public comment if effluent limitation standards are to be relaxed for any reason. If the relaxation period is to exceed 24 months, a public hearing may be called. Citizens have an inherent right to be informed and to give comment when their water supply and/or their health and well-being face possible negative impact.

Citizens also have a right to be informed about those who violate permit limitations and thus endanger their neighbors. The proposed listing of such violations by DEP with appropriate notice to county newspapers seems to us a fair and reasonable requirement. The court of public opinion may well prove to be the strongest deterrent to violators in some areas.

And, we do have violators! If the quality of New Jersey's waters met the Federal standards of "swimmable" and "fishable," we would have no need for such a bill as this. Other pollution sources exist, yes; that we recognize, but this is merely one step in the right direction. If there were no violators, New Jersey citizen suits under the Federal Clean Water Act would not have resulted in more than two dozen judgments against polluters in just the last few years. We must do more if we are to preserve the potable water supply that makes New Jersey habitable for us all.

Thus, the increase in fines and the mandatory imposition of fines for violations seems a reasonable next step. Even within that mandate, however, great discretion is allowed the DEP Commissioner. Not only is the amount assessed discretionary above the minimumm but, once imposed, the penalty may be compromised if the Commissioner determines that such is

in the best interests of the parties concerned. We agree, however, with the requirement that such compromise not be less than the statutory minimum and that no amount assessed representing economic gain by the violator be thus compromised.

"Economic benefit" gained by the polluter is truly the underlying cause for this measure in the first place. Too long have inspections and enforcement been haphazard in New Jersey, much due to the understaffed DEP. Too long has it been "cost effective" to ignore permit limitations. Too long has the cost of changed methods of operation been the least favored option when pollution occurs. Too long have penalties been imposed and "forgiven" with little public benefit. The time to improve our enforcement and to clean up our water is now! We would urge the Committees in both houses to vote "yes" on this measure and to bring it to the floor as soon as possible.

Thank you.

ASSEMBLYMAN SMITH: Are there any questions for Ms. Curtis? (no response) All right, then our next witness will be Bill Dressel, from the State League of Municipalities. For the record, the legislators have received testimony of six pages and proposed amendments of four pages. I would ask Bill, rather than reading the testimony, because that document will be entered into the public record and will be available for the legislators-- Perhaps, Bill, you might want to give us a summary of the six-page statement.

W I L L I A M G. D R E S S E L, J R.: Chairman Smith, my testimony-- I would like to read it into the record, if I may. Mr. Buzak and Ellen Gulbinsky from the Authorities Association of New Jersey are here. They will amplify on the six pages -- if that is permissible.

ASSEMBLYMAN SMITH: All right. This will automatically go in. It will be made part of the hearing record, so it is really not necessary to read it word by word to put it into the record. It is in the record at this point

because you have given it to us. So you might want to, rather than reading it, you know, each of the six pages, give us your summary view.

MR. DRESSEL: As I said, I didn't prepare to--

ASSEMBLYMAN ALBOHN: Mr. Chairman?

ASSEMBLYMAN SMITH: Yes?

ASSEMBLYMAN ALBOHN: Will this regulation apply to all speakers? It seems to me that one of the previous speakers probably did at least six pages. Did she not provide, also, that same text?

ASSEMBLYMAN SMITH: Assemblyman, this is not in the category of limiting speakers. I am encouraging testimony. I thought that perhaps rather than be redundant, since the League has gone to the tremendous effort of putting together a six-page statement, and four pages of proposed amendments-- Rather than reading it line by line, they might want to use their time more effectively to summarize their position, because this, line by line, will go into the record.

ASSEMBLYMAN ALBOHN: I have no problem with that, but I think--

ASSEMBLYMAN SMITH: It is their choice. If they want to read it, they are more than welcome to do so, but I just don't think it is the most effective way to use their time. It is your choice.

MR. DRESSEL: I would prefer to read it, Assemblyman Smith, if I may.

ASSEMBLYMAN SMITH: It's your call, Mr. Dressel.

MR. DRESSEL: Thank you very much. I appreciate it.

Thank you, Chairman Van Wagner and Chairman Smith, and thank you, members of the Committees. My name is William Dressel, Jr., and I am the Assistant Executive Director of the New Jersey State League of Municipalities. It is a pleasure to be here today, and you should all be commended for holding this hearing at this fine New Jersey high school. By doing so, you

are giving these students the rare opportunity to see State government in action. I think it is important to note that today's students are tomorrow's voters, and that those of them with an interest in public service may also be tomorrow's Assembly members and Senators. And perhaps, if they can demonstrate to their peers that special combination of intelligence and compassion, they may achieve even greater goals. They may become municipal governing body members, or even mayors. (laughter)

The League, for those who don't know, is a voluntary, statewide association of local governments. Our membership includes 561 of New Jersey's 567 cities, towns, townships, boroughs, and villages. Our principal constituents are the over 4000 people who hold elective municipal office. But indirectly, we also work to protect the interests of the millions who finance local government through their property taxes. It is on their behalf that we must oppose the Clean Water Enforcement Act in its current form. Though we, of course, embrace the goal of clean and safe water for all New Jerseyans, we hold some of the provisions of this bill to be unrealistic and potentially counterproductive.

Intergovernmental cooperation must be an essential element of New Jersey's economic and environmental future. The people who were elected by the people to serve them at the various levels of government -- State, county, and local -- should be working together in the public's interest. Yet, this bill will set one level of government against another. Instead of allies, we will be adversaries. Instead of cooperating, we will be in conflict.

Further, this bill will impose an unnecessary and nonproductive burden on our property taxpayers. The solution to our environmental problems requires the judicious application of three resources. These are: time, money, and expertise. Yet, in its current form, the Clean Water

Enforcement Act will impose mandatory fines on local governments. Thereby, it will draw financial resources away from communities all around our State and to the DEP bureaucracy in Trenton. Money spent in the prosecution and defense of environmental lawsuits is not available for the improvement and expansion of treatment facilities. Neither is money paid in the form of fines and penalties. Several recent studies have highlighted the need for massive infrastructural investments in our State. Those same studies, and others, have described the constraints which will prevent local government from meeting those needs on its own. Yet this bill, in its current form, will require all levels of government to expend public funds in legal contests; while it will directly produce not one new dollar for the improvement and expansion of water treatment facilities.

Further, the bill, in its current form, imposes new paperwork burdens on the local official's limited temporal reserves. It also encourages litigation involving treatment works operators. This will inevitably take valuable and experienced quality control people out of the facility and into the courtroom. Time better spent attending to the operation and maintenance of the plant will, instead, be spent preparing for and responding to the avalanche of lawsuits, which this bill will produce.

We, therefore, would like to see certain specific changes to this bill before it moves on to the Appropriations Committee in the Assembly or the Senate Revenue, Finance and Appropriations Committee. First, proceeds from fines, penalties, and settlements not dedicated to the Wastewater Operators' Training Account should be directed to the Wastewater Treatment Trust, thereby creating a new pool of funds for the improvement and expansion of treatment works. If our goal is clean and safe water for all New Jerseyans, then we should be looking for ways to increase the availability of

those three key resources that I mentioned earlier -- time, money, and expertise. The Operators' Training Program will increase expertise, and increased funding for the Treatment Trust will, obviously, provide some sorely needed money. We would even like to see the funds collected through citizen suits deposited in the Trust. If those citizens truly want cleaner and safer water in our State, they will have no objection to that.

Second, the cap on awards for legal expenses for citizen suits should be reduced to $10,000. Remember, public funds are a limited resource, and money awarded to plaintiffs will not be available for the maintenance and improvement of treatment works. We believe that our mutual goal is ill served, when public funds are diverted to nonproductive uses.

Third, the penalties in this Act should be applicable only to permits issued after the effective date of this Act. In time -- another crucial resource -- all will be covered. In the meantime, money that would have gone to fines can, instead, be spent on upgrading water treatment works.

Fourth, and most importantly, DEP should have complete discretion with regards to fines and penalties against publicly owned treatment works. The proponents of this legislation have argued that DEP has been too lax in assessing fines and enforcing the existing environmental statutes as they pertain to governmental entities. But the fact is that under current law, the DEP assessed $8.5 million in fines and penalties against publicly owned treatment works in Fiscal Year 1989. These costs have caused considerable fiscal hardships at a time when local taxes have already hit an "all-time" high. So, there is no question that DEP is willing to wield the big stick. But, with its discretion, DEP has also proved that it can use the "carrot approach" to environmental protection. With that discretion, in 1988 DEP was able to enter consent agreements with 114 municipal permit holders, collecting

reduced fines of $1.8 million in return for commitments of $1.4 billion in capital construction improvements.

We realize that this bill provides for a gradual whittling away of DEP discretion. But we also realize that many of the violations of this Act, which will result in a diminishment of DEP discretion, will not result in the degradation of the water and fail to take into account the severity of the event. Many violations are purely administrative concerns, such as the timely filing of reports which, while important, have no effect on the quality of water in our State.

Please remember, the people the League represents have no economic incentive to pollute the environment. Not only are they sworn to serve the people who drink the water, they are the people who drink the water, and their children and grandchildren, in many cases, also drink the water. They do not believe that the Legislature was elected or the DEP established to punish them. They believe that all levels of government should work together in the public's interest. That's what the people of this State expect, and they deserve nothing less.

I have enclosed herewith a copy of our specific language changes which were prepared by Edward J. Buzak, Esq., who has been working with the League. He is also with the Legislative Committee of the Authorities Association of New Jersey. He will amplify further on our technical concerns.

Mr. Chairman, that concludes my testimony, and I would be happy to try to answer any questions you may have.

SENATOR VAN WAGNER: Thank you, Mr. Dressel.

Karen Kiss, Alliance for a Living Ocean. Karen, before you begin, I would just like to introduce a gentleman who is a representative of the City of Old Bridge who was kind enough to come here today. He is a Councilman from the Third Ward in Old Bridge. His name is Reggie Butler, and he is

sitting over to my left. I would also like to introduce -- I believe she is still here -- Assemblywoman Joann Smith. She's not here?

UNIDENTIFIED SPEAKER FROM AUDIENCE: She had to leave.

SENNATOR VAN WAGNER: Okay. Karen?

K A R E N K I S S: Good morning. My name is Karen Kiss. I am President of the Alliance for a Living Ocean. We are a 3000-member citizens' group based on Long Beach Island. Our membership is from in and around the State and tristate area, but with ties to southern Ocean County.

A.L.O. has been in existence for two-and-a-half years, and we have pursued issues related to the preservation of our coastal waters as "swimmable and fishable." Indeed, southern Ocean County is nearly 100% directly or indirectly dependent on water quality at the coast, as tourism is the number one industry in that area.

From a number of perspectives -- environmental, economic, and psychosocial -- A.L.O. firmly believes that the Clean Water Enforcement Act is a necessary component of coastal water preservation.

As this bill has been intensely debated for over two years, and in deference to prior testimony today on the nuts and bolts of this bill, I would like to limit my remarks to the controversy of the Clean Water Enforcement Act, where we have been, and where we are going.

Clean water -- "swimmable/fishable water" -- is a matter of public trust; a covenant of responsible management demanded of us in the present in the interest of those in the future.

Frankly, there could or should be no other conclusion drawn from what the 203rd Legislature did with the Clean Water Enforcement Act other than it demonstrated a blatant insensitivity of that Legislature to the gravity of that trust.

The razzmatazz and political games surrounding the Clean Water Enforcement Act in the last few months of 1989, while entertaining, are disturbingly analogous to the "bread and circus" policies of ancient Rome. As you may recall, "bread and circus" was a political tactic of giving the public what they wanted, not necessarily what they needed.

What the public needs is strong and creative leadership on clean water, as well as all environmental problems; leadership which considers the needs of all New Jerseyans and their quality of life; leadership which demonstrates a firm resolve on environmental reform, tempered with attractive incentives to the affected parties, to encourage cooperation, rather than create adversaries to the reform. In other words, leadership which is truly committed to an agenda; creates ways to make that agenda happen. Obviously, for almost 20 years, New Jersey has not had the leadership committed to enforcing clean water laws.

A.L.O. recognizes that the diversity of our industries in this State is part of the New Jersey success story. The Clean Water Enforcement Act would help protect that diversity, and not necessarily at the expense of any other industries. But, failure to pass a strong Clean Water Enforcement Act is a nail in the coffin of many of New Jersey's water-dependent industries.

Examples such as Harry DeSoi, owner of a metal plating industry -- Pioneer Metal Finishing of Franklinville, New Jersey -- demonstrated years ago that you can be both environmentally conscientious and competitive in the marketplace. Mr. DeSoi implemented a pretreatment and recycling program in the early '70s because it was the right thing to do. He admits that it has not always been easy. That is because the lack of enforcement of clean water laws allows less scrupulous competitors to slip through the loopholes and violate the law, subsequently enhancing their financial gain..

It is a morally bankrupt society whose attitudes and values protect the financial interest of a minute segment of the society at the cost of society's health and welfare. We cannot continue to reward the crooks at the expense of law-abiding citizens. A.L.O. strongly objects to the special interest pandering of the 203rd Legislature, which caused the defeat of the Clean Water Enforcement Act.

The Harry DeSois of this State, who abide by the law and have concern for "doing what is right," foster the kind of attitudes, values, and quality of life we want in the New Jersey we are designing for the 21st century.

The very least government should do for law-abiding businesses like Pioneer, is to enforce the laws that keep them competitive. Good businesses, like Pioneer, which demonstrate sincere interest in cleaner ways of doing business, should be given incentives to research ever-improving technologies in waste management.

Additionally, there should be attractive financial incentives offered by the State to encourage others to convert to the appropriate pretreatment and recycling programs to meet clean water laws.

If we truly want a cleaner State and the maximum number of diverse industries as well, then we need strong, creative leadership which will make it happen. We are now looking to the 204th Legislature to provide that type of leadership.

A.L.O. appreciates that this joint session today is a jump start on the clean water enforcement issue in the new Legislature. We are hopeful that this is a positive indication that this Legislature will be aggressive, yet creative in attacking New Jersey's environmental problems.

In the interest of all New Jerseyans, we respectfully request passage of only a strong Clean Water Enforcement Act. Thank you very much.

SENATOR VAN WAGNER: Are there any questions from the Committee? (no response) Thank you, Karen.

I would like to call now Mr. Greg Honachefsky, of PBA Local 120.

G R E G H O N A C H E F S K Y: Good afternoon. My name is Greg Honachefsky. I am a member of PBA Local 120, which represents the conservation officers throughout the State of New Jersey. My PBA is among the 85 organization which have endorsed the Clean Water Enforcement Act.

Over the last year, I have had the opportunity to testify before several Senate and Assembly committees regarding this bill. I have never considered myself much of a political activist, so it has been a real opportunity to become involved and take part in this campaign.

I am not really sure how much more I can say to convince our legislators that passage of this bill is the right thing to do. I have tried to explain so that a person could envision what New Jersey was like just a relatively short time ago, the incredible natural resources we possessed, the neglect and lack of stewardship that we have shown for our land and water, and the real loss we have experienced because of that attitude. I have asked that we change that, explaining that the time is now that we should change that.

During my testimony, I have taken you on a verbal tour of our State from one end to the other, explaining that most of our shellfish beds are condemned; explaining how this bionic barometer reflects on poor water quality statewide. I explained that health advisories exist for bluefish, catfish, eels, crabs at various locations in our State; that the sale of striped bass is banned statewide because of pollution, and our Assembly gave us a weakened Enforcement Act.

In my testimony, I took you on a walk with me on a spring day near the Vineland Chemical Company, and spoke of the silence and devastation I saw there because of the

contamination of that watershed with arsenic. A place that should have been alive and thriving in spring, was not, and our Assembly gave us a weakened Enforcement Act.

I used my father as a metaphor for the feeling of the average man; the fact that the average person does want a clean, nurturing, and restoring environment to enjoy. I spoke of my father's work in a steel mill and his desire to spend his leisure time, like so many of us, along a river fishing and simply enjoying the peace of clean, flowing water with his children. In spite of the reality that many of you cannot do that today, cannot enjoy that simple pleasure with your own families, our Assembly gave us a weakened Water Enforcement Act.

I have listened at these hearings I have attended. I heard in an open hearing a chemical industry spokesman explain that one part per million could be visualized as the equivalent of a pea in a boxcar, neglecting to explain that that pea or peas in a boxcar may, under the right set of circumstances, be quite lethal; that that pea in a boxcar may mean that you can't eat the fish from our rivers; that that pea in a boxcar bioaccumulating through the food chain may mean that your children will never see an eagle alive and wonder. Quite frankly, he forgot to mention that that pea in a boxcar was one that shouldn't be there at all.

I heard another gentleman who, if I remember correctly, represented an organization of operators of publicly owned wastewater treatment plants. He held up a piece of paper as if it were a New Jersey pollutant discharge elimination system permit, and said that he didn't understand. "We never had to worry about these permits before." To me, that typified an attitude and gave more varifiable evidence of a need for a strong Clean Water Enforcement Act than anything that I could have said.

Again and again I hear that taxpayers are going to pay for the violations or upgrades of plants made necessary because

of this bill, as if people didn't realize that tax money is spent on water pollution control now; as if continuing to pollute was economical. Fortunately, most of us are not naive. Pollution is not free. The costs are in the loss in tourist dollars; loss in commercial fisheries; money spent for cleanup after the damage is done; money spent in health care because of pollutant-induced illnesses. The only question is: Do you pay for more of the same, or pay for a change -- a better life, really?

I have heard that non-point source pollution is the problem, what we should tackle. Well, non-point source pollution is an extremely relevant issue, but looking at our state of affairs, I think that starting out with getting our relatively few point source polluters into compliance will be hard enough, without tackling the literally millions of non-point sources. Maybe next year for that.

I have listened to the Department I work for -- the Department of Environmental Protection -- explain that they are doing the job, but, quite simply, it is not being done. Our waters are not being protected. Dreams of restoring our lakes, rivers, and bays to fishable and swimmable conditions are still that -- dreams -- and nothing more.

Somewhere, somehow, that Department has forgotten the most important part of its name -- Environmental Protection. When it was established, no one said, "Let's see, we'll call it the Department of Environmental Trade-offs, or maybe the Department of Endless Negotiations." They seem to have forgotten that they are no longer the Department of Conservation and Economic Development. The people saw that it was right and important to have a separate entity with one goal -- environmental protection. They were to be, on one hand, apart from the consumers of the resources, be those resources freshwater wetlands, coastal barrier islands, wildlife, or, in this case, water. One goal, to protect the environment and,

where possible, restore resources neglected or abused. A strong bill would go a long way in redefining that purpose, reestablishing that structure.

I would like to conclude by speaking about another type of loss to us all which is harder to explain. A society which allows the degradation of its natural resources causes the loss of something inside each of us. That is the sense of connectedness to the earth. It destroys the sense of caring and the feeling that this planet is really an incredible gift. The lesson we teach now is that it is okay to do this thing; to despoil every aspect and aquatic environment -- the fish, wildlife, and the water quality itself. The lesson taught is that we are apart from our world, our very home.

In 1990, if there is a lesson we should be teaching, not just in New Jersey but globally, it is that, "Hey, this natural world sustains us. It is a marvelous world. It deserves our protection." This bill can be a model of that understanding. I feel sometimes that it is 20 years ago and this is a fight to pass the Federal Clean Water Act. Well, that fight is all over. That decision was made. We chose clean water. Really, there is no more time for debate. It is time to enforce the laws and to pass a strong Clean Water Enforcement Act.

Thank you very much. (applause)

SENATOR VAN WAGNER: Please-- I realize that those pro and con attempt to applaud speakers on one side of this issue or the other, but in this type of a hearing, I would appreciate it if we would limit our demonstrations to words such as the last speaker spoke. I appreciate it, sir.

MR. HONACHEFSKY: Do you have any questions, sir?

SENATOR VAN WAGNER: Pardon?

MR. HONACHEFSKY: Do you have questions?

SENATOR VAN WAGNER: I don't believe so. Thank you.

I should mention, as people testify, that in the last Legislature this bill did, in fact, pass the Senate. The Assembly members of this Joint Committee, for the most part -- I think every one of them -- did not support the amended version in the Assembly. So, I just wanted to correct that for the record. Some of the comments referring to the 203rd Legislature, I guess Mr. Smith and I, and some others on the Committee, are particularly sensitive to. We did, in fact, pass this bill in the Senate in October of 1989.

Mr. Douglas Dowtry, of Dowtry Brothers, Inc. Mr. Dowtry, are you still here, sir? (affirmative response)

D O U G L A S D O W T R Y: Hello. You have heard from big business today, and now I would like you to hear from a small business. My name is Doug Dowtry. I am a fresh seafood distributor in the town of Highlands. I have been in business for the past 10 years, and believe my livelihood depends on waterways that are clean. It's imperative that this bill is passed in its current form. My business and many others -- restaurants, retail stores, hotels, motels -- have all experienced tremendous losses over the past three years. It's my belief that our water quality has directly affected these losses.

Tourism in the State of New Jersey is much too important to my business, as well as to many others, and especially to the State of New Jersey. We cannot let this valuable resource slip away.

Being in the seafood business, all of our waterways affect me and all of the businesses along the State and along the coast of the United States. This problem has to be addressed. I can't begin to think how badly these losses to my business, as well as many others in the State, have really affected the State of New Jersey. I don't know what kind of deficits the State has, but I believe that we're really afraid to admit how bad they are. So, if now is the time, let's let

it be the time to correct our waterways; to stop pollution; and to get on with business as it should be.

Thank you.

SENATOR VAN WAGNER: Thank you, Mr. Dowtry. Are there any questions from the Committee? (no response)

I would like to just go somewhat out of order, because I noticed a gentleman who has just arrived. He was the original Assembly sponsor of the original Clean Water Enforcement Act, which now stands in the Senate in a somewhat amended version, but basically and substantively the same bill, which is now under my sponsorship, along with Senator Dalton, a co-sponsor of S-2188. I'd like to ask him to come forward for some comments -- Senator John Bennett.

S E N A T O R J O H N O. B E N N E T T: Thank you, Mr. Chairman. I apologize for being late this morning. That's the problem with having too many things on my schedule all at the same time. But I would be remiss if I didn't come in front of this auspicious body to talk on a very important piece of legislation.

The Clean Water Enforcement Act was one of the most controversial issues that was considered by the Legislature in the last session. As one who has spent many hours working on the legislation, I was disappointed that it was not approved in its strongest form. I am confident, however, that during this session we will succeed. I commend Senator Van Wagner and Assemblyman Bob Smith for putting this important legislation at the top of their agendas this session. I also commend the many environmental groups with which I worked at length last session, for their sustained commitment to the goals of this legislation.

This is a very complicated piece of legislation because it concerns, perhaps, the most complicated regulatory program implemented by DEP -- the Water Pollution Control Program. There are many complex technical and legal provisions

in the bill, as I know both Senator Van Wagner and Assemblyman Smith, and members of their Committees are aware, from their work on the bill last session. Although I know that many still oppose the bill, I believe the bill, in its present form, addresses these technical and legal issues in a way which is fair and workable.

In spite of the complexity of the legislation itself, however, the bill is based on a simple premise: Industry and public agencies which accept water permits from the State should comply with the conditions of those permits. DEP should take action when the conditions are violated. Because of all of the controversy which this legislation has provoked, many have the impression that this bill violently overhauls the Water Pollution Permitting Program, and imposes new and draconian requirements on both industry and public wastewater treatment systems.

As all of us in this room today know, however, this is not the case. The bill does not change the permit standards for any pollutant. This bill does not make it harder to comply with any permit standard or condition. The bill does not specify what the standard for any pollutant should be. The bill does not specify a method for setting any standard for any pollutant. The bill does, however, make it harder to pollute the State's waters and not pay a penalty for it. The bill simply says that once a permittee accepts a permit from the DEP with specific standards, the permittee is responsible for complying with those standards, and the DEP is responsible for enforcing compliance with the permit.

Is this a radical concept? Is it bomb throwing to propose that a permit holder must comply with a permit which is created by the citizens of New Jersey, not as a right, but as a privilege? I think not.

Indeed, this bill can be considered as advancing a radical concept only by those who were comfortable with a

permitting program which was not taken seriously, and which was not strictly enforced. If this controversy over this legislation accomplishes nothing else, it at least has brought the problems associated with the State's water pollution problem, into the light of public scrutiny. I think we all know that the public takes water pollution seriously and demands a water pollution program which is taken seriously and which is enforced.

In addition to requiring DEP to take enforcement actions for violations of water pollution permits, this bill also contains important provisions which would allow citizen groups to assist DEP in the enforcement of the water pollution program. This bill would grant citizen groups the right to intervene in DEP actions on a water permit at the administrative level, and would remove the current $10,000 cap on legal and expert witness fees imposed on citizen groups bringing enforcement actions under the New Jersey Environmental Rights Act. Both of these provisions would open up the permitting and enforcement process to increase public participation which, in my opinion, would result in better permits and better enforcement.

Again, I applaud the Committees for moving quickly on this legislation, and would be happy to personally assist the Committees in any way in advancing this legislation through the legislative process. Thank you for allowing me to speak today, Mr. Chairman and members of the Committee.

SENATOR VAN WAGNER: Thank you, Senator. Any questions? (no response) Okay.

I'd like to call now Wendy Benchley, of the Princeton Committee of the New Jersey Environmental Federation.

W E N D Y B E N C H L E Y: Mr. Chairman, I am here today not as an expert, but just basically as a citizen, mainly because I have been astounded when hearing talk about this bill, that even legislators refer to environmental groups as "special interest groups." Please, we are not special interest groups.

SENATOR VAN WAGNER: What legislator here today referred--

MS. BENCHLEY: I don't know whether you did, but other legislators who were against the bill did.

You know, as I was sitting there thinking whether I would come up and testify or not, I thought, "Here we are talking to the converted." In a way, we're sitting here, and I don't know whether anyone who is against the bill is ever going to read any of this testimony-- But I began to think I'd be better off to just go home and sit down at the typewriter and write a letter to all of those people who are against it. Is that true? Is that what we should do?

SENATOR VAN WAGNER: Well, I have to say that there are people who do not support this bill. That doesn't mean that they're necessarily against it. They just don't support it in the form we have it in. But some others of us do support it. So, it's really a matter of information that flows back and forth, whether it's industry, or publicly operated treatment water works' representatives, or whether it's an environmental group that is, you know, attempting to convince that particular legislator that they should support a stronger bill, as opposed to, maybe, characterizing the legislator as being for or against this particular bill. I think what we find, is that legislators generally are responsive to the groups that, in their view, represent the largest part of their constituency. So, I think depending on how you approach a legislator, and depending upon who that legislator is, normally they are receptive and flexible on any particular issue at any time. Sometimes the strongest opponents of a bill become its strongest proponents.

MS. BENCHLEY: That's good to hear.

SENATOR VAN WAGNER: I guess the message is, "Never give up. Use anything you can, but never give up."

MS. BENCHLEY: Okay, we'll keep-- (bell interrupts testimony)

SENATOR VAN WAGNER: That you can't fight.

MS. BENCHLEY: No, we can't fight that. Boy, shades of high school days.

The other thing that interests me, though, is that it seems that everybody keeps finding a million different ways to make it more complicated and to put so much baggage into the bill, with so many questions. I mean, I think industry does that. It's just going to sink under the weight of one additional amendment, amendment, amendment, amendment; to try to make every tiny, little thing absolutely perfect. As we know, there is no bill that is ever absolutely perfect. To me, this would spearhead the drive to have enforcement across-the-board so that indusry, municipalities, and everybody, would be under the same umbrella of enforcement. That doesn't mean that there can't be good ideas that come along for training programs; for sewerage treatment plants. We can certainly float municipal bonds to help to fund this, because I think we do need more money for the infrastructure, to get that going.

But, I think the citizens of the country, as well as the citizens of New Jersey-- When you look at the polls, people are 80%, 85%, 90%, 95% wanting to get going on cleaning up the water and the air. It doesn't matter what district you come from. Across-the-board, that's what people want. I feel as though, as a private citizen, that for years we've been voting this way, and trying to get things moving. Basically, nothing seems to happen. Also people say in their polls that they're willing to pay for it. They are willing to pay for good environmental legislation and cleanup, and we'd rather pay now for prevention, than to pay later to clean up the Superfund sites, which, as we know, take billions and billions of dollars and are almost impossible to clean up.

I think we've got to get moving and respond to 85% of the American people. Thank you.

SENATOR VAN WAGNER: Thank you. Mr. Herbert Kukasch, of the Bayshore Regional Sewerage Authority.

H E R B E R T K U K A S C H: Thank you, Senator. My comments will be extemporaneous. I did not really come intending to speak, but I've heard some things.

I'd like to start off and indicate that I'm really not opposed to the bill in its totality. There are many things that are very good in that bill. Having been in this field for over 16 years, I am definitely in favor of many aspects of it. However, this a very technical and complicated issue. I get calls regularly from people in the Environmental Federation, the PIRG people, and whatnot. They seem to draw a relationship between the Clean Water Enforcement Act and the fact that that will result in cleaner waters. Well, I have to disagree with that. I don't think there's a very direct relationship there at all.

You asked earlier about the 85%. Last year, I attended an environmental law conference given by Dr. William Goldfarb of Rutgers University. He had a Dr. LaPort (phonetic spelling), I believe it was, from DEP. She stated very clearly that 85% of the pollution in the waterways is caused by non-point source pollution, and not coming from there at all. Now, if we have to accept that, we are dealing with only 15% of the problem here. If you are dealing with sewerage authorities and industries, a very small portion. Now, you know very well that you can't clean up most of that.

There are some aspects of this which I would like to go into. You have fines; for instance, you have fines that are being given for, let's say, things like BOD removals and things of this nature. Now, you understand -- and I think one of my predecessors here pointed this out -- there are some very

serious technical deficiencies with the testing we are performing. BOD, the tests that are in the standard methods-- It is a poor test, at best. A few years ago they had a standard deviation of 18% on that test. A standard deviation is an indication of the variability of just performing the test. The larger the number, the more variable it is.

Now, what this says is-- If I had a sample of wastewater with a BOD of 100 and I gave this to a very competent person or group of people to test, they would find out-- They would come up with tests 99% of the time between the number 45 and 155. I am going to submit to you that this is a very poor thing to base a fine on; a very poor thing to base a fine on. This is just a normal variability one would expect to find in a thing like this.

The same thing is true of suspended solids. You will find that there are many areas where the results are extremely variable just by their nature. I believe this is what some of the other people were referring to in this matter.

Now, am I opposed to clean water? Obviously not, but I think there has to be some consideration of what you are dealing with. I represent an authority which the Senator is very familiar with. The communities we serve are having some real problems. Just in my community alone, we lost 2200 jobs in the last few years. My rates went up 25% this year, not because of any action or any improvement we are trying to make, but from just trying to comply with the law. Water in the area has gone up 75%. Solid waste disposal has gone up 50% or more. The infrastructure costs are going out of sight. This is in an area where many people no longer have second incomes to make it. The Asbury Park Press recently -- a few months ago -- had a very nice map. It showed that the service area that I am serving is at the very bottom of our county. It is very difficult.

However, despite that, this Authority has been spending almost a million dollars a year to upgrade its facilities. We have been spending this money to correct the design and construction deficiencies that went into this plant some 16 or 17 years ago. Frankly, if we are going to be subject to these kinds of fines, we are not going to have the money to continue that kind of a program. Now, this is a self-induced program. I don't think this is unusual in any sense of the word. I think there are other authorities that have accomplished these kinds of things, too.

I don't want to harangue too much, but I want to say, I think we have a very technical problem here. Bacteria, unfortunately, do not know how to read the law, and all the sewerage authorities require, or use bacteria to perform their treatments. I don't know of any way we can convince them to continue to work when they don't want to work. There are very subtle things that get in there. Despite all the efforts of all the competent people you can find, these plants just go out of compliance. You have some technical issues here, and you cannot deal with them on a purely legal basis.

Thank you.

SENATOR VAN WAGNER: Thank you, Mr. Kukasch.

Jane Nogaki, New Jersey Environmental Federation.

J A N E N O G A K I: I have 10 copies of my statement.

SENATOR VAN WAGNER: Thank you, Jane.

MS. NOGAKI: Good afternoon. My name is Jane Nogaki. Thank you for the opportunity to testify before this joint hearing.

I am Chairperson of the New Jersey Environmental Federation. The Federation is a coalition of 45 environmental, labor, and citizens' groups. We also have 60,000 individual members who are recruited through our door-to-door canvas. The Federation is the New Jersey Chapter of a national organization, Clean Water Action, which helped lead the fight

for passage of the original Federal Clean Water Act amendments in 1972.

Working together with New Jersey PIRG to form the Clean Water Enforcement Campaign, we have gathered the support of 92 diverse organizations, such as: the Industrial Union Council, the American Littoral Society, Shore Regional Tourism Council, Ducks Unlimited, Delaware River Keeper Project, the New Jersey Audubon Society, Clean Ocean Action, the Association of New Jersey Environmental Commissions, Coalition Against Toxics, the Garden Clubs of New Jersey, United Auto Workers, and the Princeton Committee, all of which support strict and mandatory enforcement of the Clean Water Act.

The reason the Campaign has gained such widespread support, is that the majority of residents of New Jersey recognize that unless profound enforcement efforts begin to happen in New Jersey, and soon, our State will be doomed to third-rate water quality; water quality that is so poor that 70% of our streams and rivers will not even meet fishable and swimmable standards.

New Jersey residents cannot wait another 20 years for clean water. We want agressive enforcement now. Furthermore, we fear that unless the Clean Water Enforcement Act is passed now, the damage to our waterways and ocean will be irreversible. Rivers like the Maurice River in Cumberland County, the Rancocas River in Burlington County, the Raritan River in Middlesex County, the Hackensack River in Bergen and Essex Counties, and the Delaware River which borders New Jersey's western edge, are rivers that were fishable and swimmable 20 years ago, but which are restricted from swimming and fishing now because of hazardous and biological pollutants which have been discharged illegally for many years. It is very important to protect these waters now, if never before, because some of them will be needed as drinking water sources in the very near future.

Please understand that our support for this bill, which we feel retains the critical heart of the mandatory enforcement principle while meeting the concerns of local officials and municipal utility authorities, is predicated on the fact that the Clean Water Act needs to be enforced across-the-board on a consistent basis in order to prevent blatant, long-term industrial and municipal wastewater permit violations. We unalterably oppose amendments which would alter the triggers for enforcement, the assurance of penalties for violations, or the referral to the AG's Office of facilities which fall into the significant, chronic noncompliance category. We also would oppose any amendments which would take away citizens' rights to third-party hearings and citizens' suits against polluters when DEP fails to act to enforce pollution discharge permits. We believe that when the Clean Water Act gets consistently enforced, there will be no cause to bring citizen suits. Nevertheless, we think they should be retained in the law as a backup enforcement measure.

Much has been made about the cost to municipalities, and ultimately to taxpayers, that would supposedly be incurred if the Clean Water Enforcement Act were enacted. But, in fact, the bill is designed to make the program self-supporting.

The pollution discharge elimination permit system was designed to be a pay-for-itself, fee-based program. The charges incurred for inspection, testing, verification, and permit writing are rightly borne by the discharger, whether it be a municipal wastewater plant or an industrial discharger. Municipalities and utilities authorities have borne the majority of these costs, and industrial dischargers which send their wastewater to a municipal sewer or a utilities authority sewer benefit greatly by being a so-called indirect user. This inequity will be remedied by the Clean Water Enforcement Act, which will give local authorities new powers to regulate what is coming into their treatment facilities from industrial

users, and to levy fines when those permit levels are exceeded. Ninety percent of those fines collected will stay with the local treatment facility to be used to maintain or upgrade the facility; 10% will go into the Wastewater Operator Training Fund.

Therefore, municipal or authority treatment plants will be able to recover the costs of receiving and handling industrial wastewater, and will have new authority to regulate toxics in incoming wastewater in order to ensure that the sludge produced at the local facility meets the clean sludge standards.

Secondly, should a municipality find itself with a poorly functioning plant that cannot meet water quality standards, that municipality or authority can, and should, avoid any further penalties by entering into a compliance agreement with DEP with a schedule for making the necessary improvements. During that compliance agreement, no further fines would be assessed unless the terms of the compliance agreement are violated. Compliance agreements are negotiated with the aim of reaching a workable solution with a timetable, and both parties agree to the terms. The goal of the Clean Water Enforcement Act is to encourage violators to come to the table to work out a compliance schedule, using a strong penalty schedule as the deterrent to prolonged noncompliance. We think the bill is fair, and we urge you to support it.

We know that this bill is not the total answer to surface water pollution control, and that additional controls over non-point source pollution are important to the protection of our waterways. But as Greg Honachefsky of PBA Local 120 says, "If we can't get control over our 'end of the pipe' discharges, how are we ever going to get control over non-point pollution?" If pollution discharges continue to be ignored or inconsistently enforced, what will be the incentive for industries or municipal wastewater treatment plants to comply

with the law? The strict enforcement of the Clean Water Act is an economic, as well as an environmental necessity.

The tourism economy at the shore has been severely impacted by pollution events and beach closings due to bacterial contamination. Some people say we can't afford the Clean Water Enforcement Act, but our position is, we can't afford not to pass it. Clean water is not a luxury; it is a necessity for the economic viability of our State, as well as the health of our residents and the web of life that makes up our world. We must send the message to polluters that the cost of polluting will rise with repeated violations, and that chronic and reckless violators will face jail sentences if they are found guilty. Industrial polluters cannot be allowed to continue to use public sewer systems as their free disposal system for toxics. According to the 1987 emissions data submitted by 700 industrial facilities in New Jersey, 33%, or 65 million pounds, of toxic chemicals were discharged to public sewage treatment systems.

The future of our water quality and the inheritance of clean water which we hope to leave to our children depends on your wise use of your legislative authority to insist that our environmental laws will be enforced consistently and without exception by the agencies which are charged with environmental protection. Speaking for the 95 groups in the Clean Water Enforcement Campaign, I urge your strong support for S-2188.

We thank Senator Van Wagner and Senators Dalton and Bennett who have done exemplary work in preparing this bill. We thank the Assembly lead sponsor, Bob Smith, and we thank the work of the Committee in hearing comments on this bill today. Thank you very much for your time.

SENATOR VAN WAGNER: Thank you, Jane. Are there any questions from the Committee? (no response) Okay.

Ellen Gulbinsky and Edward Buzak, of the Authorities Association of New Jersey.

E L L E N G U L B I N S K Y: Thank you, Mr. Chairman and members of the Committee. I am Ellen Gulbinsky, Executive Director of the Authorities Association of New Jersey. With me is Edward Buzak, Chairman of our Legislative Committee. I would like to make some general overall remarks regarding the bill, and Mr. Buzak will then present the amendments which the League of Municipalities and the Authorities Association are hoping you will consider with regard to the bill.

First of all, I would like to say what the Authorities Association is. It is a misleading Association name. Many people think we are policemen. In reality, the authorities are the water, sewage, and solid waste authorities across the State. My membership consists of 151 publicly owned treatment works and the professionals who serve that industry.

DEP, in one of its testimonies before the Legislature, in showing the surface water permits and the number that are out there, indicated that there are 1500 surface water permits. A popularly held myth about this legislation, is that the legislation is going after the industrial polluter, but when you look at the 1500 surface water permits, over 1000 of those are held by publicly owned treatment works. And, if the impact of this bill is on those surface water permits, you can see where the impact of the bill is: It is on the publicly owned treatment works. We have to keep this in mind, because the goals that you look at before you -- the polluter you seek to go for, is your neighbor, in many cases; is the taxpayer, who is going to pay under this system right now.

We are also hoping that, because this is a new Legislature, that perhaps we will not be held to the old feelings and thinking about this legislation from the last Legislature. Maybe since it is 1990, and we are all looking to the future, we can take a look at what we have right now and say, "Gee, let's take a new look at this."

One of the things to look at is the fact that we have a new DEP, with new leadership. Right now we haven't given that leadership an opportunity to look at what the Department has assessed as problems that it wishes to address, and we haven't given them an opportunity to target their enforcement systems right now. They may be able to handle many of the problems that this bill seems to address by simple administrative solutions and by a different team of leadership.

So what I am saying is, "Let's keep in mind that perhaps we don't need this bill, as we did looking at the statistics that were presented about the bill." Those statistics that were presented, and the problems with noncompliance, were results of a look at a study that was done with information from 1985-1986, and we are a long way from those dates right now. And, when you look at the $37 million that the Commissioner announced at Chairman Smith's Committee the other day that were levied against polluters during 1989, we can certainly say that DEP has not been lax. They have definitely turned around-- Whatever criticism there was for lack of enforcement, they definitely have moved in the opposite direction in 1989, and those figures sort of speak for themselves.

The main component, if we are to be successful in helping to improve the water quality of New Jersey, is funding. Mr. Dressel brought that out in his comments, and the Authorities Association echoes that. DEP has recently done a study called, "The Municipal Sector Study." It is in draft form right now, and I am sure the Commissioner is going to present that to the Legislature shortly. In that, they show the amount of money that is going to be needed by municipalities to meet the water, wastewater, and solid waste needs for the next five years or so. That is what they projected in that particular program.

It is a staggering figure, and it is going to have a definite impact where we are going to hear from the citizens of New Jersey about this. This is a problem that you worry about, because you will hear about it as elected officials. My authority members will hear about it, too, because when the user fee bills go up and they go to the citizens, people want to know why. People want to know: "Why do we need this expansion in this plant?" One of the things that they are not going to want to accept is that part of the things we are doing is paying fines. We paid fines and we also sold bonds to correct and upgrade the plants. We paid both. We paid fines because our administrative consent order gave us unrealistic numbers, and we paid to upgrade the plant. Those are hard things to tell the citizens -- why both things were there. When you did the responsible thing and they accepted the bonds and they voted to go ahead and expand, it is hard to then tell them why they also had to pay some heavy fines, too. So, funding is an important thing.

The other major important thing is the fact that we also represent at the Authorities Association-- My comments are also in conjunction with the Water Pollution Control Association. These are the 1500 licensed operators across the State who are now operating those plants as we speak. They need effective training. The science and the technology for wastewater treatment are changing every day. We have never had an effective training program in New Jersey. One of the things the bill seeks to institute is operator training. The problem with it -- as the bill is drafted right now -- is that you have the same authorities paying for that training program as presently pay for it right now by the tuitions they pay when they send an employee to become licensed. In the original drafting of the bill, the authorities had asked that a portion of the penalty money from DEP be geared into operator training, and we would hope that you would consider that again. It is in

the general public's interest. It is not just the authority that needs that trained personnel. It is the citizens in general. Therefore, I think the funding should come from both sources -- the public at large, as well as the delegated local agencies which will be collecting fines and therefore dedicating 10% of the money they collect from their indirect dischargers to the Operators' Training Fund, as prescribed by the bill.

Regarding enforcement, the authorities feel that the laws on the books are adequate, and let me just point out a couple of things: You have heard a lot of testimony to the contrary, but when I read the Administrative Code under the penalties, I see a chart that shows me that the minimum penalty for a fine under the NJPDES system is $2500, and the maximum is $50,000 a day. I fail to see what we are doing differently in this bill, except for the way the fine will be instituted, and the way DEP must behave. I fail to see what we are changing here. We are just moving something from regulation.

So, the whole idea of saying, "We are now going to really go for penalties," is just not true, because we really are going for penalties now. That money is there. That is what is being levied against dischargers right now, so there is really no increase or change there. That is a myth that the public is being fed; that there is going to be some major change in penalty numbers.

Under Barbara Kalik's bill which was passed last year, publicly owned treatment works that are delegated local agencies were given many responsibilities, and of those, disconnection has always been one. In the papers that I handed you, I gave you a response that the Authorities Association wrote to the paper that was done by New Jersey PIRG. We responded as far as the individual authorities that were listed in the bill and criticized in the bill. You will find one in particular there from the Gloucester County Utility Authority.

The Gloucester County Utility Authority, in that letter, disconnects an industrial user. Therefore, you will see that definitely that has always been one of our powers. We don't need this bill to do that. We can do that right now.

Authorities can also change their bylaws, and can perform many-- They can take industrial dischargers to court, using the court system right now -- the county court system. The one thing we do agree with which Ms. Jenkins said, is that we would also like to see restored civil administrative penalties, so that the delegated local agencies could more quickly respond and levy a fine of at least $5000 to an industrial discharger, and then perhaps stop the discharges a little faster and get a faster hold on that. But right now, the indirect discharger can be pursued under the existing law. So there, too, there is no need to pass this law in order to achieve that goal.

I raise this to your attention only to say, "Let's pass what needs to be done for real water quality improvement." We see right now as number one, funding for operator training. We want to see the penalty money moved into the enforcement fund, and that money should go to the Wastewater Trust. If it goes to the Wastewater Trust, there would be money for upgrades. That is the best place to put it. That is where the water quality is really going to improve as a result of it.

Right now, I have also handed you a piece of paper that is a consultant's study that the Authorities Association commissioned. One of the problems with this legislation -- and we have said this over and over-- For some reason, it is viewed as some kind of an excuse process, but the reality is that the NJPDES permitting system and the way the permit limits are set in permits today, is really difficult in New Jersey, and definitely needs reform. We have given you a couple of examples. Mr. Kukasch gave you the example of flow and the

example of chlorine residual, which is now zero. Those are two examples of particular limits that are going to be troublesome to all POTWs across the State. With this bill enacted exactly as it is, with those provisions, it will put everybody into the category of "significant noncomplier" very quickly. The reality of the situation is you have to ask yourself, "Has there been a degradation of the water? Has there been an environmental impairment?" When the answer to that comes up, "No," then you ask yourself, "Then why should the POTW pay this big fine, when perhaps that money should be better used in plant maintenance, upgrading, operational activity?"

We have presented that study because we would like to see DEP improve the way NJPDES' limits are set right now. Just to illustrate to you that this is not just an excuse, but a fact that the Authorities Association stands ready to work with the Department to improve water quality and to improve the permitting system -- that is the reason the Association paid to have that consulting work done -- we have some constructive suggestions. We don't just stand here and say, "The Department has a lax program," but, instead, we are giving you some suggestions for ways to improve it, and some very, very realistic ways that administrative changes can occur.

In one of the former versions of the bill, we asked that a study be done by DEP taking into account the categories that we have investigated, or that we mention in that report. We asked DEP to look into their administrative procedures and reform their system, because to place the caveats of the Clean Water Enforcement Act on this very flawed NJPDES system that exists today, is what is creating the problem. The system needs to be administratively corrected, in order for the provisions that you are asking for in the Clean Water Enforcement Act to work well and to target the egregious polluter that you want to get, and not pull into its net all 1500 of the people who have surface water permits.

We also feel that the paperwork and the obligatory monitoring inspections and the timetables set for those that really make DEP have to respond in a robotic manner and in a timetable sequence, are going to be detrimental to the overall look at pollution abatement, in the sense that the Department now is going to have to spend a lot of time on paperwork, rather than targeting, focusing, and correcting, which is what they have been meant to do, and what the EPA has wanted them to do with the program.

So, right now, because of the way systems are in Trenton, we have to work with what is there -- the structure that is there. Basically, none of us are going to be served well by DEP. Particularly, the authorities worry about the fact that we will not get permits issued. We need permits issued. You can't float bonds. It is a requirement to your bondholders that you have an active permit in good order. We need to know that when we put in an application for a permit, that that permit is going to be issued. All of us need to make sure that the Department functions well; otherwise, we have nothing under the system.

Bill Dressel brought out, very eloquently, the idea of the effective and prudent use of public money. So, again, we go back to the issue that we really feel that the best use of it is to put it into the upgrade and the expansion. One of the things that will result, also, from the caveats of the bill, is that we will expand the litigation process. Right now, you have heard the criticism that formerly, public entities when they would go in for their permits, consent orders, etc., there would be a negotiations process, which has often been referred to as, "Let's Make a Deal." But the reality of this situation is, the authority, or the permittee, is not in the position of power that you are led to believe they are in. In most cases, you have a monologue with DEP. DEP then says, "This is the way it is going to be. We are not going to change these limits."

Even though the authority will say, or the public entity will say, "Our equipment will not now allow us to do this. We can't hit this. We will be fined," they still go ahead and say they want to keep the limits where they want to keep them.

As a result of that, we find ourselves in a situation where we have to deal with this up-front. In the past, when the Department would give us a limit, and the authority would say, "Look, if it rains, this flow limit is going to be a problem for me," the Department would say, "Well, if it becomes a problem, then we will address it." No longer will that be the case under this bill. We will have to address that at the time the permit is being drafted. That is going to mean that we bring in extra monitoring consultants; we bring a lot of additional legal work into that process. It slows it down; it elongates it. It is going to be a system where DEP is going to be slower in getting those permits out.

So, this is something to be aware of. That is why when we say that the cost of the system is going to go up-- There is where it is, because it means that to negotiate so that you don't get permits on the outside, you are going to have to fight on your limits up-front.

Delegated local agencies need administrative -- the ability to do civil administrative penalties. We also need to look at the Department's costs. I told you about the litigation costs that the POTWs will have to raise. The Department costs have already been addressed several times. The Department needs more money than the $750,000 listed there. Our concern is with the way their time is going to be spent and the money that is now going to be a drain on the Department. They are all going to lead to eroding the effectiveness of the permitting system -- a major concern for us.

At this point, I would like to introduce Edward Buzak, who is going to go through the amendments that the Association

and the League of Municipalities have presented to the Committee.

E D W A R D J. B U Z A K, E S Q.: Mr. Chairman, members of the Committee, I appreciate the opportunity to speak today. I enjoy coming before you toward the end of the testimony, because it is always interesting and enlightening to listen to the other speakers and to see what is said about a bill, and probably more importantly, to see what is unsaid; to listen to the subtle wording that is given by both proponents and opponents of the bill.

Ellen indicated that there are many myths that are being discussed regarding this bill. Criminal penalties, for example, are presently in the law. If you have a willful or negligent violation of the Clean Water Act, you are subject to penalties, and you are subject to penalties of up to $50,000 per day. This bill does not change that right. This bill does not change the ability of DEP to take action. It does not change the ability of the Attorney General to bring criminal actions against polluters today.

One of the things that has been said over and over again, is that the authorities and the POTWs and all of the permit holders have had to live with these permits for years, and that once and for all we are going to make everyone comply with these permits. We agree that there should be compliance with permits, but before you are going to change the law to mandate penalties and to eliminate DEP discretion, you better look at how the permit limitations are set. It is absolutely unfair and inequitable to utilize a permitting system that sets standards based upon a seven-day, ten-year low flow industry situation, and say, "If you violate that parameter, you will be subject to a mandatory fine."

You might say, as many have said, "Well, why did you accept that in the first place? Why didn't you tell DEP that that was unacceptable? Why didn't you fight the permits?"

Well, we didn't fight the permits because DEP understood just what I am saying. They knew how those permit limitations were set. They knew that those permit limitations were set on the basis that if a violation occurred, you would not necessarily degrade the water. And they would look at the effect of a number violation before they imposed their penalties. If they found that, indeed, there was no water quality degradation, they would have the discretion to not impose the penalty.

Under those kinds of rules, the municipalities and the authorities took the position that they could accept those permits, because they agreed that they should be set under strict standards. However, if you are not going to allow DEP to exercise any discretion, then the permitting system has to change.

We have heard over and over again that this bill is a self-funding bill; that the NJPDES program is a self-funding program. We agree that the NJPDES program is a self-funding program. However, one ought to read this bill before one makes the statement that the fines and penalties that are collected by the DEP will go to enforcement. That is not what the bill says. If anyone thinks that is what it says, they ought to look at it, because what the bill says is: "Subject to Chapter 122 of the Public Laws of 1989, the funds will go to a Clean Water Enforcement Fund." That is what this bill says.

Now, as I understand it, that legislation provides that the first $6 million in fines and penalties that is collected will go to subsidize the State budget. So, the first $6 million is gone.

Secondly, the comment has been made, in response to the authorities' and municipalities' contention that money should go to improve treatment plants, that excess funds that are in the Clean Water Enforcement Fund will go to the Wastewater Trust. Well, read the bill. It is very well worded. What it says is that excess funds, after funding has

been provided for the following fiscal year, will then go to the Wastewater Treatment Trust. So, you don't only fund your present enforcement; you fund a year in advance.

The idea, and what we are trying to get at, is that fines and penalties do not produce clean water. Fines and penalties under this bill do not produce clean water. Money produces clean water; money that is spent to make the upgrades that are necessary produces clean water. And when this Legislature looks at this issue, that is what they ought to look at. They ought to provide funding. Let the money go to the Wastewater Treatment Trust.

It is interesting that the bill appropriates $750,000 to implement it. The testimony of DEP last year before the Senate Revenue and Finance Committee, was that unequivocally it would cost $7.5 million, and an amendment was made right there in the Committee, "Let's give them $750,000 -- 10%." Then the Appropriations Committee called upon OLS to make an independent study, because no one believed DEP. OLS said, "Well, it is going to cost between $4 million and $8 million. We can't really fix the number." What is appropriated in the bill? Seven hundred and fifty thousand dollars.

If you are going to produce a bill, then have the ability and have the courage to put the money in there that should be in there to enforce it. Don't just appease the people and say, "Let's pass this bill, but we will give it $750,000." We know that that is not enough. Do what you are supposed to do.

SENATOR VAN WAGNER: Is that your directive to us, Mr. Buzak?

MR. BUZAK: We are asking you, when a bill is considered--

SENATOR VAN WAGNER: I didn't hear you ask.

MR. BUZAK: Pardon me?

SENATOR VAN WAGNER: I hear you giving a directive.

MR. BUZAK: We are imploring this Legislature -- this Committee -- when reviewing bills, and when considering bills, to provide the appropriations necessary, and that will be necessary to implement the bill. I think that all reports that have been submitted -- independent reports that have been submitted -- have indicated that costs will well exceed $750,000. There is absolutely no support for that number, none.

The amendments we have proposed address the concerns we have. We have asked that an amendment be made to this bill to include a provision that sets forth that the NJDEP will conduct a study of the NJPDES program; will review that study; will review the program; and will revise it. They will look into the once in 10 years, seven-day low flow basis upon which NJPDES permits are issued. That will go to solve the problem.

We do not understand why that amendment is not in this bill. What is wrong with looking at the permitting system? What is wrong with looking into what everyone says is a given?

We have asked for amendments to provide that the moneys that are collected from fines and penalties be placed to upgrade and expand systems. Fine and penalty money which is used to feed on itself and produce more fine and penalty money does not improve the treatment works.

We have asked that DEP be given the discretion when imposing fines and penalties, and when compromising fines and penalties. It is absolutely undisputed that last year DEP -- or two years ago -- through their administrative consent orders, collected some one or two or three million dollars in fines, but parlayed that into $1.4 billion of upgraded expansion. DEP would not be able to do that under this bill.

The idea that, "Well, if you are a municipality, the first fine can be compromised without limitation, and the second fine can be compromised up to 75%, and therefore this bill gives the discretion to DEP," is really unrealistic, because one of those fines could just as soon be the $100 fine

for failure to put a permit limitation number in your DMR, and DEP can say, "Well, you know what, we won't fine you the $100. And guess what? Your first offense is finished." And the second one might be $100, and they will compromise that to 75% so you only have to pay $25. But then your third one is the $50,000 one, and DEP comes to you and says, "You know, you didn't degrade the water. There was no effect at all on the environment, because all it was was a numbers violation. Your flow exceeded the permit limitations, but we can't compromise it."

We have asked for civil administrative penalties. That was in the Assembly version of this bill; that is, the ability to allow local agencies to impose civil administrative penalties to reduce the costs those agencies will have in terms of enforcing the law. It is absent from this bill. Why? If you want to give us the tools, give them to us. It wasn't in S-2787. It wasn't in A-3831. It was in the Assembly version. It is gone from this bill.

If you are going to pass this bill, at least give the POTWs and the permit holders the ability to either renegotiate their permits, which are five-year permits, so that the limitations can be realistically set, or make the bill effective after the permits are issued. So if one has a new permit that is now pending, let them negotiate the permit limitations with full knowledge of the lack of discretion in DEP, but don't change the rules in the middle of the game without giving the players the ability to respond.

Finally, with respect to citizen suits, it is interesting. The law allows citizen suits; have allowed them for years. The law has always had a limitation of $10,000 in expert fees and legal costs. The idea of that was that windfalls would not be created, and taxpayers, among others, would not have to pay twice; would not have to pay a defendant's suit -- actually three times: a defendent's suit

to correct the problem and pay the other side's attorney's fees and expert's fees.

Now, there is no limitation with respect to citizen suits brought against private enterprise, and $50,000 -- $50,000 as a cap for lawsuits that are brought against public entities. We suggest to you that the $10,000 is more than enough. Interestingly, the New Jersey law has not been utilized by New Jersey PIRG or others very often, if at all. They go right to the Federal courts, because there is no limitation. So there is no need to change this to give citizens better rights. Citizens have those rights now.

This Legislature, in the past, has been concerned about the taxpayers and ratepayers in the State. Unlike the Federal government in Washisngton, they have been concerned about them, and they have put limitations on to protect the taxpayers and ratepayers. Now you are being asked to eliminate those protections, or to waive those protections, at a time when the taxpayers and ratepayers cannot afford it.

We ask you very sincerely to consider the amendments we have proposed. We have spent a lot of time. We have gone through the bill. We have attempted to address the kinds of problems that I alluded to during the course of my testimony before you, and we hope that you will sincerely look at those amendments and consider the effect of those on what we are trying to do. We are all for clean water. We are trying to make the bill better so it will work, because in the end we are on the front lines. We take what comes down the pike, and we have to treat it and discharge it. We need your help. Please don't let us down.

Thank you.

SENATOR VAN WAGNER: Thank you. Mr. Ben Forest, Monmouth County Friends of Clear Water.

B E N F O R E S T: It is nice to see you again so quickly, Mr. Chairman. I think you may recall that I was at your Exxon hearing last week.

Monmouth County Clear Water: We are a volunteer organization here in Monmouth County. I don't think there has been any legislation in our 14-year existence that we have cared more about than the Clean Water Enforcement Act. Lobbying is not one of the most exciting issues as far as getting volunteers motivated, but it doesn't take a rocket scientist to go out on our boats on the Raritan Bay and the local rivers to see that the water is dirty and that the status quo system that now exists is not working. Our water is dirty, and we need to do something to change that.

I don't know how long DEP has been around, but our experience in this -- our personal experience with IFF over in Union Beach -- has been very discouraging. We have had to go over to DEP and spend a lot of our time getting them to do what we thought was their job in the first place. At IFF, the problems had been documented there. We actually have an EPA photo going back to 1971 or '72, showing a huge plume of black pollution going into the Raritan Bay.

So, how quickly did we move to solve the problems at IFF as far as water pollution goes? Well, last year, in 1989, we completed phase one of a two-phase report to define what the problem is there at IFF. Right now we are working on phase two, and hopefully we will find a way to solve our problems at IFF.

So, to Monmouth County Clear Water, this law is almost something personal, because it has been very discouraging. You know about the Keyport Landfill. Every time we have gone to DEP for anything just about, it has been a struggle to get them to do whatever they are supposed to do. So there really is a problem.

SENATOR VAN WAGNER: What's interesting-- I thought I would maybe just add a parenthesis to what you're saying. I don't know if Mr. Kukasch is still here, but about six years ago, the Bayshore Regional Sewerage Authority was having a

great deal of difficulty with IFF. Oddly enough, he, along with other commissioners, asked for the same authority that is in this bill. Obviously, today it is a different story.

MR. FOREST: Incredible.

SENATOR VAN WAGNER: Go ahead.

MR. FOREST: Well, it is my belief that-- I am Chairman of the Environmental Action Committee. I have listened to the opposition's point of view at this hearing. I have read press releases; I have read stories. And, in my opinion, the opposition-- It is just a smoke screen. I think the reason that industry is so dead set against this bill, is because they do not want to end the "good old boys'" network of permits which has been in existence now for however long permits have been around, I guess 1972.

When we listen to what points they make, we wonder if they actually read the bill. Also, in terms of the facts-- For example, when Ellen -- I don't know if I can pronounce this correctly -- Gulbinsky spoke, she actually had the facts backward. It is 250 sewage authority dischargers, not 1000, and 1000 industrial dischargers. I mean, we have read all kinds of paranoid press releases from various opposition about how this is going to bankrupt the taxpayers, and all this kind of fear tactic stuff, and it really scares us that industry and the opposition to this bill would resort to this kind of what we consider a "disinformation campaign."

You know about the oil spill. I have not read the new version of our Clean Water Enforcement Act -- I have not finished it -- but I kind of think I would rather have had the Clean Water Enforcement Act around when that spill took place, than right now. I don't know what is going to happen there as far as Exxon goes, but as I said last week, it really horrifies us that these pollution problems persist.

I just want to close by saying, I don't know of anyone who has gone to jail under the current system. We had one

person here talking about -- I don't see him -- "Well, under the current laws, someone can go to jail now." Well, who is in jail? I don't know anyone in jail. Maybe there have been one or two persons somewhere in the last -- since the Clean Water Act was adopted, but I don't know of anyone. Certainly no one at IFF has. Not that we want anyone to go to jail, but we want a fair and reasonable law here. What we have here, I think, is a fair and reasonable law. We have gone through hearings. We have made compromises. Your friends in Monmouth County, and the Friends of Clear Water hope that we pass a tough version of this Act, and reject these ridiculous amendments, which are really an effort to continue the "good old boys'" network of permits.

Anyway, that is the long and the short of it. Are there any questions I can answer, Senator?

SENATOR VAN WAGNER: I don't think so, Ben. I think you have made your point quite clear. Any questions from the Committee? (no response)

MR. FOREST: Thank you.

SENATOR VAN WAGNER: Thank you, Ben. Mr. John -- I hope I pronounce this correctly -- Cawk. Is that right, John?

J O H N C A W K: Cawk (corrects pronunciation).

SENATOR VAN WAGNER: Cawk, I'm sorry. And you are representing yourself, John?

MR. CAWK: Yes. Thank you. Although I currently work with a few environmental groups, I am testifying for myself. That is the way I want it. My approach is really much more of a commonsense approach. I don't have any degrees in anything relevant to this particular bill, but I am a family man. I have a wife and two bright children.

I would like to address three specific points from the opposition, which keep on coming up over and over again: one about point source pollution being insignificant; two about the carrot and stick enforcement approach; and the third being pollution measures beyond their control.

As for the first one, I'm sure everyone here would agree that non-point source pollution is a very prevalent problem in New Jersey, but to say, as one person said, that if all of the point source pollution was corrected, it would have an insignificant effect on the State of New Jersey, seems to me an incredibly callous thing to say in light of the Exxon Arthur Kill disaster, as I would see it.

Another thing about point source pollution is that the one thing that the larger industrial polluters have on their side that the citizens, being the non-point source polluters, do not have, is large amounts of money to do studies and research on what works, what doesn't work; what's healthy, what's unhealthy. In fact, what the non-point source polluters, the consumers, are polluting with are the products that are primarily produced by your point source polluters, and by addressing point source pollution, it seems to me from the trickle down theory, that we may come up with some kind of a solution for non-point source pollution.

Secondly, the carrot and stick approach for law enforcement has been the prevailing tactic now for the last 18 or so years. Opponents are really advocating that there should not be any fines; that that money should go toward upgrading pollution control systems. The question, of course, is, what has happened? You know, what happened during the last 18 years? They say that the last couple of years DEP has basically woken up and decided to enforce a lot of these laws, but to my mind that is not directly related to the carrot and stick approach. It has a lot more to do with the public pressure that primarily environmental groups and citizen suits have put upon DEP. Therefore, I see that it is very important that citizen suits be a much larger part of the enforcement process of these environmental laws.

A $10,000 cap-- Phew! I can imagine it being very difficult for a private citizen or organization to come up with expert witnesses, and so forth, for $10,000.

As to the contentions that a significant part of this point source pollution is beyond their control, and it's going to -- how do we say this -- result in, you know, -- with the increase in fines -- the loss of jobs, prosperity of the State. A man brought up a figure of the 18% variability in the test procedures. You know, I thought we learned that lesson in the 1400s in the Tragedy of the Commons. If the limit is set at "X," is it appropriate then, to pollute all of the way up just exactly until "X," not taking into consideration that there are variable factors. That doesn't seem prudent to me that, if, in fact, there is 18% variability in test procedures, if you pollute as much just under the amount that the DEP has said is the limit between what is safe, and what is harmful to the environment, that, in fact, you should be polluting at least 18% less than that.

Finally, what I want to say, is that I'm really encouraged that we now, as a State, have the opportunity to really do something about this major pollution problem here in New Jersey. I'm convinced that we're all people, and that polluters don't get out of bed in the morning wanting to pollute. In fact, I don't think they think about it very much. I believe that they're old dogs that need to be taught new tricks. The problem is that if we don't take this opportunity, we will have to hold ourselves accountable to our children and grandchildren for limiting their resources in the broadest sense.

The pollution we're talking about that is addressed in the Clean Water Enforcement Act, is pollution which occurs beyond the law, meaning people are allowed to pollute up to a certain amount. This bill addresses the pollution that is caused above the pollution limit. If we do not address the standardization of this law, what incentive does that give to the rest of New Jersey to abide by other laws? Thanks very much for the opportunity to testify.

ASSEMBLYMAN SMITH: Thank you very much. Are there any questions? (no response) There being none, our next witness is Phyllis Elston from the New Jersey Sierra Club. Phyllis, if you are ready?

P H Y L L I S E L S T O N: Thank you, Mr. Chairman. I can abbreviate a lot of the remarks that I would have made because many of them have been articulated already by the sound and responsible -- at least in my opinion -- testimony that you heard from the Authorities Association. I think it's thoughtful, factual, and thought provoking.

I'm not here today as a technical person, because I'm not one. I'm not here today to grind a partisan ax, because I don't have one. But what I do have is 20 years of background work in environmental protection, through government; ten of that in elected office. I currently work as an independent legislative agent down in Trenton. One of the organizations that I represent is the New Jersey Chapter of the Sierra Club. Some remarks that I will make here today will be the position of the club, others that I want to make are simply from my own experiences to what might be helpful in cleaning up the State's polluted waters.

With regard to the official position of the New Jersey Chapter of the Sierra Club, it focuses on three entities, at least with regard to the legislative activity that went on in the 203rd session. I would like to say that they carry over into what we need in the 204th session.

Number one has to do with accountability in oversight in a clean water bill, no matter what form that bill might take. Accountability in oversight were missing last session, and they're still missing now.

The second point that the Sierra Club was concerned with had to do with discretion for the New Jersey Department of Environmental Protection; that kind of discretion which brought about $1.4 billion in planned improvements over the past few

years. That kind of discretion and those kind of moneys fix broken treatment plants. The estimate out there right now to bring current treatment plants up to par is in excess of $3 billion; that's outside of the $1.4 billion. We need to get this money from somewhere. We should be working for a clean water bill that will help capture some revenue to help get that $3 billion, especially in light of the current deficit that the government is facing.

The third point that the club was concerned with had to do with fiscal clarification; that goes to the matter of the $750,000 versus the $4 million to $8 million. Those being the estimates of what one entity thinks the bill might need to work effectively, what the Department seemed to think, and what the independent OLS study seemed to think. The Sierra Club can't give you a figure, I can't give you a figure. We can only point out that when you have $750,000 on one end of the scale and $8 million on the other, that something isn't working well. There must be a figure in between those two very far apart figures, which is more realistic. So hopefully, you'll be looking to try to come to a realistic figure for enforcement. That is the part of my testimony that I am allowed to officially represent today for the Sierra Club. So now I would like to speak just from my past experience with the bill and with environmental protection in general.

When I first came to work down in Trenton, the first job that was given to me was to lobby for the DEP budget. It was a horrendous job and one that practically sent me packing back home to where I came from, because that has to be the most frustrating thing that anybody can ever work on. We have never seen-- In my 20 years of working as a municipal official trying to respond to environmental regulations, and in my several years down here in Trenton, we have never seen what we need in the way of enforcement money. That starts in the Governor's Office of Management and Budget. It doesn't start

on the floor of the Legislature. It doesn't start in OLS. It starts in the Governor's Office. We haven't gotten what we need for whatever reason, be it because since Earth Day, 1970 we have paid attention to the kind of environmental regulations we need to make this State a decent place to live in and we've buried ourselves in environmental regulations. We are neophytes at figuring out environmental regulations. We let the Federal government be our guide. We are drowning in environmental regulations right now that aren't working.

Three years ago, when I was brand new in Trenton, I sat with Senator Dalton and a bunch of environmentalists trying to figure out what was wrong with the system. Senator Dalton, for whom we all have the greatest respect said, "It's a sad thing that we've got all of these great environmental regulations on the books in New Jersey, but too often they are just paper." We've got to learn how to stand back and look at what is good about them, what is efficient about them, what is working about them, and do more of that. And at the same time, it obviously requires that we stand back and look at what is not working, what is cumbersome, what's killing us and the taxpayers with expense; get rid of that and fine-tune everything else that's in-between.

Some years later as Commissioner of DEP, Christopher Daggett articulated the same need. Now he's gone, but from what we've seen of the new Commissioner, Judith Yaskin, she recognizes the same problem. We've all got to recognize this problem.

When I came into municipal government in the '70s, I was 100% in favor of home rule. In my 10 years as an elected official, I did a complete about-face, realizing at least in my experience, that home rule was killing our State; that we really needed some kind of regional planning and regional lawmaking. I still say that.

With regard to environmental regulation, I have had the same revelation. We've got to stop doing it to ourselves; and still we are sure that it can work. Now we're looking at a deficit such as has not been seen before, for many reasons. We can blame it on some other Governor, we can blame it on too much regulation, we can blame it on the fleeing of corporations and the dying of small and marginal business in our State. There are may places where we can put the blame, but the fact is, we've got it. Now we're looking at another regulation that's going to cost big bucks. So who -- that really wants clean water -- could be against the premise of collecting up every single penny that the polluter pays, and directing it toward the enforcement that we need; every penny from fines, settlements, and every penny that we can glean off of citizen suit settlements? Because that's millions of dollars that under the current system is escaping into territories uncharted with no oversight and no follow-up.

Further, when a corporation is caught polluting, when a treatment plant is caught polluting, there is a definite advantage to sitting down and settling, before dealing in court, with the parameters of the Federal law or anything proposed to be, or currently on the State books. Corporations, when caught, like to settle because it's cheaper. And so the corporation, while not necessarily acknowledging guilt, comes to the bargaining table and says, "Okay, maybe I did it; now I'm caught. Now I'm going to pay. But I'll settle, because what the law will make me pay is really going to kill me, so let's have some dialogue." Here comes the dialogue: A number is reached. A citizens' suit group says $1 million; corporation says $500,000. It goes back and forth until finally a number is reached. The corporation will pay. What happens to the money? The judge wants to be sure that a sound decision is being reached. The lawyers want to be sure that they don't have to come back and fuss around with this again.

After those parties are reasonably sure of that, the settlement occurs and the book is closed; no oversight, no accountability. Goodbye, money. And guess what? The corporation, if deciding to lodge that money with a tax-exempt organization, takes a write-off. Is the polluter paying? Not really, but the people are, in lost revenue that should have gone to the government. Then there's those legal fees. If they're uncapped, God knows what they'll be? But being capped at even 10 or even 50, that's written off as a cost of doing business. Who pays? The polluter, or the people as the corporation gains again.

This is not going to get us clean water until we have accountability and oversight on every penny collected through fines, penalties, and most importantly, settlements.

I think it's sad that we hark back to the 203rd session, which was painful and agonizing for all of us that had anything to do with it. We looked at a bill that's a sexy topic, that frightens people, that defines a true need that we have for clean water in this State. We looked at that bill being pushed while we were ignoring basic natural resource protection that we still need, the lack of which is crippling us with no answer to the non-point source pollution problem. We paid attention-- We focused attention onto a bill that sprang from the Senate, for whatever reason, 32 to 0, with the statement being made that it was a flawed bill, and that the Assembly was being entrusted to fix it. The Assembly went to work to try to fix it. We came out with a hybrid: The Sierra Club had input, Authorities had input, Business and Industry had input, the Department had input, the Governor had input. Everybody that was at the table, as should be, had input. And the hybrid came out; which as we hear so often that it's become trite, "Well, it must be a good compromise, because everybody's unhappy." You know, that may be trite, but there's an element of truth in that.

The point is, that on the floor of the Assembly that day, 50 elected State representatives voted for the amended bill. They can't all be bad. They can't all not care about clean water. It was a nonpartisan vote, with Democratic leadership shouting out the loudest with the "Aye" vote. On the other side of the ledger, there were 12 only, voting against it. The balance was sitting it out.

If we took the legislators on the dais today as a representative sample, we would find one that voted against, one that voted for, one that wasn't there, one who abstained, and one who comes from the other house of Legislature in Trenton. So I wish we could depoliticalize the bill. I wish we could start striving for an efficient bill that will bring clean water. I wish we could strive for a bill that will get every penny of revenue that we can into the State's coffers, and I hope that maybe everybody has been trying to do that.

I hope that everybody realizes that we're not there yet, that we have to go back to the table and work out some more details, painful as it may be; that hopefully with a new administration and a new Commissioner up in DEP, we'll get there, because we shouldn't forget this. With the bill floating around the last time in the 203rd session, you had a Department that wasn't in support; you had a Governor that wasn't in support; you had economic entities that weren't in support; a major environmental group that was having problems with it; but most importantly, a large amount of people in the Legislature, and even more important, in the general public who were misinformed on the bill.

I make myself available to do anything I can to help. I'm sure everybody that cared enough to come here today, will make, or has made the same offer. I thank you very, very much for your time.

ASSEMBLYMAN COHEN: Excuse me, does the Sierra Club support this bill, or not?

MS. ELSTON: They cannot support the bill until the accountability with the citizen suits, and the fiscal discrepancy in the amounts of money needed to implement it are taken care of.

ASSEMBLYMAN COHEN: The Sierra Club doesn't support the citizen suit provision?

MS. ELSTON: It needs to have accountability and oversight built into the citizen suits. Nationally, in Washington, D.C.-- Now remember I'm speaking for the New Jersey Chapter of the Sierra Club, and there has been some confusion spread abroad about that and how it works. So, if I may, I will tell you how it works.

The Sierra Club nationally is a huge organization. It has state chapters and those state chapters are broken down into groups. There is a voting body made up of representatives of these groups that form the ex. com. of the State chapter. When the State club takes a position, it is only by vote of that body. That has happened with regard to that bill. That's the position I articulated here today. It may come to pass, and indeed it has here, that State positions are not exactly the same as positions that the national club has on national issues.

SENATOR VAN WAGNER: Does the New Jersey Sierra Club support this bill?

MS. ELSTON: We support citizen suits. We can't support citizen suits as are in this bill without accountability and oversight.

ASSEMBLYMAN COHEN: The Sierra Club has brought citizen suits, has it not?

MS. ELSTON: It supports citizen suits on the national level. That is an official position which seems to be working well on the national level. As far as the State chapter, we perceive a problem with citizen suits due to lack of accountability and oversight in the moneys gleaned from the same.

SENATOR VAN WAGNER: I don't understand what you mean by that.

MS. ELSTON: What don't you understand, Senator?

SENATOR VAN WAGNER: I don't understand what-- You're saying that nationally the Sierra Club supports the provision for citizen suits--

MS. ELSTON: That's correct.

SENATOR VAN WAGNER: --because there's accountability in the national Clean Water Act?

MS. ELSTON: On the national level, as a position, citizen suits, to their experience, are working well. As regard to the State chapter, our experience watching what's happened here is that is not the case. So, we have taken the position that while we support citizen suits, we need to see accountability and oversight built in. Hopefully, that's going to happen here.

SENATOR VAN WAGNER: What kind of accountability would you--

MS. ELSTON: Well, the most easiest and efficient--

SENATOR VAN WAGNER: Did you offer language for that in the last session, for accountability?

MS. ELSTON: No, I don't feel qualified to offer language. I articulated the problem, then somewhere out of either Legislative Services or, you know, one of the legislators, language was built into the bill which turns out in my opinion, to be the easiest way to do it -- capture all of the revenue, including citizen suits settlement revenue. If you have a cap on legal fees, it should be realistic to pay a lawyer so that he is not in there working for nothing; although many environmentalists do.

But on the other hand, when you are talking millions of dollars that corporations are writing off, then there's got to be accountability and oversight built in. So the easiest thing is take the money and send it back to the enforcement

program, especially in light of the deficit. Lacking that, another option would be -- I'm nervous with this option, and we have no official position it, but you know, it's an obvious answer that will come to light, and it has come to light a little bit already -- to form some kind of a body that would perform the oversight function when the settlements are made. Then you have to worry-- Again, my municipal government experience makes me nervous, because who is watching the body who is watching the process? You know, that may be a catch-22 situation that never ends. The clear and efficient way, especially since we need the money so desperately to fix the plants and train the operators, is to shoot it back into the program, not counting what an attorney would need. I do think they would be hard pressed to find an attorney to come in and do it for nothing.

ASSEMBLYMAN COHEN: Corporations are always going to write-off the attorney's fees.

MS. ELSTON: Well, you know when I started thinking--

ASSEMBLYMAN COHEN: They're going to be doing that. Exxon's going to be doing that.

MS. ELSTON: I know.

ASSEMBLYMAN COHEN: They're going to write-off all of those costs, and you're never going to see an ultimate pass-through into the products a year or two later.

MS. ELSTON: I know. It's a very imperfect world. It's a very imperfect world. When I realized that, you know-- I'm half a century old now, and I'm still constantly amazed at how naive I can be, because I didn't realize that on day one. I realized that somewhere along the way. And when I realized that, unfortunately, a light bulb went on in my head. It said to me, "There must have been a concession made way back when the Federal act was passed."

But wouldn't it wonderful if we could really call a spade a spade? Say, "Hey polluter, you're going to pay; and

you're going to pay so badly that you're not even going to be able to write it off." I'd love to see that, but I'm trying to be realistic. I doubt if we could ever get it. If you want to try for it, I'll be behind it 100%.

ASSEMBLYMAN COHEN: Well, maybe some corporations will ultimately have to answer to their shareholders when they continue to be hit with large fines and--

MS. ELSTON: That's right.

ASSEMBLYMAN COHEN: --bad press.

MS. ELSTON: That's right.

ASSEMBLYMAN COHEN: I'm just surprised that any organization or affiliate of the Sierra Club-- The Sierra Club being known to bring citizen suits in State and Federal courts all over this country, and being instrumental in promulgating new legislation, court cases decided that there would be a separate group, or a dissident group that would in some way oppose, in any fashion, citizen lawsuits.

MS. ELSTON: We aren't opposing them. We are supporting them and saying-- We're working on a State issue here, and we're supporting the national premise and the State premise, but saying, "We haven't looked at it closely enough. We need to fix it, because it's not working in this State."

I'll tell you one instance as to how it's not working. It's not working when a corporation settles and deposits the money in settlement into a tax-exempt organization only to have, at some later date, that same money be dispensed to an organization that's not tax-exempt. The write-off has occurred, and the public isn't profiting. These really are public moneys.

SENATOR VAN WAGNER: Can you cite- You're making some very serious allegations which are fairly new to me, and I think Mr. Cohen is concerned about that too. This is the first time that I heard of this. Are you saying that the Sierra Club or yourself, that you have proof that moneys that have been

awarded for settlement of these suits have been, in fact, deposited by corporations into nonprofit corporations, and the money siphoned off in other directions, other than for what the judge awarded?

MS. ELSTON: I'm not saying that for the Sierra Club, because I wasn't representing the Sierra Club when I experienced that. But I'm saying, yes, I experienced that; and I don't have the proof here with me today. In order to protect my own existence, I would like to give that to you at another occasion. I would like to have it worded properly. I have it. I thought you had it, too. If not, it's simple to get it to you.

SENATOR VAN WAGNER: No. This is the first I've ever heard you say this. I was not aware-- Mr. Smith and I have said that we supported-- We have a resolution, I believe, that we're going to ask the Congress not to allow cleanup costs and costs that are incurred as a result of the spill, to be written off in the usual course of doing business. I sense you support that.

MS. ELSTON: Yes sir.

SENATOR VAN WAGNER: But I-- This the first I've heard that there are actual moneys in settlement -- cases that have been settled -- that are taken and siphoned off into a fund in a nonprofit organization and not used, I guess, for the purpose that they are supposed to be used. I don't have anything, any proof, of that anywhere. But if you have, I would certainly like to see it.

MS. ELSTON: I have, and you'll get it.

SENATOR VAN WAGNER: Thank you. I would also point out to you, in section 10, on page 31 of the bill, it states, "In any action under this act the court may, in appropriate cases, award to the prevailing party reasonable counsel and expert witness fees, but not to exceed a total of $50,000 in an action brought against a local agency." It says, "The fees

shall be based on the number of hours reasonably spent and a reasonable hourly rate for the counsel or expert in the action taking into account the prevailing rate in the venue of the action and the skill and experience of the counsel or expert." So apparently the court does exercise oversight over these moneys.

MS. ELSTON: To award those legal fees, and expert witness fees. But then there's the rest of the money, as the man on the radio says. It's the rest of the story.

You know, the other thing to think about here is that-- I think it's safe to assume that were this law to have been passed last session, or should it be passed in its current form this session--

SENATOR VAN WAGNER: You're talking about settlements?

MS. ELSTON: Right. But, if we got this law, or get this law in its current form on the books, municipalities and corporations will come in heavily with litigation to dispute it. So, if we were worried about uncapped legal fees and unmonitored settlement moneys in the past. With regard to the legal fees, we're going to have to worry even more because there's going to be substantially more litigation, if we are to believe what's been said by people testifying before you and others, over the past year.

ASSEMBLYMAN COHEN: On the other hand, the lower the legal fees and the lack of funds available to a prevailing party will chill any citizen's right to bring a suit.

MS. ELSTON: Right.

ASSEMBLYMAN COHEN: No one will file suit, things will go unattended, the environment will be degraded, and everything will be fine.

MS. ELSTON: No, everything won't be--

ASSEMBLYMAN COHEN: That is the problem with capping it at $10,000.

MS. ELSTON: Right. I'm not saying cap it at $10,000. I'm not saying cap it at $50,000. The club doesn't have a position on that. Phyllis Elston thinks that it's unrealistic to say that legal fees couldn't be capped. I don't thing $10,000 is realistic. I don't think you would get a lawyer-- You know, I have a lot of experience being sued on the municipal level, so I know what it costs to get these experts in. They aren't cheap. We need enough money. We do have to be able to have the money to hire those on. But that the court shall, and should, monitor. But then there's the rest of the settlement. What?

ASSEMBLYMAN COHEN: The court does. The court ultimately makes that decision based upon certifications submitted as to services rendered--

MS. ELSTON: Right.

ASSEMBLYMAN COHEN: --and to determine whether reasonable and necessary expenses is part of the litigation. So there is judicial oversight, specifically on any litigation.

MS. ELSTON: On the lawyers' fees, which are currently uncapped under the Federal--

ASSEMBLYMAN COHEN: And on experts' fees.

MS. ELSTON: Right, on experts' fees. But then there's the rest of the settlement money which is unmonitored and unclear where it goes.

ASSEMBLYMAN COHEN: But you'll be telling about that later?

MS. ELSTON: Right. You know, it really doesn't-- You must realize the precariousness of my position. You have to realize I've got 20 years of credibility to protect. You must realize that if I weren't frightened deep down in my bones about this, I wouldn't be standing here saying it. It's not pleasant, and I'll be attacked for doing it. I've been attacked for doing it in the past, when I left a paying job, and continued to work in Trenton for no salary, because it's that important. It's very important.

Those of us who work for the environment don't have a lot of money. Even when we're paid, we're not well paid. What we always do think we have is being on the side of right. We have trust, because you're on the side of right when you are working for the environment. You almost get to cloak yourself in it. That's a heavy responsibility. It's as heavy as the responsibility for public trust that an elected person has. We should keep that mantle as clean as we possibly can. I don't think that's happening right now in the State of New Jersey. But that is the subject, I think, of another hearing.

SENATOR VAN WAGNER: Well, that may be so, but what you're saying is very serious.

MS. ELSTON: I know.

SENATOR VAN WAGNER: What you're saying to me, to this Committee -- and maybe my attorney colleagues can clarify it for me -- is that settlement moneys, other than attorneys' fees and expert fees that have been made in awards by courts, have gone into funds which are not used for the purpose for which the settlement was awarded. And that that has happened here in New Jersey, particularly; that you have been attacked for saying so. I have never heard you say this before, so you have to excuse me. I would like to know where those instances have taken place--

MS. ELSTON: Okay.

SENATOR VAN WAGNER: --because whether or not that's the subject of this hearing, it is a subject for the Committee that I Chair, and the Committee that Assemblyman Smith Chairs. So I would like to, if I could, find the specific instances that you can point to, where an award was made and the money -- other than attorneys' fees and expert fees that were accounted for by the court -- where the rest of that money went somewhere else. I would really like to get my hands on that, because I know we would want to sit with Mr. Del Tufo and anyone else in the State law enforcement area, and bring some very serious

actions against these people and anyone in government who might have let this go on, as a matter of fact. So I would really, hopefully, like to see this. I know the members of the Committee certainly would.

MS. ELSTON: The lack of oversight and accountability has been something that has happened -- as far as your legislative view, I am sure -- in an accidental manner. With everything that needs to be paid attention to, this hasn't been paid attention to. It has taken this renewed activity for revised legislation to focus attention on it.

What I'm saying, Senator, is that there hasn't been accountability and it's been so bad-- I will say this to you -- because I have no fear of saying this right now, because it's my experience -- I have seen people involved in that process laugh out loud, saying, "Don't worry about it. Nobody looks over your shoulder, and nobody knows where it goes."

SENATOR VAN WAGNER: Well, I'm certainly going to find out about this, because what you are saying is a very serious thing.

MS. ELSTON: I realize that.

SENATOR VAN WAGNER: Obviously the Legislature is not aware of settlements in these cases. We're not reported to on what case was settled.

MS. ELSTON: Nor is the general public. That's the sad thing.

SENATOR VAN WAGNER: But apparently somebody in the government knows about it, or at least, in the last government knows about it. I don't think there have been any settlements recently. I'd like to find out, if that's the case, who in the government is responsible for not making sure the moneys that were paid in damages were, in fact, paid into a fund of some type? When they were paid into that fund, someone did not make sure that the money was used appropriately. I want to get to the bottom of that. I mean, that is a serious thing.

MS. ELSTON: It's an oversight on oversight.

SENATOR VAN WAGNER: I think it's more than an oversight. It seems to me, from what you're saying, to be something that is very deliberately done.

MS. ELSTON: No, I disagree with you. I don't think it has been deliberate. I think it has been a flaw in the legislation.

SENATOR VAN WAGNER: Well, if somebody says, in a settlement as you just stated, "Don't worry about a thing--"

MS. ELSTON: Oh. Okay, that's not been accidental. That has not been accidental.

SENATOR VAN WAGNER: No matter what legislative enactment you make, it's not going to mean anything.

MS. ELSTON: No, that wasn't legislative.

SENATOR VAN WAGNER: I don't understand how you legislate the fact that, other than to say, "Make sure it goes into this fund"? How, if someone wants to avoid it going into that fund-- (bell interrupts conversation) I wonder what they do in here between bells? Jeez, it's been a long time since I taught, but I don't ever remember hearing that many bells at one time.

MS. ELSTON: Me too.

SENATOR VAN WAGNER: You know, you talk about legislative oversight, and it's a flaw in the legislation-- What flaw are you talking about?

MS. ELSTON: The open ended--

SENATOR VAN WAGNER: What bill do we have that has a flaw in it that allows this money to float somewhere?

MS. ELSTON: Unfortunately, apparently the Federal Clean Water Act--

SENATOR VAN WAGNER: Oh, Federal legislation?

MS. ELSTON: --which is what's being used right now, when citizen suits are articulated here in New Jersey. Now when we get the State one on the books, if we can close that loophole, we'll have accountability.

I have no staff. I work on State issues, and any one of those State issues can keep an army busy all day, everyday, all year, for their lifetime. I don't work on Federal issues, but you can't work on this clean water issue in this State without becoming familiar with the Federal Clean Water Act. Because I used to be executive director of an environmental organization in the State of New Jersey, I am aware of it, and I'm aware of the fact that there isn't accountability and oversight for whatever reasons, God knows. We'd have to go back and ask those who worked on it in 1972, who were in Congress at the time.

What I'm begging you please, is let's not make the same mistake in New Jersey. Let's get that money into the enforcement program after the cost of the suit; after the lawyer is paid; after the expert witnesses have been paid. Let's keep a handle on that money by putting it where we so desperately need it, into the Enforcement and Operators Training Funds. Let's treat citizen suits, outside of the expenses for the experts and the lawyers, just like departmental suits -- for the good of the State and to efficiently and finally get clean water.

SENATOR VAN WAGNER: Thank you..

MS. ELSTON: You're welcome.

SENATOR VAN WAGNER: Would you submit your information, please, to the Committee on where the money is being diverted?

MS. ELSTON: Yes, I will.

SENATOR VAN WAGNER: Thank you.

ASSEMBLYMAN SMITH: Is Mr. Eric Cramer here? Mr. Cramer?

E R I C C R A M E R: I'm speaking as a citizen of New Jersey -- somebody who grew up in New Jersey, and went to high school and college in New Jersey. I don't have a biology or chemistry degree, I have a politics degree. But I'd like to make a

comment about a lot of the scientific evidence that we have heard today.

From what I've learned from studying politics it's not what science, but whose science. I think we've heard a lot of science from chemical experts and biology experts, on the part of business and industry, and on part of the chemical industry that is bias. We have to look at where it's coming from. It's coming from people whose dollars -- whose money -- come from protecting an industry.

The first thing I'd like to do is start out with an anecdote. I wish I heard some of the arguments that the opposition has put forth today before I got caught for speeding last night. I could have used them; I could have argued, "Well it's not the speeding that causes accidents, it's really the non-car sources, like potholes and rocks falling, that cause all of the accidents. So Mr. Policeman, why don't you go after those things? Don't come after me for speeding." Or I could have argued, "It was my foot that slipped on the accelerator, and it's really not my fault. I couldn't comply with the speed limit. It's just not possible for me to do." Or I could have argued, "The limit" -- the speed limit of 55 or 25, or whatever it happened to be -- "was set knowing that I wouldn't be able to comply with it. So therefore, don't write me a ticket. It's not worth it. You shouldn't write me a ticket." That seems to be the logic behind the argument of the opposition.

What I would like to do is point out three observations -- just general observations about what I've heard today.

The first is an oxymoron that ranks up there with military intelligence. That is safe pollution. I really don't know what it is; I don't know what it means. Whenever a toxic is dumped into the environment, be it in a sewer, in a lake, in a river, or in an ocean, it doesn't disappear. It's with us forever. It goes into the food chain; it ends up in human

beings; it ends up in our society, whether it's destroying the environment, humans, or business. It doesn't disappear.

I think, the term "safe pollution"-- The reason why we've come to sort of accept that term, is because society right now accepts death. We accept that there will be a certain amount of deaths as a direct result of pollution. We accept that if we have a certain amount of air pollution, there will be one death in 10,000. We accept that as a society. So, when you say safe pollution, you mean pollution that only causes 10 deaths in 100,000, not one death in 100,000. But it's not really safe, it's just safer. I think we should look at that when we're looking at what permit limits are and what they do.

The second observation I have is that we're in a high school here-- I don't know, when I went to high school we were taught that we were supposed to follow the law; that laws were set for a reason; permits were set for a reason. What we're seeing here -- and what high school students, if they came in here would see -- is that laws are set for certain people and permits are set for certain people, but if you're a big business or industry, or if you're running a sewage treatment plant, then you don't have to follow those laws because it doesn't really matter, or the laws weren't even set for you to comply with in the first place. So, therefore, you don't have to comply with them.

What are we teaching people in our society when we say there's a permit that is set? But it's not even set for you to comply with. You don't have to comply with it. It wasn't even meant for that in the first place. It's just there as a nebulous limit that they could cross over or not cross over. I think we should look at that when we're looking at the Clean Water Enforcement Act as well.

The last observation I would like to make is that the society right now is having a war on drugs, or supposedly

going after and trying to stop children from ingesting chemicals into their bodies; from destroying themselves with dangerous drugs and chemicals, all over the schools and all over the country. Yet, we're allowing government sewage treatment plants, industries, and chemical companies in New Jersey to dump similar substances, similar toxics to the human body, into our environment. We allow that to be drunk in insidious fashions. It comes in our water supply. It comes out on our beaches. It seems to me a hypocrisy that on the one hand we're fighting this war on drugs because we don't want dangerous chemicals being ingested into the society of Americans; and on the other hand, we're saying, "Well, if you're a big business and industry, this type of dangerous toxic, these types of dangerous chemicals, don't matter anymore."

The last thing I would like to conclude with is really to use the one part per billion and two part per billion point that one of the people from business -- the chemical industry, I think -- brought up. He said, "Well, there's no real difference, if it's one part per billion or two parts per billion." But you have to look at what that translates into. It translates into maybe, one more death per 10,000 or two more deaths per 10,000. It's not safe pollution you have to remember. It's pollution that ends up causing deaths or damage somewhere. Two deaths per 10,000 is another 800 people who die every year in New Jersey. So you have to look at that when you're looking at what safe pollution is and when you're looking at the Clean Water Enforcement Act.

I really think that the Clean Water Enforcement Act is the least we can do here in New Jersey. It's the least step that we can take, so please vote for it in the strongest fashion.

ASSEMBLYMAN SMITH: Thank you, Mr. Cramer. Dolores Phillips from the New Jersey Environmental Lobby. Dolores, are you here?

UNIDENTIFIED MEMBER OF AUDIENCE: She stepped outside.

ASSEMBLYMAN SMITH: Okay. In that case Cindy Zipf, Steve Sutner, Manny Dossell from the Clean Ocean Action.

UNIDENTIFIED MEMBER OF AUDIENCE: They submitted their testimony in writing.

ASSEMBLYMAN SMITH: Their testimony has been submitted. I gather there is no one further here from Clean Ocean Action? (no response) Cynthia Poten, Delaware River Keeper. Cynthia, are you here?

UNIDENTIFIED MEMBER OF AUDIENCE: No.

ASSEMBLYMAN SMITH: All right. Well, if someone would check to see if Dolores is outside and wishes to speak, I would appreciate it. Is there anyone else in the audience, while we are waiting, who has a comment they would like to make? (no response)

UNIDENTIFIED MEMBER OF AUDIENCE: She'll hold the opportunity for another time.

ASSEMBLYMAN SMITH: This may be the last public hearing.

UNIDENTIFIED MEMBER OF AUDIENCE: On this bill?

ASSEMBLYMAN SMITH: Yes.

UNIDENTIFIED MEMBER OF AUDIENCE: That would be terrific.

ASSEMBLYMAN SMITH: All right. There being no further public testimony, the hearing on the Clean Water Act is now closed. Thank you for your kind attendance.

(HEARING CONCLUDED)

APPENDIX

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF ENVIRONMENTAL QUALITY
JOHN FITCH PLAZA, P. O. BOX 2007, TRENTON, N. J. 08625

March 13, 1975

Edgeboro Disposal Inc.
39 Edgeboro Road
East Brunswick, New Jersey 08816

Gentlemen:

This is to advise you that your landfill facility along with nine other sites in the state has been designated as a disposal point for emergency clean-up of oil-spill debris. Acceptance of these wastes will be required when you are so requested by Mr. Karl Birns or his designee of the Bureau of Water Pollution Control. This Bureau is in charge of oil spill clean-up.

If your current tariff on file with the Public Utilities Commission does not reflect this type of service, you should immediately file for this service in accordance with the rules and regulations of this agency.

Your cooperation will be appreciated in helping to solve these emergency situations.

Very truly yours,

Bernhardt V. Lind
Chief
Bureau of Solid Waste Management

CEG:omt
cc: K. Birns, Div. of Water Resources
L. Gaeta, Public Utility Commission

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IX

P.O. BOX 2007 TRENTON, N.J. 08625 Form VSW 005 1/7A

SOLID WASTE FACILITY

INSTRUCTIONS: READ CAREFULLY PRINT OR TYPE

1. Enter your Registration Number and Name from Section B, or if new, enter only name from Registration Statement, on each side of this form.
2. Enter tonnage for solids and gallons for liquids of wastes disposed of at your site for the period January 1, 1975 to December 31, 1975.
3. Enter tonnage for solids and gallons for liquids for all reclaimed materials for the period January 1, 1975 to December 31; 1975 on reverse.
4. Make entries to nearest whole ton or gallon and enter totals.

ENTER YOUR NAME HERE → EDGEBORO DISPOSAL, INC.

ENTER YOUR REGISTRATION NUMBER HERE → 1204-A

A. Disposed Wastes

WASTE ID.	SOLIDS		TONS
10.	Municipal (Household, Commercial)	10.	301,785
11.	Institutional	11.	
12.	Dry Sewage Sludge	12.	
13.	Bulky Waste	13.	13,324
14.	Construction and Demolition	14.	15,652
15.	Pesticides – Dry	15.	
16.	Hazardous Waste Containers	16.	
17.	Hazardous Waste – Dry	17.	
18.	Chemical Waste – Dry – Non Hazardous	18.	
19.	Junked Autos	19.	
20.	Tires	20.	10,916
21.	Dead Animals	21.	
22.	Leaves and Chopped Tree Waste	22.	1,227
23.	Agriculture Vegetative Waste	23.	
24.	Tree Stumps	24.	3,478
25.	Food Processing Wastes	25.	
26.	Oil Spill Clean-Up Wastes	26.	1,150
27.	Industrial (Non Chemical)	27.	19,820
	Total Disposed Solids		367,352

	LIQUIDS		GALLONS
70.	Waste Oil	70.	186,000
71.	Semi Solid Waste Oils and Sludges	71.	474,000
72.	Bulk Liquid and Semi Liquids	72.	984,000
73.	Septic Tank Clean-Out Wastes	73.	
74.	Liquid Sewage Sludge	74.	2,400,000
75.	Pesticide Liquids	5.	
76.	Hazardous Waste Liquids	6.	
77.	Chemical Waste Liqui	7.	
			4,044,000

FOR OFFICE USE ONLY

3

2X

... your Registration Number here → 1206-A

B. Reclaimed Wastes

WASTE ID.	SOLIDS	TONS	
50.	Ferrous Metals	50.	
51.	Non-Ferrous Metals	51.	
52.	Newsprint	52.	
53.	Corrugated	53.	
54.	Other Paper Products	54.	
55.	Glass	55.	
56.	Chemicals – Dry	56.	
57.	Plastics	57.	
58.	Tires	58.	
59.	Junked Autos	59.	
	Total Reclaimed Solids		Tons

	LIQUIDS			
90.	Oil ....Road. Dust .Control.	90.	186,000	
91.	Chemical Solvents	91.		
92.	Other Chemical Liquids	92.		
	Total Reclaimed Liquids			Gals.

I CERTIFY THAT THE INFORMATION SUBMITTED ON BOTH THE REGISTRATION AND THE OPERATIONAL STATEMENTS AND ALL ATTACHMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE.

DATE 6/25/76 SIGNATURE Harold L. Hubert TITLE Pres.

Re: Application of Oil and Oil/Water Mixtures for Dust Control

Dear Sir:

This document shall serve as official notification to you that the application of oil or oil-water mixtures for roadway dust control is PROHIBITED.

Furthermore, be advised that any discharge of oil or any other hazardous substances onto the lands or into the waters of this State may be a violation of the Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.), the Water Pollution Control Act (N.J.S.A. 58:10A-1 et seq.), an/or the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.), with potential penalt of up to $25,000 per violation per day.

In addition any intentional discharge of a hazardous substanc could involve potential criminal penalties of 5-10 years imprison ment under the New Jersey Code of Criminal Justice (N.J.S.A 2C:17 et seq.).

very truly yours,

Lino F. Pereira

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF ENVIRONMENTAL QUALITY
JOHN FITCH PLAZA, CN 027, TRENTON, N. J. 08625

Lino F. Pereira
Assistant

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State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SOLID WASTE ADMINISTRATION

TRENTON, 08625

BEATRICE S. TYLUTKI

DIRECTOR

May 16, 1978

Mr. William Johasz
Parker Andrews Inc.
U.S. Route 130
Dayton, NJ 08810

Dear Mr. Johasz:

Pursuant to our conversation today concerning ~~oil~~ contaminated soil which was dumped without permission of the Solid Waste Administration at the South Brunswick Township Landfill, we require the above material be removed and disposed at the Edgeboro Sanitary Landfill as oil spill cleanup debris.

In the future, any wastes generated by your facility should be hauled only by State registered collector/haulers to State approved disposal facilities.

Should you have any further questions, please call me directly.

Sincerely,

Michael Rosenberg
Assistant Environmental Engineer

cc: Jerry Bitner
Jim Benson
Edgeboro Disposal

10

4X

SCA SERVICES, INC.
MID-ATLANTIC REGION
Northern Division
1099 Wall Street West
Lyndhurst, New Jersey 07071
(201) 935-7850

SCA SERVICES

January 18, 1979

Mr. John Timofae
Tomae
P.O. Box 5101
Newark, NJ 07105

Dear John:

This letter will serve to confirm that Avon Landfill, Lyndhurst, New Jersey, has made arrangements with Harold Herbert of Edgeboro Landfill in New Brunswick, New Jersey, whereby Edgeboro will receive approximately 1,000 cubic yards of waste water treatment plant sludge for disposal. It is understood that the sludge is generated by the Ford Motor Company assembly plant in Mahwah, New Jersey.

Edgeboro Landfill will be prepared to start receiving this waste on Monday, January 22, 1979.

Very truly yours,

Anthony D. Gaess

ADG/ak

cc: Frank F. Viola

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MEMORANDUM

State of New Jersey
Department of Environmental Protection

TO: Ron Corcory

DATE: April 16, 1980

FROM: Kevin Cashlin

SUBJ: Edgeboro Landfill Surveillance

On the above date, George Smajda, East Brunswick police officer Tony Tabaszewski and myself were engaged in observing incoming waste to the Edgeboro fill. During the day, incidents of indiscriminate and questionable disposal practices occurred. The first involved discovery of a 6' X 6' X 4' pile of black and purple sludge and six 5 gallon cans. The cans were labeled in Spanish and indicated that the contents was a herbicide manufactured by American Cyanamid. The trade name FINAVEN is used on the label. The chemical identification and environmental consequences of the herbicide is not known at this time. All of the cans were nearly empty, but two contained a bright purple liquid. The liquid foamed slightly when agitated, the bubbles displayed the spectrum. A stencil on the can indicated that they had been at Con-De-Lux in Laredo, Texas. Samples of both waste types were taken for analyses.

After contacting landfill owner Jack Whitman and one of the landfill operators, it was determined that BFI of Fairfield had hauled the waste from American Cyanamid in Bound Brook. This was verified by Landfill ticket #368515 dated March 28, 1980 which was assigned by Cyanamid and signed by Harry S. The waste was deposited at the location on the attached sketch.

Peter Horhuty of BFI was notified that the material was of a questionable nature. He dispatched a roll-off container to isolate the material until identification could be made. Cyanamid representative Sid Frankel arrived at the site for that purpose. He could not be certain of the waste types or even that the load came from Cyanamid, but he took samples of both types for their corporate labs to identify. Appropriate action will have to await an interpretation of samples and other pertinent facts.

The second incident occurred simultaneously with the first. A tractor trailer (license #N.J. XRH-13E and TR-791M, respectively) was stopped by George which contained drums. The driver, Larry Jacobs of 103-30 168 Place, Queens, New York had in his possession an invoice from a firm called Patterson Chemical Company, 102 Third Street, Brooklyn, New York. The invoice listed Patterson as hauler, Photo Circuits of Riverhead, New York as generator and the waste type as hard paint, a non-hazardous solid. The owner of Patterson Chemical is Moe Stone who resides at the Patterson address. He contended that Mike Rosenberg issued written permission for dumping of hard paint. The letter was not in the truck, nor in Stone's possession.

SAMPLE #'S
A0138
A0139
A0140
A0141

20

CX

Upon examination of the drummed contents, it became evident that the Patterson invoice was fraudulent. Smajda and I examined approximately half of the eighty-eight (88), 55 gallon drums. Many of the drums were punctured near their tops. Others were unsecured open head type steel drums. The waste observed was of four basic types. (No odors were detected because we were wearing respirators equipped with organic vapor cartridges). Samples of each type were retrieved:

1. Eight drums of grey-off white powder located at the very rear of the trailer. The drums were blue in color and were the only containers observed which contained a purely solid material. Sample #'s C1357

2. Most drums contained a varied amount of liquid and solid mixture. The majority were full. The liquid was thin, opaque and varied in color from blue-green to grey to a caramel color. It was similar to paint wash or thineer. The solid was granular. It may be a paint sludge or filter acid. The sample was a mix of grey liquid and silver-grey solid. Sample #'s C1341

3. A beige and grey semi-solid with elastic properties. The drum sampled was topped with a thin layer of wood chips and sawdust. This drum was near the front of the trailer. Only two of this waste variety were found. Sample #'s C1352

4. An amber, transparent liquid. It was somewhat viscous and reminiscent of lubricating oil. This singular drum released pressure when opened. It was located five rows from the trailer rear and had a red top. Sample #'s C1340

Due to the obvious inconsistencies in alleged and actual drum contents, they were not allowed to enter the landfill. The trailer load was consigned back to Patterson Chemical on N.J. manifest #45301 (see attached). The ultimate disposition will be determined after correspondence between Stone and Photo Circuit. Stone was instructed to manifest the material wherever it is disposed of. Other pertinent information concerning the principles in this case is available through Craig Perrelli and Jim Monticello of criminal justice. They performed interviews with Stone, Jacobs and a third unidentified man employed by Stone.

The generator and hauler are considered to be in violation of the following regulations according to the rules of the Solid Waste Administration, N.J.A.C. 7:26-1 et seq.:

12-31

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

[illegible] PLAZA, CN027, TRENTON, N.J. 08625

SOLID WASTE ADMINISTRATION

GEORGE J. TYLER
DIRECTOR

May 28, 1980

Mr. Frank Herbert
Edgeboro Disposal Inc.
39 Edgeboro Road
East Brunswick, NJ 08816

Dear Mr. Herbert:

This letter is to serve as authorization for the Edgeboro Disposal Sanitary Landfill to accept for disposal certain solid wastes as designated by the DEP resulting from the clean-up of the A-Z chemical property in New Brunswick.

This waste consists of solid (water-based) latex, rags and other miscellaneous debris. The total quantity will be approximately five hundred (500) cubic yards and will be hauled by Mid Atlantic Refinery Services. Each load will be inspected prior to shipment and will be accompanied by a DEP inspector.

This letter is valid for sixty (60) days from the above date and is non-transferable.

Should you have any further questions concerning this matter, please contact Michael Rosenberg of my staff directly at (609) 292-9877.

Very truly yours,

Ralph Pasceri

Ralph Pasceri
Chief
Bureau of Hazardous Waste

RP:hjg

cc: Director Tyler
Director Giardina
Assistant Commissioner Arbesman

24a

8X

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF ENVIRONMENTAL QUALITY
SOLID WASTE ADMINISTRATION
32 EAST HANOVER STREET, TRENTON, N. J. 08625

SOLID WASTE ADMINISTRATION

JACK STANTON
DIRECTOR

LINO F. PEREIRA
ADMINISTRATOR
SOLID WASTE MANAGEMENT

Terminal Manager
Celanese Chemical Co.
354 Doremus Ave.
Newark, New Jersey 07105

March 12, 1981

Dear Sir:

This letter is being sent to you as a request for information concerning certain disposal practices employed by your company. The attached New Jersey Special Waste Manifest, A 32248, indicates that 23,800 pounds of "Still Bottoms (Formaldehyde)" were dispatched from your plant on 5/31/79 for disposal at the Edgeboro Landfill in East Brunswick, N.J.

I would appreciate it if you would please send me a detailed chemical and physical description of the waste material described on Manifest A 32248. Did your company make arrangements with Edgeboro Landfill personnel for this disposal? If not, who made the arrangements for this disposal practice? Did "Covino's" haul the material on Manifest A 32248 (see section III) or did "Astro Pak" (see section I)? If you have manifested more than one shipment of material to the Edgeboro Landfill please detail these shipments, including manifest numbers, names of haulers, dates and a description of the wastes involved.

The reason this letter is being sent to you is that East Brunswick (N.J.) officials have voiced concern over the types and quantities of wastes that have been disposed of at the Edgeboro Landfill which is located in their Township. I trust that this request for information will be processed in an expeditious manner. I am looking forward to receiving your response soon. If you have any questions on this matter please contact me at 609-292-9877. Thank you.

Very truly yours,

Jonathan D. Berg

Jonathan D. Berg
Bureau of Hazardous Waste

JDB:cmc

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NL/EP 12-31

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

DIVISION OF ENVIRONMENTAL QUALITY
SOLID WASTE ADMINISTRATION
32 EAST HANOVER STREET, TRENTON, N. J. 08625

JACK STANTON
DIRECTOR

LINO F. PEREIRA
ADMINISTRATOR
SOLID WASTE MANAGEMENT

March 12, 1981

Mr. Steve Berte
Consolidated Diesel
1700 Post Road
Old Greenwich, Conn.

Dear Mr. Berte:

This letter is being sent to you as a request for information concerning certain disposal practices employed by your company.

The attached New Jersey Special Waste Manifest, A42004, indicates that 27,000 pounds of "paint and pigment residues" were dispatched from your plant on 3/27/79 for disposal at the Edgeboro Landfill in East Brunswick, N.J.

I would appreciate it if you would send me a detailed chemical and physical description of the waste described on Manifest A42004. Did your company make arrangements with Edgeboro Landfill personnel for this disposal? If not, who made these arrangements for you? If you have shipped more than this one load to the Edgeboro Landfill, please detail these shipments (manifest numbers, dates, haulers, description of wastes.)

The reason this letter is being sent to you is that East Brunswick (N.J.) officials have voiced concern over the types and qualities of wastes that have been disposed of at the Edgeboro Landfill which is located in their Township. I trust that this request for information will be processed in an expeditious manner. I am looking forward to receiving your response soon. If you have any questions on this matter, please contact me at (609) 292-9877. Thank you.

Very truly yours,

Jonathan D. Berg.

Jonathan D. Berg
Bureau of Hazardous Waste

JB:dt

31

10X

New Jersey Is An Equal Opportunity Employer

DWEC # _____

DIVISION OF WASTE MANAGEMENT
--ENFORCEMENT LOG

CASE NAME: Edgeboro

DATE	SYNOPSIS
5/23/82	Amerada Hess – asbestos
6/22/82	BFI Waste System – asbestos
5/26/82	Exxon – asbestos
6/0/82	Cousins J & J, ortho material non-Hazardous
11/17/82	Rust & Industrial – Spill aqua ammonia
11/23/82	Analytical & Incident Reports
11/30/82	Incident Report
12/[illegible]/82	" " – odors
12/13/82	Odor Problems
5/27/82	Memo Smajda to Rogelski Problems at Edgeboro
4/28/82	BFI Waste Systems – asbestos
4/19/82	" " " "
3/25/82	" " " "
3/17/82	Hoffman-La Roche – asbestos
3/30/82	BFI Waste Systems – "
4/8/82	" " " "
4/20/82	" " " "
3/16/82	Exxon – asbestos
4/5/82	BFI Waste Systems asbestos
5/13/82	Federle – asbestos
4/14/82	Olson & Harrold – asbestos
5/12/82	" " "

11X

MIDDLESEX COUNTY UTILITIES AUTHORITY
P.O. BOX B-1, SAYREVILLE, NEW JERSEY 08872
201-721-2800

January 12, 1990

Olympic Construction Co.
515 Washington Road
Parlin, NJ 08859

Re: Block 834, Lot 4.110
Edgeboro Road
East Brunswick, NJ

Gentlemen:

In conducting various monitoring activities requested by the New Jersey Department of Environmental Protection, the Middlesex County Utilities Authority ("MCUA") has received information from its consultant of a potentially dangerous condition which may affect your property. Test results show the presence of methane in quantities which exceed the 25% Lower Explosive Level ("LEL").

If this gas were confined in a closed area and subjected to spark or open flame, ignition of the gas could occur. It is possible that uncontrolled ignition of the gas could result in an explosion.

We are enclosing a copy of the preliminary raw data received by MCUA. **You are urged to take all reasonable precautions to protect your interests and insure your safety. This information is being provided to you as a public service and MCUA expressly disclaims any liability or responsibility for such methane gas.** Indications are that the source of the gas causing the concentrations above the LEL is outside the landfill area presently being leased by the MCUA.

If you wish to discuss the matter further or require additional information, please contact Richard Fitamant, Project Engineer at the Authority.

Very truly yours,

Frederick H. Kurtz
Executive Director

FHK:lm
enc.
Certified Mail - RRR and Regular Mail
CC: Mayor Jack Sinagra, East Brunswick Township
Edgeboro Disposal, Inc. - Certified Mail-RRR & Regular
R. Fitamant
Property Occupants - Hand Delivered

12X

State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

DIVISION OF ENVIRONMENTAL QUALITY
SOLID WASTE ADMINISTRATION
32 EAST HANOVER STREET, TRENTON, N. J. 08625

JACK STANTON
DIRECTOR

LINO F. PEREIRA
ADMINISTRATOR
SOLID WASTE MANAGEMENT

November 30, 1981

Mr. John Timofai
A. Tomae and Sons Refuse
Removal
P.O. Box 5101
Ironbound Branch
Newark, NJ 07105

Re: Transportation of Ford (Mahway) Process Waste Water Sludge (20% solids) to Edgeboro Landfill in February, 1979

Dear Mr. Timofai:

This letter is being sent to you as a request for information relevant to the referenced subject. The Department of Environmental Protection is in possession of one hundred sixteen (116) special waste manifests which indicate that Tomae and Sons Refuse noted a total of two million three hundred twenty thousand (2,320,000) from Ford's Mahwah Plant to the Edgeboro Landfill in East Brunswick, New Jersey, over a period of nine days.

For the period in question (February 1, 1979 through February 9, 1979) Tomae and Sons had two vehicles that were registered with the Solid Waste Administration to haul waste (see attached copy). Logistically, it is impossible that the two permitted vehicles hauled all this material to the Edgeboro Landfill over a nine day period. Attached to this letter you will find Ford's quarterly manifest report, which in past details the transactions described within this letter (refer to pages 4, 5, 6). Said report describes the quantity, manifest number and transportation date of each load. It is required that you provide the following information for each manifest number on this list (116 manifests total):

1. Type of vehicles used;
2. License plate of each vehicle used (both tractor and trailer);
3. Owner of each vehicle used (both tractor and trailer);
4. Address of owner of each vehicle used (both tractor and trailer);
5. Name of driver and address.

In addition you are to provide the following information:

1. Copies of all contracts, receipts, bills, bills of lading, cancelled checks relevant to the described disposal transactions.

2. Copies of all correspondence between Tomae and Sons, Ford, Edgeboro Landfill relevent to the described disposal transactions.

3. Copies of all analyses (both chemical and physical) in the possession of Tomae and Sons of the material hauled from Ford's Mahway plant to the Edgeboro Landfill in February, 1979.

Submission of the requested information is required within fifteen (15) days from your receipt of this letter. If you have any questions concerning this matter, please call me at (609) 292-9877. Thank you.

Very truly yours,

Jonathan D. Berg

Jonathan D. Berg
Bureau of Hazardous Waste

JDB:hjg

Attachment

Feb - 13, 1990

Mr. Chariman:

My name is Julian Capik, I reside at 76 Roosevelt Blvd. in Parlin, N.J. I am a member of the Middlesex County Environmental Coalition.

Dead birds along the Arthur Kill river after the Exxon oil spill in January, thousands of dead fish off Long Island Sound in 1988, the devastated clamming industry in New Jersey, and the dead dolphin and trash along New Jersey beaches should be a reminder that our polluted waters may pose a health risk which may be getting out of control.

I would like to address an area before this committee which may shed some light as to how pollution gets into our potable water and marine food chain.

Middlesex County is the home of Edgeboro landfill, which borders two rivers, wetlands, and sits over a major acquifer, which supplies potable water to a large area of Middlesex County residents and industry. Across the raritan river are closed dumps which are already on the superfund site list.

Because of their location, all of these dumps pose a pollution threat to to our marine food chain and potable water supply.

Although Edgeboro Landfill is specifically prohibited from accepting chemical wastes, oil-spill cleanup wastes, sewage sludge, or sludge of any-kind this type waste was dumped there.

The public record shows that: The New Jersey Department Of Environmental Protection (DEP) allowed itself discretionary power to overide the permit, and letters and manifests attest to the fact that in the past, the NJDEP directed prohibited wastes to this dump.

The practice of permit bypassing by the DEP aan be compared to the recent ignoring, and overiding of spill alarms at the Exxon refinery

On February 12, 1990 (yesterday) the Star Ledger of Newark, printed an article by Art Carlton stating that mercuryemissions at the Warren County incinerator exceeded limits. In other recent news articles reporters wrote that in Minnesota mercury levels from incinerators were so high, that fish advisories had to be issued around lake superior.

High mercury levels in incinerators should be another area of concern because if it is not getting into the atmosphere then it will get into the ash. In a copright article of the Press of Atlantic City this past spring Sludge from an Atlantic County incinerator leached from landfills into adjacent wetlands.

It is important to relate this at this time because the NJDEP is again seeking ways to dump hazardous waste into sensitive landfills. This time by changing the classification of hazardous ash to special waste. As one environmentalist aptly put it: This is linguistic detoxification.

If we are to succeed in cleaning our water then we need a meaningful clean water enforcement act. An act without mandatory penalties is no act. We have to take action to stop the people who are supposed to protect the environment, from making it easier for the polluters to pollute.

I have attached some information from public files which corroborate some of the statements which I have made.

Please do not water down any provision for penalties in the Clean Water enforcement act.

Julian Capik
member of the
Middlesex County
Environmental Coalition

(201) 721 - 4435

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v. "Serious violation" means an exceedance of an effluent limitation for a discharge point source set forth in a permit, administrative order, or administrative consent agreement, including interim enforcement limits, by 20 percent or more for a hazardous pollutant, or by 40 percent or more for a non-hazardous pollutant, calculated on the basis of the monthly average for a pollutant for which the effluent limitation is expressed as a monthly average, or, in the case of an effluent limitation expressed as a daily maximum and without a monthly average, on the basis of the monthly average [~~maximum~~] of all daily maximum test results for that pollutant in any month; in the case of an effluent limitation for a pollutant that is not measured by mass or concentration, the department shall prescribe an equivalent exceedance factor therefor. The department may waive the definition of "serious violation" where there is a substantial basis to believe that the apparent exceedance has occurred due to exceptional circumstances not related to the discharge of a pollutant in excess of permit limits. Exceptional circumstances may include unanticipated test interferences, sample contamination, analytical defects, or procedural deficiencies in sampling, or other circumstances of similar nature beyond the control of the permittee. The department may utilize on a case-by-case basis, a more stringent factor of exceedance to determine a serious violation if the department states the specific reasons therefor, which may include the potential for harm to human

health or the environment. "Serious violation" shall not include a violation of a permit limitation for color;

w. "Significant non-complier" means any person who commits a serious violation for the same hazardous pollutant or the same non-hazardous pollutant, at the same discharge point source, in any two months of any six month period, or who exceeds the monthly average or, in a case of a pollutant for which no monthly average has been established, the monthly average of the daily maximums for an effluent limitation for the same pollutant at the same discharge point source by any amount in any four months of any six month period, or who fails to submit a completed discharge monitoring report in any two months of any six month period except where the person demonstrates to the satisfaction of the department that the failure to submit a complete report was due to the actions or omissions of a third party or other circumstances beyond the person's control. The department may waive the definition of significant non-complier where there is a substantial basis to believe that an apparent exceedance has occurred due to exceptional circumstances not related to the discharge of a pollutant in excess of permit limits. Exceptional circumstances may include unanticipated test interferences, sample contamination, analytical defects, or procedural deficiencies in sampling, or other circumstances of similar nature beyond the control of the permittee. The department may utilize, on a case-by-case basis, a more stringent frequency or factor of exceedance to determine a significant non-complier, if the department states

the specific reasons therefor, which may include the potential for harm to human health or the environment;

Page	Section	Line	Amendments
~~3~~ 4	w.	~~29~~ 30	after "six month period" insert "except where the person demonstrates to the satisfaction of the department that the failure to submit a complete report was due to the actions or omissions of a third party or the circumstances beyond the person's control."
~~21~~	~~4~~	~~9~~	~~after "regulation" delete "except that.....bill"~~
~~19~~ 20	~~x~~ h.	~~4~~ 31	Add at end ~~delete "The....act." insert~~ "The penalty provisions of this section shall not apply to permit limits which have been contested or are subject to adjudication or to permit limitations established in a permit, administrative order, or administrative consent agreement, including interim enforcement limits, or letter of agreement issued or entered into prior to the effective date of P.L. c. (C) (pending in the Legislature as this bill) or a schedule of compliance relating to such permit or letter of agreement for a period of two years after the effective date of P.L. .c. (C.) (pending in the Legislature as this bill); additionally, the permittee shall have the right to reopen permit negotiations on permit limitations which will remain in effect and be subject to the provisions of this paragraph after the expiration of the two year enforcement moratorium.

Page	Section	Line	Amendments
~~25~~ 21	new g	~~at~~ 39	insert "The penalty provisions of this section shall not apply to permit limits which have been contested or are subject to adjudication or to permit limitations established in a permit, administrative order, or administrative consent agreement, including interim enforcement limits, or letter of agreement issued or entered into prior to the effective date of P.L. c. (C) (pending in the Legislature as this bill) or a schedule of compliance relating to such permit or letter of agreement for a period of two years after the effective date of P.L. .c. (C.) (pending in the Legislature as this bill); additionally, the permittee shall have the right to reopen permit negotiations on permit limitations which will remain in effect and be subject to the provisions of this paragraph after the expiration of the two year enforcement moratorium.
~~27~~	10a	3	~~after "fees" insert "but not exceeding a total of $20,000"~~
~~28~~ 31	10a	~~at~~ 30	after "merits" insert "and not trivial or purely procedural success." delete "The fees.....expert."

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NEW JERSEY STATE
CHAMBER OF COMMERCE
Governmental Relations Office
28 West State Street, Suite #1100
Trenton, NJ 08608
(609) 989-7888

New Jersey State
Chamber of Commerce

Clare Schulzki
Associate Director
Governmental Relations

Public Hearing
"Clean Water Enforcement Act"
February 13, 1990

The New Jersey State Chamber of Commerce, representing over 45,000 business members throughout the state, opposes the "Clean Water Enforcement Act" as it is currently written for the following reasons:

* It targets over 15% of industrial facilities and 75% of POTW's and MUA's as "non-compliers" and issues fines and possible criminal prosecution.

* These fines would force towns to increase property taxes.

* It does not address the non-point source pollution, such as storm runoff from roads and developments or combined sewer overflow.

* The bill would eliminate the DEP's discretion in seeking compliance.

* The measure is extremely costly. The DEP would need up to $8 million a year to operate this program. Right now, the State is in a severe financial situation.

We support efforts to correct the knowing and willing violators of our State's water permits. However, we believe that the "Clean Water Enforcement Act" as it is currently written would be ineffective in addressing and solving the real problems that we face with our water supply.

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EDWARD J. BUZAK
Law Offices

MONTVILLE OFFICE PARK
150 RIVER ROAD SUITE N-4
MONTVILLE, NEW JERSEY 07045

(201) 335-0600

FAX: (201) 335-1145

EDWARD J. BUZAK
(MEMBER OF N.J. & D.C. BAR)
JACQUELIN P. GIOIOSO
ROBERT B. CAMPBELL
EVA HESS
JEANNE M. MIKELSON

2-7-90

RECOMMENDED CHANGES IN S-2188/A-_____

SOURCE:	AMENDMENT:
(S) p.4 (Sec. 1) [R.S. 58:10A-3v&w] (S) P.20 (Sec. 6) [New]	1. Mandatory penalties not related to water quality. Continues to assume that a permit violation by 20% for hazardous and 40% for non-hazardous monthly averages constitutes a degradation of water quality. Fails to include "flow" as exceptions (as it does with color). Fails to include waiver provision for exceptional conditions not related to pollutant discharge, i.e. sample contamination, etc.
(S) p.4 (Sec.1) [New]	2. Upset definition in S-2787 is more limited than the original A-3831 relating "other circumstances" defining upset to "other similar circumstances" which seems to limit definition only to "acts of God" types of activities.
(S) p.7 (Sec. 3) [R.S.58:10A-6f(5)]	3. Requires "Significant Indirect Users" to report monitoring results to delegated local agencies. This creates paper managing problem for delegated local agencies.
(S) p.8 (Sec.3) [R.S. 58:10A-6f(8)]	4. Fails to limit required reporting within two hours of a violation of an effluent limit that poses a threat to human health or the environment to a "significant" threat to human health or environment.

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SOURCE:	AMENDMENT:
(S) p.9 (Sec. 3) [R.S.58:10A-6i(1)]	5. Delegated local agency still required to petition County Prosecutor or Attorney General for criminal prosecutions (no discretion). Fails to allow delegated local agencies to impose civil administrative penalties and appeal to Chief Executive Officer of local agency. Instead it requires them to proceed through the Court for civil damages and refer matters to County Prosecutor or Attorney General for criminal matters.
(S) p.12 (Sec.3) [R.S.58:10A-6m]	6. Increase from 30 days to 60 days time within which inspection is to take place after identification as significant non-complier.
(S) p.12 (Sec.3) [R.S.58:10A-6n]	7. Delegated local agency must still perform priority pollutant scan annually. Should read not more than once annually. Annual inspections should commence 13th month after effective date of Act.
(S) p.14 (Sec.4) [R.S.58:58:10A-7d]	8. Change to limit appeals of determinations of Commissioner to permittees and delete rights of third parties to participate.
(S) p.15 (Sec.3)[R.S. 58:10A-10c] (S) p.28 (Sec.13) [New]	9. Fails to provide for 10% of fines and penalties collected by NJDEP to be deposited in "Wastewater Treatment Operator's Training Account" as required for monies collected in enforcement by local agencies. Also fails to dedicate funds to Wastewater Treatment Trust.
(S) p.16 (Sec.5) [R.S.58:10A-10d]	10. Fails to limit the aggregate of a civil administrative penalty to $50,000 in any given day for any and all parameters violated.

SOURCE:	AMENDMENT:
(S) p.17 (Sec.5) [R.S.58:10A-10d(4)]	11. Continues to limit compromises and penalty assessments to 50% of the assessment for POTW's after second violation (no limit on compromise for first violation, 75% limit for second violation). Modify to allow full ability for NJDEP to compromise fines and penalties assessed.
(S)pp.19-20(Sec.5) [R.S.58:10A-10f(1)-(4)]	12. Enhanced penalties for all crimes beyond criminal provisions should be deleted.
(S) p.18 (Sec. 5)[R.S.58:10A-10b(7)]	13. There continues to be mandatory referral action by the Commissioner to the County Prosecutor and Attorney General for criminal prosectuion for Significant Non-Compliers. Modify to give Commissioner discretion.
(S) p.20 (Sec. 5)[R.S.58:10A-10h]	14. Fails to make new penalties applicable only to permits issued after the effective date of Act.
(S) p.20 (Sec. 6) [New]	15. Continues to provide mandatory no discretion penalties of $1,000.00 and $5,000.00 for exceedances and $100.00 from missing parameters.
(S) p.24 (Sec. 8) [New]	16. Provides for public notice, public comment and potential hearings on Administrative Consent Orders which relax effluent standards for more than 24 months. It should be 30-36 months to allow for construction of upgrades.
(S) p.25 (Sec.9a) [New]	17. Change date to September 15, 1991 to better integrate into existing system. Also change date to September 30 from March 31 for same reason.
(S) p.25 (Sec.9b) [New]	18. Delete requirement that notice to newspapers be given by Commissioner.
(S) p.27 (Sec.10b(4) and (5) [New]	19. Delete need to list local agency that has failed to file information and delete requirement for summary report of water quality since that is already done.

SOURCE:	AMENDMENT:
(S) p.27 (Sec.11) [New]	20. Require filing reports with Department in the same frequency as required under the permit.
(S) p.28 (Sec.12) [New]	21. Significant amount of funds should be transferred to Wastewater Treatment Trust.
(S) p.31 (Sec.16) [R.S.2A:35A-4]	22. Expands subject matter of citizen's suits to include assessment of civil penalties (previously just for injunctive and/or equitable relief). Fails to require that all damages, fines and penalties collected under citizen's suits be paid to Clean Water Enforcement Fund and Wastewater Treatment Trust. Should be modified to reflect these comments.
(S) p.32 (Sec. 17) [R.S.2A:35A-10a]	23. Increases the cap of $10,000.00 on counsel and expert fees in citizen suit to $50,000 against local agencies. Unlimited counsel and expert fees if local agency not involved. Provides that in order to qualify for fees "reasonable" as opposed to "significant" success must have been attained. Must include listing of information required in supporting affidavit for fees and reduce cap to $10,000 for all suits.
(S) p.32 (Sec.18) [R.S.58:11-55]	24. Give delegated local agency discretion in enforcing pretreatment standards and bringing lawsuits.
(S) p.33 (Sec. 19) [New]	25. Fails to make any significant appropriation for implementation. NJDEP suggests at least $7.5 million is needed. This bill appropriates $750,000.
[New]	26. Fails to include language requiring NJDEP to examine entire permitting process.

EDWARD J. BUZAK, ESQ.

EJB:fd-18A-5-1
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REVIEW OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION NPDES PERMITTING RULES AND PRACTICES

Prepared By

Zorc, Rissetto, Weaver & Rosen

For The Authorities Association Of New Jersey

FINAL DRAFT

26K

Water quality-based permit limits are established through the development of total maximum daily loads (TMDLs) and waste load allocations (WLAs) for the water quality limited segment. These calculations specify the maximum amount of pollutants that a receiving water can assimilate and remain in compliance with applicable water quality standards. Conservative and outdated modeling, standards and permit procedures, however, often result in permit limits being more stringent than necessary to meet water quality standards during critical periods (e.g., low flow). Review of DEP's existing standards and effluent limitation procedures indicates that many are out-of-date and inconsistent with EPA recommended approaches that are based on the latest scientific information and techniques. In addition, misapplication of water quality standards (e.g., applying chronic standards under acute conditions) has resulted in improper selection of the critical period parameters and in overstating the degree of protection necessary to protect a stream segment.

Such deficiencies in the water quality based effluent limitation development process, and other inconsistencies in DEP's permitting process, have resulted in permit effluent limitations which are much more stringent than necessary to protect water quality, to achieve minimum technology-based requirements, or to meet the applicable laws. In such instances, permittees are needlessly expending local resources for capital improvements and being subjected to significant fines and penalties for noncompliance when permit requirements could have

REVIEW OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION NPDES PERMITTING RULES AND PRACTICES

I. Overview

NJPDES permits issued by the Department of Environmental Protection (DEP) set forth requirements which, if violated, can lead to significant civil and criminal penalties. Penalties can be assessed under Federal or State law and may be as much as $50,000 per violation for each day of violation. Permit requirements are usually construed strictly, allowing few defenses to liability. Permit limitation exceedance is, at times, beyond the reasonable control of a permittee. Although DEP and EPA may exercise their enforcement discretion under such circumstances, citizen groups may nevertheless sue NJPDES permittees for permit violations. Municipal permittees should not be subject to such significant liability unless it is necessary to ensure environmental protection and is appropriate under all the factual and legal circumstances.

Municipal permits are required to contain minimum technology-based requirements (i.e., secondary treatment) and any more stringent requirements under State law, including requirements necessary to protect water quality. State water quality standards are developed by designating the use(s) to be made of the receiving water segment (e.g., warm water fishery, swimming, agriculture, etc.) and setting numeric standards necessary to protect such use(s).

been established at a less stringent level without any increased threat of harm to the environment.

The following factors appear generally responsible for establishment of inappropriate effluent limitations and permit requirements:

1. outdated rules and guidance are used to evaluate treatment needs;
2. confusion over application and interpretation of existing requirements;
3. complexity of the evaluation process; and,
4. lack of necessary information to properly set limitations.

Future correction of permit effluent limitations based upon outdated modeling, misinterpretation of applicable requirements, or mistakes of law may not be easily accomplished. The antibacksliding provision under the Federal Water Quality Act of 1987 (amending the Clean Water Act) significantly limits reissuance, renewal or modification of permits with less stringent effluent limitations except in limited circumstances. The impact of the antibacksliding statutory requirement will depend, to a large extent, upon EPA's interpretation of the statutory language. Nonetheless, permittees cannot readily accept permit limits which are incorrect and unsupportable given the legal consequences of non-compliance nor should the Department seek to maintain outdated permitting procedures because of this new Federal requirement.

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Concerns over appropriate permit requirements are heightened given the legislative climate that is disposed to establishing severe penalties for failure to comply with environmental laws. (See, for example, the "Bennett Bill" - A-3831). Because the new State rules provide few defenses to severe liability, it is incumbent upon the DEP to ensure that proper requirements are established in permits and to amend existing rules where necessary.

The purpose of this review is to identify the permitting issues that have resulted in municipal Authorities being subject to unnecessarily stringent effluent limitations or permit requirements. By identifying areas where improvements in the State program may be made, the Authorities Association of New Jersey ("AANJ") believes that all citizens of the State will benefit and that environmental and economic resources will be better served.

After the DEP has been provided the opportunity to informally consider this analysis, the Department will be asked by AANJ to address these municipal issues as required, by modification of procedures and rules and issuance of appropriate guidance. The intent is to change DEP practices, within the legal bounds of applicable law, to assure appropriate environmental protection, and to obtain fairer DEP permitting of municipal entities.

II. Results of the Permit Workshop

On January 5, 1989, the Authorities Association of New Jersey held a permit workshop in order to review issues arising in recently issued NJPDES permits and to determine whether or not the State was taking consistent positions in developing effluent limitations included in those permits. Approximately twenty (20) members attended the workshop and, based on the results of the permitting review, it was apparent that numerous effluent limitations, terms and conditions established in the members' permits appeared to vary substantially without any stated basis or apparent rationale.

Table I identifies the range of effluent limitation requirements contained in the permits and draft permits that were reviewed. Based on a comparison of the permits, it is apparent that substantial confusion exists within the Department regarding use of seasonal limitations, application of CBOD test, appropriate bases for setting water quality based permits (particularly for ammonia toxicity), appropriate permit averaging periods, the need for $CBOD_u$ and NOD limitations, and development of percent removal requirements. Because of the inconsistencies among the permits, the Association initiated a more broad ranging review of Department permitting practices in order to determine if the quality and consistency of permit requirements could be improved.

Zorc, Rissetto, Weaver and Rosen was commissioned to initiate an overall NJDEP program review, based on their

knowledge of State and Federal permitting rules and guidance. That review has identified 13 areas where the Department's existing requirements are either (1) inconsistent with the latest available information and techniques for assuring appropriate establishment of effluent limitations, or (2) not properly incorporated into the permits. Given the significant liability that Association members may face for violation of their NJDEP requirements, and the need to cost effectively address municipal pollution control matters, the Association plans on submitting this report as a basis for the Department to initiate rulemaking to update its procedures and technical guidance to assure that only appropriate limitations, terms and conditions are established in the permits.

III. Review of Specific Permitting Issues

The following presents a review, analysis and recommendations regarding various technical, regulatory and legal permitting issues that appear to be arising in numerous AANJ member permits.

A. Use of Flow in Establishing Permit Limitations

1. Issue

Most NJDEP permits specify flow as an effluent limitation not to be exceeded on either an annual, monthly or instantaneous basis. Because flow is listed as an effluent limitation, facilities that are in compliance with all pollutant discharge limitations may nonetheless be penalized if the flow exceeds

the permitted level.

2. Discussion

In most States, wastewater flow is not considered an effluent limitation, but only a sampling requirement. The rationale behind this approach is that flow is not a pollutant and, therefore, should not be regulated as are other pollutants. This is consistent with the Clean Water Act which only permits the regulation of "pollutants" from point and non-point sources. (See 33 U.S.C. § 1362(6).)

Pollutants are fully regulated through procedures established under Section 303(d) of the Clean Water Act by which the State determines the maximum pollutant mass discharge (e.g., the total maximum daily load or TMDL) that may occur without violating water quality standards. Based on the allowable mass loading, where necessary, an acceptable discharge concentration may be determined based on the expected facility flow.

Under the existing NJDEP program, a facility can be fully in compliance with its pollutant discharges (in concentration and mass) but still be in violation of its permit if the treatment facility flow is in excess of that stated in the permit. This places the facility in the situation of being subject to significant potential fines for completely acceptable discharges. Unless increased facility flow is tied directly to some other pollutant release occurrence (such as increased combined sewer overflows), flow should not serve as a basis for

direct regulation, the pollutants should serve as the basis for regulation. This approach is consistent with engineering procedures for facility design that use pollutant loading as the primary design basis for the facility. While certain units are hydraulically limited (e.g., clarifiers), these limitations are usually secondary design factors, the primary concern being the loading to the facility.

3. Recommendation

Flow should not be regulated in the permit as an effluent but a MONITORING Requirement limitation, unless the Department can establish that other pollutant restrictions are insufficient to assure water quality standards attainment.

B. Mass Limitations

1. Issue

Many water quality based limitations specify mass limitations and in addition, list the concentration limitation which is based on some expected design flow which will occur in the future. Use of concentration limits in addition to mass limitations can result in overregulation when the discharger is not at its design condition. The ultimate design flow of the facility is often used to establish the concentration based limitations, although existing flow conditions would normally allow significantly higher concentrations for compliance with water quality standards. In situations where a permittee is in compliance with the mass limitation (and therefore in compliance with its water quality standards), a violation of concentration

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limitations will nonetheless result in a potential fine or penalty. A mechanism should be established to prevent municipal dischargers from being penalized for acceptable mass discharges.

2. Discussion

The Clean Water Act and its implementing regulations require the calculation of mass limitations for all discharges to waters the United States but allows for the use of alternative means for restricting discharges (e.g., concentration) where mass limitations are not effective. 40 C.F.R. § 122.45. Over the course of time, permit writers have tended to include concentration limitations in addition to mass limitations, although the need for the additional requirement is not apparent. Mass limitations are generally sufficient to regulate pollutant discharges because they establish the total amount of loading that a receiving water can assimilate without violating a water quality standard. In most instances, this occurs regardless of the concentration of the pollutant (or associated flow) being discharged into the receiving water.

The addition of concentration based limitations only serves to further restrict the discharge beyond that necessary to achieve water quality standards. The Department, in calculating wasteload allocations and effluent limitations for a wide range of parameters, utilizes the facility's design flow which is often projected to occur approximately twenty years in the future. At times, this design flow may be only slightly greater than the existing wastewater flow; however, in other situations

where there is significant growth in the area or regionalization is occurring, the design flow can be significantly higher than the existing flow. While selection of design flow does not usually alter the acceptable loading that may be discharged, it does dramatically effect the establishment of concentration based limitations, making them much more stringent than necessary during the five year life of the NJPDES permit. As a result, the facility may have to immediately meet concentration limitations that are not necessary to assure water quality standards attainment for another twenty years. Nonetheless, violation of the concentration limitations is actionable and could result in the imposition of fines and penalties up to $50,000 per day per violation, even though the exceedance of a concentration based limitation at a lower flow cannot result in the exceedance of an instream water quality standard.

3. Recommendation

Mass limitations provide a more objective basis for determining the acceptability of a discharge and are normally applicable regardless of the flow rate of the discharge. As appropriate, mass limitations should be used instead of concentration limitations as the criteria for determining non-compliance to avoid penalizing the permittee during low plant flow conditions. Concentration limitations should only be established in the permit where they provide an additional appropriate basis for regulation and do not result in overregulation of the discharge prior to it reaching its design

flow. Where used, concentration based limitations should be developed based on the actual flow that the facility expected during the five year term of the permit and not the 20 year design flow.

C. Use of BOD and CBOD Requirements

1. Issue

Most NJDEP permits utilize the BOD_5 test procedure as the basic requirement for determining the discharge of organic (carbonaceous) oxygen pollutant loadings, although the test is widely recognized as an unreliable procedure for assessing carbonaceous pollutant discharges from municipal facilities. Use of the more reliable $CBOD_5$ test has been recognized in some permits. Some permits not only include BOD_5 or $CBOD_5$, but also establish $CBOD_u$ limitations. There does not appear to be any technical basis for the use and interchange of these various requirements or an explanation for why certain facilities, in addition to having BOD_5 or $CBOD_5$ limits, also get $CBOD_u$ limits.

2. Discussion

Compliance with the water quality based permits should utilize the $CBOD_5$ test, not the BOD_5 test due to the inherent errors that can occur when the BOD_5 test is run.

In 1984 EPA published its final position on use of the CBOD test and noted that for water quality based permits the BOD_5 test should never be utilized because there is no technically correct way of establishing it in the permit.

If the permit would include BOD_5 rather than $CBOD_5$ term, no technically correct

> method exists for account for the NOD_5 component of BOD_5 in translating the wasteload allocation result for $CBOD_u$ to BOD_5. This situation occurs primarily because the wasteload allocation must represent critical conditions, generally including low stream flows and warm receiving water temperatures. During such warm weather periods, wastewater effluent, particularly advanced treatment effluents, are at least partially nitrified (ammonia oxidized to nitrate) and nitrifiers are present in the effluents. As explained previously, such effluents will produce erratic and unpredictable BOD_5 test results because they include widely varying NOD_5 components. Thus, an across-the-board numerical adjustment (such as the 5 mg/l adjustment for secondary treatment during cool weather) cannot be reliably applies to translate either $CBOD_u$ or $CBOD_5$ values for warm weather to BOD_5 results.

49 Fed. Reg. 36986, 37001 (September 30, 1984).

Consistent with the Federal rule, the State should utilize the CBOD test for all water quality based permits. This test provides a more accurate measure of the carbonaceous pollutant loadings to a receiving stream and avoids the potential for interference with nitrifying bacteria which can result in significantly higher and erroneous BOD_5 measurement for well operated treatment facilities. When nitrification in the BOD_5 test occurs, permit exceedances may be erroneously reported for acceptable discharges.

Use of carbonaceous ultimate ($CBOD_u$) requirements in the permit, in addition to $CBOD_5$ requirements, is inappropriate because the requirement is merely duplicative. As noted by EPA, $CBOD_u$ is merely another way of expressing the limitations for $CBOD_5$.

> The wasteload allocation determines the allowable value of the $CBOD_u$ term for a given DO criterion for the receiving water. In turn, the permit writer translates the $CBOD_u$ term into the $CBOD_5$ term included in the permit by applying the appropriate $CBOD_u$: $CBOD_5$ ratio (the Agency's wasteload allocation guidance explains these ratios). Accordingly, advanced treatment effluent limitations for $CBOD_5$ are simply and directly derived from the wasteload allocation process.

49 Fed. Reg. 37001 (1984).

The problem with establishing both five day and ultimate requirements in the permit is that the violation of a five day requirement automatically results in the violation of the ultimate requirement, subjecting the facility to duplicative violations for precisely the same discharge. Because CBOD is already adequately regulated under the five day procedure, there is no technical basis or need to establish the ultimate limitation.

3. **Recommendations**

$CBOD_5$ test procedures should be used in all situations involving water quality based permits. CBOD ultimate limitations are unnecessary and should be eliminated as a duplicative requirement for facilities that have $CBOD_5$ limitations.

D. Total Suspended Solids

1. **Issue**

Total suspended solids (TSS) requirements vary substantially from permit to permit without apparent technical or regulatory bases. TSS limitations appear to be established at the same

level as BOD_5 limitations, even though TSS are only subject to the minimum Federal technology based requirements in the vast majority of cases. By law, more stringent limitations for TSS may only be established where necessary to meet a water quality standard. (33 U.S.C. § 1311(b)(1)(C).)

2. **Discussion**

Suspended solids are discharged by all municipal wastewater facilities due to particulate matter placed into the sanitary system. Total suspended solids (TSS) requirements are generally established by the Federal secondary treatment regulation (40 C.F.R. Part 133) which imposes the following limitations:

- 7 day average TSS, 45 mg/l;
- 30 day average TSS, 30 mg/l; and,
- 85% removal of TSS.

In specific instances, technology based percent removal limitations may be less stringent (such as weak influent wastewater allowing a modification to the 85% removal requirement). However, TSS limitations can only be made more stringent than the above technology based standards if there are overriding water quality concerns. State water quality standards for TSS are as follows:

25 mg/l - Trout Streams

40 mg/l - Non-Trout Streams

A review of the current water quality limitations for total suspended solids demonstrates that the establishment of

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suspended solids limitations more stringent than Federal secondary treatment requirements would rarely, if ever, occur. For all non-trout streams (which are the majority of the streams in the State), the 30 mg/l Federal requirement is more stringent than the applicable standard of 40 mg/l. Nonetheless, permit writers, as a matter of course, appear to be in the habit of establishing more stringent suspended solids limitations whenever CBOD or BOD limitations are established more stringently than secondary treatment. For example, if the CBOD limitation is established at 15 mg/l, permit writers will normally establish TSS limitations at 15 mg/l, although there is no commensurate technical or regulatory justification for establishing the more stringent limitation. Because suspended solids levels are virtually always greater than the commensurate $CBOD_5$ pollutant level for municipal discharges,[1/] this may require the facility to provide additional treatment to achieve the more stringent (and controlling) suspended solids limitation. As one can see, this may not only cause an unnecessary increase in pollution control costs, but can also subject the facility to effluent limitation violations even though there is no legal or regulatory basis for the violation, unless the municipality fails to achieve the minimum secondary treatment requirements.

3. <u>Recommendation</u>

Suspended solids requirements should not be established more stringent than the Federal technology based requirement unless there is an express water quality basis for a more

stringent requirement.

E. Ammonia Limitations

1. Issue

Establishment of ammonia limitations in municipal permits appears subject to significant variation and confusion. Some limitations are established on seasonal bases and others are not. Some limitations are established as instantaneous maximums, whereas 30 day average limitations are allowed in most cases. At three facilities, the State proposed pH and alkalinity limitations alleging that it was necessary to prevent exceedance of the ammonia toxicity standard. These additional requirements are inconsistent with hundreds of previously issued permits and are not considered necessary by any other State in the country or EPA. The Department needs to develop a uniform procedure for establishing appropriate ammonia limitations for municipal discharges to avoid unnecessary expenditures and establishment of inconsistent limitations.

2. Discussion

Water quality based limitations for ammonia are typically established for two reasons: (1) to achieve instream dissolved oxygen requirements: and (2) to meet ammonia toxicity requirements based on the applicable ammonia toxicity criteria. Generally, ammonia removal for dissolved oxygen purposes is only necessary during the warmer weather months when ammonia may be oxidized instream and produce an oxygen demand thereby lowering the instream dissolved oxygen concentration.

Nitrifying bacteria are very temperature sensitive; nitrification, and therefore ammonia oxidation, does not occur in the natural environment below 10°C and occurs at very diminished rates between 15-10°C. For this reason, there is rarely a need to remove ammonia for D.O. purposes during the cooler weather periods.

Similarly, ammonia toxicity is generally less of a problem when ambient temperatures decrease. The unionized fraction of ammonia (which is the toxic fraction) is diminished during cooler weather periods because the unionized fraction of ammonia exists in smaller amounts as temperatures drop. As a result, ammonia discharges generally may be increased during cooler weather periods because of the reduced toxic impacts of ammonia under those conditions.

a. <u>Seasonal Treatment Requirements</u>

In addition to temperature effects, the adverse impacts of ammonia are diminished where greater flow is available for dilution, therefore reducing the overall instream concentration of the parameter. Most analyses for ammonia toxicity are conducted for the 7 day one in 10 year low flow which is usually a rare low flow event. For all flows higher than this flow, the amount of ammonia that needs to be controlled for either DO or ammonia toxicity purposes is typically lessened because of the increased instream dilution. For waters that are classified as warm water fisheries, ammonia removal is generally not required where there is greater than a 10-1 dilution of stream

to treatment plant flow.[2]

The Federal government has recognized in a series of guidance documents that it is appropriate to establish effluent limitations on a flow and temperature based methodology.[3] This more refined basis for determining treatment needs results in achievement of existing water quality standards but does not require the discharger to achieve high levels of ammonia reduction on a year-round basis because such levels are not required to appropriately protect the environment. EPA has demonstrated that major cost savings can occur where seasonal limitations are established. In general, the sizing of a facility is increased by a factor of 2 where year-round nitrification is required as opposed to requiring nitrification only during the warmer weather periods.[4]

Flow based limitations provide an added advantage to municipal dischargers in that the facility will not be held accountable for a violation of a water quality standard for higher flows when no such violation can actually occur. Under such circumstances where stream flows are above the critical cutoff for requiring nitrification, the discharger should be allowed to discharge a concentration or loading above the requirement established under the critical low flow condition. This federally approved approach recognizes that it is not appropriate to demand that dischargers achieve stringent requirements under circumstances that do not require such stringent requirements. It would also avoid the need to initiate

enforcement action against discharger when no harm to the environment has occurred. Given that water quality standard compliance is the basis for establishing effluent limitations, it is not appropriate to penalize the facility for circumstances that are clearly not violations of the applicable law (e.g., water quality standards are attained).

b. pH and Alkalinity Issues

Alkalinity and pH are important parameters for determining the amount of unionized ammonia that will be present in a receiving water. Municipal facilities are not designed to regulate these parameters and within the ranges found in domestic systems, no environmental threat is present from these parameters.

No State water quality standard has been adopted for alkalinity; therefore, no permit limitation for this parameter may be established. See N.J.A.C. 7:14A-3.13. For pH, the State standard allows the pH to vary between 6 to 9. There is no legal or technical basis to demand that the effluent pH be further restricted within this range. Despite the clear requirements for establishing effluent limitations, the Department has recently sought to propose both pH and alkalinity limitations by contending that such limitations are needed to regulate ammonia toxicity.

Putting aside the questionable technical basis for establishing pH or alkalinity limitations, the DEP has never provided for public notice or comment on the establishment of

alkalinity or more restrictive pH limitations; therefore, the ad hoc establishment of such a requirements is not permissible. The DEP has historically issued permits addressing ammonia toxicity limitations without additional requirements on alkalinity or pH. This is consistent with accepted practice throughout the country.

It appears that the Department's permit writers may be confused over the use of expected conditions under the low flow event, in the model and the need to establish those assumptions as effluent limitations in a permit. Not all model assumptions are effluent requirements. In the extreme, such an approach would require the discharger to refrigerate its discharge and the stream in the winter and heat both in the summer to maintain the temperature assumptions used in the model. Standard modeling practice is to use conditions expected to occur during the critical flow event, for those parameters that are not regulated by the facility (e.g., pH, alkalinity, temperature). These uncontrolled parameters are then used to establish limitations on the pollutant parameters that the facility is designed to control. Only where a discharger proposes to operate their facility in an unusual mode to reduce instream pH or intentionally alter instream alkalinity to a designated level should a special limitation on alkalinity or pH be required.

3. Recommendation

The State should consider all seasonal effects when developing ammonia limitations. Such determinations should

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consider the impact of the wastewater flow on the instream pH under the expected conditions in addition to the variability of flow and temperature that occurs in the environment. Seasonal limitations with meaningful dates relating to the appropriate flows and temperatures should be established. Where appropriate, flow based limitations should also be used to avoid the imposition of stringent treatment requirements under flow conditions that do not require such stringent performance. Additional pH and alkalinity requirements should only be established where a discharger proposes pH control facilities to lower instream pH.

F. Phosphorus Limitations

1. Issue

Phosphorus limitations are established in many NJDEP municipal permits based on assumed instream impacts of the discharge, although no actual instream data are identified to verify those impacts. Most phosphorus limitations have been established as 30 day averages but, at times, as instantaneous or daily maximum requirements. Consistency among phosphorus limitations is poor and the technical bases for requiring phosphorus removal are often not stated.

2. Discussion

Phosphorus limitations are generally established to prevent excessive algal growth in receiving waters which can cause adverse fishery impacts, change the structure of the biological community and, under severe circumstances, cause fish kills

because of the depletion of oxygen in the water column. Phosphorus impacts, by their nature, are long term water quality impacts. Algal or macrophytic growth is generally a fairly slow process requiring weeks to months to occur, and in many situations, phosphorus buildup takes months to years prior to reaching an equilibrium condition in a receiving water (this is particularly true for bays, estuaries and large lakes). Because phosphorus itself is not a problem but may cause unacceptable secondary impacts (e.g., growth of nuisance aquatic organisms), modeling of phosphorus and its impacts in receiving waters is complicated and time consuming.

Due to the complexities of algal modeling, the State has adopted stringent water quality criteria for phosphorus - 0.05 mg/l TP for lakes, 0.10 mg/l TP for streams. N.J.A.C. 7:9-4.14. The criteria allow the discharger to demonstrate that less stringent requirements are appropriate; however, a presumption that phosphorus removal is needed is contained in the criteria. As a result, the State has opted to utilize a rule of thumb which would generally require phosphorus limitation to at least a 1 mg/l for discharges entering receiving waters that flow into lakes. This approach appears reasonable but should only be utilized as a preliminary decision tool regarding the potential problem. Subsequent studies should be used to allow more or less stringent limitations, as the situation dictates.

Where basin wide standards are established, limitations

should be reasonably achievable through use of inexpensive biological uptake designs which do not result in substantial increases in operational costs of a facility. Generally such designs can achieve 2 mg/l phosphorus removal with a high degree of reliability. Absent a more precise instream analysis demonstrating that phosphorus discharges are a problem, effluent limitations should not be established on a basin wide area more stringent than this amount.

Contrary to the presumption contained in the State phosphorus criteria, phosphorus limitations are generally not appropriate for free-flowing streams that have low detention times unless one can demonstrate actual impacts from the phosphorus discharge. In many situations, this can either be directly measured through instream algal monitoring or through a review of instream dissolved oxygen concentration variability. Absent this physical verification that a problem may exist, phosphorus limitations should not be established for free-flowing streams.

Because the phosphorus criteria are written as "never to exceed" values, confusion over appropriate permit conditions has occurred. Clearly the establishment of instantaneous or even weekly phosphorus limitations is not consistent with the nature of the problem and cannot be justified based on any known modeling or ecological impacts procedure. Use of 30 day average permit limitations or seasonal limitations over a somewhat longer period is appropriate depending upon the

characteristics of the receiving water (particularly the detention time). This is consistent with the nature of the problem and the timing of the effects that may occur in the receiving water.

3. Recommendation

Phosphorus limits should not be established for any shorter time frame than 30 days due to the nature of the impacts. A presumption that 1 mg/l phosphorus removal is necessary is reasonable for lakes. For free-flowing streams, however, water quality modeling or instream sampling verifying that a problem exists should be required to justify any phosphorus limitation on this type of receiving water. Where limitations are based on assumed rather than verified conditions, discharge limits should be based on utilization of low cost biological phosphorus uptake designs that may be readily incorporated into existing treatment works.

G. Toxicity Testing

1. Issue

Whole effluent toxicity testing requirements are being established for municipal dischargers throughout the State. On a nationwide basis, questions have arisen regarding the ability of the toxicity testing procedure to reflect instream use impacts and inconsistencies with the application of the test. In many instances, the Department has been establishing toxicity testing requirements without consideration of dilution or other receiving water characteristics which is contrary to

the basis for utilizing the procedure (e.g., to protect instream uses).

2. Discussion

As described by EPA guidance documents, whole effluent toxicity testing is used to determine the overall toxicity of complex effluent discharges. Such procedures are useful because the synergistic and additive effects of pollutants are not well understood and may change significantly depending upon the characteristics of the wastewater. EPA specifies that establishment of the toxicity testing requirements should be based on the same factors considered in setting any water quality based permit: effluent variability, available dilution, and species sensitivity. (54 Fed. Reg. 1303, January 12, 1989.)

Whole effluent toxicity testing requirements are still in their infancy and substantial scientific uncertainty exists regarding whether or not the test reflects the actual instream use impacts. Exceedance of toxicity testing requirements (often established as a 96HrLC50) does not necessarily reflect unacceptable toxic impacts to the receiving water; however, as established in existing permits, would constitute a violation of effluent limitation requirements. In particular, it should be noted that the acute test procedure is based on a four day (96 hour) exposure of aquatic organisms to a particular level of pollutant. Based on this continuous exposure, adverse impacts (death, growth or spawning impacts) may be noted.

State requirements establish acute toxic requirements as

instantaneous limitations, without regard to the available dilution occurring in the receiving water or the time frame necessary to cause an acute effect. While all parties would agree that acute effects should be strictly proscribed, failure to consider the time frame required to produce an acute effect or whether the acute concentration can physically occur instream renders use of the test inappropriate as currently applied. Rather than serving as a water quality standard surrogate, whole effluent toxicity limitations are improperly used as a discharge prohibition, regardless of actual impacts.

EPA guidelines on use of whole effluent toxicity indicate that whole effluent toxicity should be considered no differently than any other water quality standard requirement and, therefore, should be based on actual instream conditions that are occurring. A particular problem arises for municipal dischargers that are allowed increased ammonia discharges in the wintertime due to the reduced toxic effect of ammonia. When the toxicity testing procedures are run, the wastewater temperature is brought up to 20°C regardless of the time of year or actual instream conditions. During the wintertime, this could cause an adverse response in the tested aquatic organisms that could indicate that excessive toxicity is occurring in the wastewater discharge. This, however, would not be reflected in the environment because the toxicity of ammonia is reduced in the wintertime. This problem occurs because the test procedure is not designed to be reflective of the site specific conditions.

Use of whole effluent toxicity testing as an effluent limitation also raises concerns for municipal dischargers that may be subject to illegal discharge into their system due to midnight dumpers or other persons who improperly dispose of toxic substances into the system without prior knowledge. Exceedance of a toxicity limitation under these circumstances places the municipality in the position of being fined for a criminal act of a third party, possibly without an adequate defense. This is inappropriate in that both the Federal Clean Water Act and the Superfund law do allow defenses for criminal acts of third parties. (See 33 U.S.C. § 1321 and 42 U.S.C. § 9607(b).) It is uncertain whether the State rules would allow such a defense even though there would be no negligence or fault on the part of the municipality.

Given the uncertainties and inconsistencies of whole effluent toxicity testing, it would be more appropriate to utilize whole effluent toxicity testing in conjunction with the pretreatment program as a tool for investigating and reducing toxicity that may be either interfering with plant operations or passing through the facility in an inadequately treated manner. Use of toxicity testing in this fashion has been approved by several States, including the State of Colorado, whereby whole effluent toxicity has not been established as a water quality standard or effluent limitation but as a requirement in the pretreatment program. Where unacceptable toxicity occurs the party must use due diligence to investigate

the causes of the toxicity and to limit its further impacts, where appropriate.[5/] This approach has the advantage of not penalizing the discharger for intermittent or uncontrollable inputs into the system, but requires the permittee to effectively manage the system to avoid any continuous or recurrent acute toxicity conditions.

3. Recommendation

Toxicity testing should only be used as a monitoring requirement in conjunction with the pretreatment program and not as an effluent limitation requirement. Where toxicity is demonstrated to be a continuous problem, dischargers should be required to review the instream water quality impacts to determine if there is any observable adverse impact occurring in the receiving water. Where necessary, toxicity reduction evaluations (TREs) could be imposed to identify the cause of a toxic discharge and require the municipality to use due diligence in investigating the matter. Municipal permittees should not be held liable for fines or penalties due to intermittent exceedance of a toxicity requirement, particularly where it may be the result of an illegal act of a third party.

H. Permit Averaging Periods

1. Issue

Permit averaging periods are established in each NJPDES permit ranging from instantaneous to a 30 day average for pollutants. The establishment of more stringent averaging periods (e.g., daily or instantaneous) does not appear to be

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based on any reasonable need to protect water quality or to prevent instream use impacts. Permit averaging periods vary significantly from community to community even though the situations and the parameters being regulated are similar, if not identical. Consistency must be brought to the establishments of permit averaging periods to avoid unnecessary expenditure for increased facility reliability and to avoid penalizing dischargers for effluent discharges that are acceptable to meet standards and protect uses.

2. Discussion

Effluent limitations established in water quality based permits usually have two components. One is the numerical limitation for the parameter (either in concentration or mass) and the other is the averaging period over which the permittee must achieve the numerical limitation. Depending on the type of parameter and its effects on the aquatic environment the averaging period maybe instantaneous (that is no sample may ever exceed the numerical value) or it may be a 30 day average, whereby the permittee is allowed to average the samples taken over the month to meet the specific numerical limitation. Obviously, it is more difficult to achieve an instantaneous limitation than it is to achieve a 30 day average limitation.

EPA studies of the effects of permit averaging period changes on municipal construction needs has indicated that to achieve ammonia limitations on a one day or instantaneous bases rather than a 30 day average bases requires the facilities size

to be doubled, if not tripled.[4/] For this reason the selection of the permit averaging period is a critical parameter. It is well accepted in Federal guidance issued on the subject that the permit averaging period should reflect the type of water quality impact that is being analyzed.[6/] For example, acute impacts (e.g., where exceeding a limitation could result in fishkills or other immediate deleterious aquatic impact) should generally be regulated on a short term basis. This time frame is usually established as a 1 day average.

Chronic impacts, such as those that only occur over a longer period of exposure, are generally met through compliance with longer term averaging periods such as 30 day averages. The vast majority of State water quality standards are based on EPA issued chronic criteria. Little, if any, acute standards have been established by the State. Therefore, the appropriate averaging period in almost all instances for municipal discharges will be the 30 day averaging period.[7/]

Recently, the Department has begun to establish limitations for chronic parameters, such as ammonia, based on a 1 day or instantaneous maximum limitations. This effluent limitations basis is inconsistent with the purpose of the water quality standard (chronic) and the applicable State regulations which specify that municipal waste allocations should be established at either 30 day or 7 day averages. N.J.A.C. 7:14-3.14(d)(2). The Association has found no technical justification or scientific support whatsoever for the premise that ammonia

limitations for chronic criteria need to be established on a daily maximum basis and in fact, such a position has been repeatedly rejected by the United States Environmental Protection Agency.[8/] Other pollutants previously mentioned such as phosphorus, have also been set as instantaneous maximums for certain communities although there can be no possible technical justification for this requirement.

3. Recommendation

Permit limits for municipalities should be based on 30 day average requirements for water quality standards based on chronic water quality criteria.

I. Percent Removal And Other Minimum Technology Based Requirements

1. Issue

Percent removal and minimum technology based requirements vary widely from permit to permit. The requirements range anywhere from 85% removal on a 30 day average to greater than 90% removal on a 4 hour average. BOD_5 concentrations are often established on a 4 hour compliance basis. It appears that the basis for applying percent removal and minimum technology based requirements is not well known nor understood within the Department or by permittees. Many of the State minimum technology based requirements appear to be (1) outdated requirements that do not reflect the latest Federal guidelines on appropriate use of percent removal, (2) misapplications of the existing law, or (3) solely used as an enforcement tool for penalizing permittees.

2. Discussion

Minimum Federal secondary treatment requirements require that 85% removal of BOD and TSS should be achieved by all facilities. These limitations may be made less stringent where influent wastewater strength is less than 200 mg/l. (40 C.F.R. § 133.103.) Under the Federal secondary treatment rule, the percent removal limitation is always established as a 30 day average value.

In the early 1970s, the State established more stringent requirements as preliminary effluent limitation targets based on a lack of available data on the actual instream impacts of municipal dischargers. State requirements reflect the Federal percent removal limitations and also establish, for certain discharges, that a more stringent percent removal and BOD_5 concentration limitations be met on a 4 hour basis. (See, N.J.A.C. 7:5-5.8.) The more stringent State regulations expressly specify that where the permittee or the State has conducted wasteload allocation analyses to demonstrate the site-specific effluent limitations, the more stringent requirements are no longer applicable (usually 4 hour percent removal and concentration limitations).

Despite being notified by numerous permittees that the 4 hour requirements are not applicable once the wastewater allocation has been set, State permitting personnel have repeatedly refused to remove the condition from the permit as required by the applicable rules. The stated rationale for

maintaining the 4 hour requirement is to serve as an enforcement tool against municipalities.

The Association can see no merit in maintaining the 4 hour BOD removal and concentration requirements and their apparent use for penalizing facilities that are otherwise properly operated and maintained is highly objectionable. If fully implemented, the 4 hour requirement would dramatically increase the cost of pollutant reduction within the State of New Jersey without any commensurate environmental improvement. Utilizing a 4 hour timeframe instead of the typically analyzed 30 day average period would easily result in the tripling to quadrupling the size of a facility in order to improve its efficiency and reliability. Because the State does not properly enforce or implement this requirement, engineers do not effectively design for this requirement and the requirement appears to serve no useful purpose other than a punitive function, the requirement should be deleted.

3. Recommendation

Where a wasteload allocation or receiving water evaluation has been done, BOD and TSS limitations should only be subject to Federal minimum technology based requirements (i.e., 85 percent removal and BOD_5 concentration limitations on a 30 day average basis). The same rules should be established for ocean discharges unless otherwise justified.

As allowed by Federal law, the State should allow for waivers to the 85% removal requirement where appropriate due to

weaker influent wastewater that is prevalent throughout the northeastern part of the United States. This waiver would bring the State rules in line with the applicable Federal rules on the subject which have been updated as a result of further scientific review and evaluation regarding the definition of secondary treatment.

J. Seasonal Limitations/Flow Variable Limitations

Both Federal and State law allow the use of seasonal permit limits and flow variable limits whenever seasonal conditions affect the degree of treatment. State permits vary dramatically in their use and allowance of flow and seasonal permits. Many facilities have year around limitations while others have two season limitations. Where seasonal limits are established, the State appears to be utilizing a two season approach without consideration of the actual instream conditions. The State should allow appropriate seasonal limitations to be established instead of adhering to a rule of thumb it follows under the current informal procedures.

1. Discussion

Water quality based permits are developed by considering the critical period in the receiving water and determining the amount of pollutants that may be discharged into the receiving water during that period. Most critical periods only occur in a particular season e.g., summer months when the temperature is hot and the flow is low. During other seasons when temperatures are cooler or when flows are higher, allowable discharges may

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be significantly greater without any threat to the environment for all pollutants including $CBOD_5$, ammonia, phosphorus and effluent toxicity. Nonetheless, permit limitations are often established on a year around basis even though the actual requirements for the receiving water do not justify year around treatment to stringent levels.

Failure to conduct an appropriate seasonal analysis results in an unnecessary increase in O&M and capital costs and increases the likelihood that the facility may find itself in violation of its stringent permit conditions. EPA has published several guidance documents on the establishment of seasonal and flow based effluent limitations.[3/4/] Use and incorporation of these well recognized procedures for establishing appropriate limitations should occur.

Currently, the Department refuses to establish flow based limits unless they are based on an assumed critical low flow. That is, for those years where the instream flows are much higher than the critical drought flow that is used for modeling purposes, the State does not allow for less stringent limitations even though the law would allow it. Bias against flow variable permits should be corrected to allow their use where appropriate in order to limit the potential liability of discharges.

Where flow variable permits are used as a means for reducing liability, this does not mean that increased waste load discharges should necessarily occur. General provisions requiring the operation of necessary treatment works during the

higher flow years would insure that continued pollutant removal capabilities would be maintained. However, if those performance capabilities decrease during the higher flow periods, the discharger should not be penalized for such discharge because it does not result in a violation of water quality standard which is the basic purpose of the effluent limitation and applicable State and Federal law.

2. Recommendation

Seasonal and flow variable permits should be allowed whenever seasonal conditions affect the degree of protection required. The number of seasons utilized should depend upon the individual and fact specific circumstances of the discharge e.g., in some instances two seasons may be appropriate whereas quarterly or monthly limits may be appropriate in other instances. Use of flow variable permits which allow for increased pollutant discharge loadings during wetter years should be recognized as a basis to avoid being penalized for acceptable discharges when greater dilution exists.

K. Chlorine Limits

1. Issue

The majority of chlorine limits established in NJDEP permits are below the level of detection of the test. As a result, the measurement of a single positive chlorine reading will often place the discharger not only in violation of daily maximum limitations in the permit but also any 30 day average permit limitation. This subjects the discharger to potential fine or

penalty of up to $1.5 million for the single positive reading. Chlorine limitations as presently expressed by the Department are not technically achievable without the elimination of chlorine from the municipal system. While such a goal may be sought, full discussion by interested State agencies including public health officials who have long required the use of chlorine to reduce pathogen levels, should occur prior to any adoption of State permitting policies and effluent requirements that would lead to wholesale elimination of this chemical.

2. Discussion

Chlorine water quality standards were established by the State of New Jersey in 1985. Since this time, the State has sought to incorporate chlorine limitations in all municipal discharge permits because chlorine is used by almost all municipal facilities as a disinfectant to control bacteria discharges. In almost all instances, chlorine limitations established in the permits were set below detection levels and therefore reliable compliance cannot be known. In addition, many permit limitations establish the chlorine limitations as never to exceed or instantaneous maximum conditions requiring that the discharger insure that the plant would be properly operating 100% of the time, day in and day out, 365 days per year. Such reliability and assurance is impossible to achieve and therefore chlorine violations are certain to occur at every facility that utilizes this chemical to obtain effective disinfection of its wastewater.

Establishment of chlorine as an instantaneous maximum condition, never to be exceeded, is inconsistent with the applicable information on chlorine impacts and the Federal water quality criteria that were used to establish chlorine limitations. Under low dosages, acute impacts only occur over several days exposure. Under such circumstances requiring the discharger to insure instantaneously that the limitation is never exceeded to avoid potential acute impacts is not technically justified.

In other States, such as the State of Virginia, a more reasonable approach is taken to regulating chlorine because of its understood dual purpose in disinfection and associated problems in causing impacts at the aquatic environment. The State of Virginia rules allow for "fine tuning" the dechlorination system to obtain a zero chlorine residual which insures adequate protection of aquatic wildlife but does not require continual 100% elimination of chlorine. This condition allows the permittee to increase the dechlorination rate whenever a chlorine residual is found in a single sample and requires that the discharger show diligence in increasing the dechlorination rate over a several hour period of the day to insure that zero residual is eventually obtained. This approach avoids the unnecessary penalizing of the discharger for chlorine discharges that will not result in an impact on the aquatic environment.

The Department should consider whether or not the stringent

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chlorine limitations currently established are reasonable and should take a more moderate approach on insuring that adequate dechlorination occurs. Approaches which do not require 100% compliance, day in and day out, should be utilized. Further debate with State public health officials and those in the Department of Environmental Protection should occur as to the continuing use of chlorine and whether other acceptable disinfection practices should be implemented on a statewide basis.

3. Recommendation

The State should establish a reasonable basis for developing chlorine limits considering technical capabilities of treatment works and actual instream impacts. Detection of chlorine should trigger a requirement to adjust discharge activities during a set timeframe to eliminate potential problems rather than subjecting a permittee to fines or penalties for noncompliance which is not otherwise avoidable.

L. Technical Basis For Wasteload Allocations

1. Issue

The State utilizes a series of modeling techniques for determining the appropriate effluent limitations that are based on technical procedures that were developed decades ago. Since that time, newer procedures have been developed and approved the EPA which allow for more precise determination of effluent limitation needs. State regulators are reluctant to utilize the new procedures due to the existing regulatory framework and

lack of familiarity with the new procedures.

2. Discussion

Since the early 1980's, EPA has issued a series of technical guidance documents for the development of wasteload allocations and effluent limitations for municipal and industrial sources. Those documents represent EPA's statement of the best available scientific information for the assessment of treatment needs. Chief among those documents are EPA's "Handbook on Permit Averaging Periods"[7] and the "Technical Support Document for Water Quality Based on Toxics Controls."[6] These new procedures allow for the calculation of appropriate wasteload allocations independent of the selection of a critical instream low flow, as is currently used by the State of New Jersey. The new procedures allow the analyst to more accurately determine the water quality needs and to insure that the effluent limitations established are neither under nor over protective.

State procedures currently specify that water quality standards must be met for all flows greater than the MA7CD10 (the 7 day once in 10 year low flow). State regulators have taken this to mean that they must utilize this flow in modeling or evaluating waste allocation needs. EPA has recognized that the use of such fixed low flows for wasteload allocation determination can lead to under or over protection depending upon the circumstances. The new techniques published by EPA while more technically demanding, do result in the most cost effective evaluation of treatment requirements.

It is recognized that the steady state modeling procedures, which are currently used, do serve as a valuable tool in many instances that do not warrant the use of more extensive and complicated evaluation techniques. Therefore, it would appear inappropriate to abandon the old techniques. It would appear more appropriate, as implemented by the State of Utah, to allow the use of either the statistical modeling procedure or the steady state procedure using a fixed low flow in assessing effluent limitations. The choice of procedure may be at the discretion of either the regulator or the permittee.

3. Recommendation

Permit limitations should be developed by using the best scientific information available. This may involve statistical modeling techniques or, as appropriate, the steady state, low flow modeling approach. Where water quality based limitations are established, permit writers should carefully identify the technical basis used to establish all permit effluent limitations and specify the types of procedures used for evaluating the discharge requirements.

M. Permit Compliance

1. Issue

For administrative convenience purposes, permit limitations are established as never to exceed limitations though it is physically impossible to design facilities to achieve 100 percent compliance. Federal regulations define a "well operated facility" as one that achieves permit compliance 95 percent of

the time. Despite recognizing this fact, a discharger may be penalized for any permit violation. State law should expressly recognize the Federal definition and prohibit fines against facilities that meet the definition of a "well operated facility."

2. Discussion

Well operated and maintained plants have an expected effluent degree of variability which can lead to compliance rates of only 95%-99%. (See, Marathon Oil Company v. EPA, 539 F.2d 974 (4th Cir. 1976).) A permittee may nevertheless exceed effluent violations due to normal plant variations in effluent that are not encompassed within the upset defense provided by EPA regulations. See, e.g., 40 C.F.R. § 133.101(f); 44 Fed. Reg. 34407 (1979); Technical Support Document for Water Quality Based Toxic Control (September 1985).6/

EPA's basic course material for permit writers presents an analysis of permit limit derivation. EPA recognizes that effluent variability will result in a one to five percent expectancy of exceeding permit limitations despite proper plant performance:

> Effluent limitations are probably the most important part of the permit. The effluent limitations are the primary mechanism for the control of discharges of pollutants. It is therefore important that the permit writer have a basic understanding of the principles of effluent variability and the permit limit derivation.
>
> The quality of the effluent from a treatment facility will normally vary over time. * * * Any treatment system can be described

> using the mean concentration of the parameter of interest (i.e., the long term average and the variance (or coefficient of variation) and by assuming a particular statistical distribution (usually lognormal).
>
> * * * *
>
> Regulatory agencies have settled on an exceedance rate for deriving permit limits of 1% to 5% (typically, 1% exceedance rates for the daily maximum, 5% exceedance rate for the monthly average). These exceedance rates correspond to the 99th to 95th percentiles of a cumulative [sic] probability distribution. * * * Thus, a discharger complying with expected performance has a 95-99% chance of not exceeding their limits in any single monitoring observation. However, over the long run, that same plant is statistically expected to discharge in excess of its permit limits one to five percent of the time. (Emphasis in original.)

Basic Course for Permit Writers, NPDES Technical Support Branch, Permits Division, Office of Water Enforcement and Permits, July 1985, at 17.

State rules do not recognize the Federal definitions and allow well operated facilities to be sued by citizens groups. There is no reasonable public interest in allowing this type of action.

3. Recommendation

State rules should be modified to reflect the Federal criteria for a well operated facility and specify that no fine or penalty may be assessed against a facility for discharges that meet this definition.

JCH16.1

REFERENCES

1/ "Nitrification in the BOD_5 Test Increeases POTW Noncompliance." Hall, J.C. and Foxen, R.J. Journal of Water Pollution Control, December 1983.

2/ Simplified Analytical Method for Determining NPDES Effluent Limitations for POTWs Discharging Into Low-Flow Streams. U.S.E.P.A. Office of Water Regulation and Standards, September 1980.

3/ Technical Guidance Manual for Performing Wasteload Allocations - Book IX - Innovative Wasteload Allocations. U.S.E.P.A., December 1984.

4/ Handbook of Advanced Treatment Review Issues. U.S.E.P.A. Office of Water Programs Operations, July 1984.

5/ "Colorado's Biomonitoring Regulation: A Blueprint For The Future." Michael, G.Y., et al. Journal of Water Pollution Control, March 1989.

6/ Technical Support Document for Water Quality Based Toxics Control. U.S.E.P.A., September 1985.

7/ Technical Guidance Manual for Performing Wasteload Allocations - Book VII - Permit Averaging Periods. U.S.E.P.A. July 1984.

8/ Administrator's Decision on Advanced Treatment Funding for the City of Chicago. U.S.E.P.A. January 1982.

TABLE 1

COMPARISON OF PERMIT EFFLUENT LIMITATIONS

Facility Number	$CBOD_u$	BOD_5	TSS <30	NOD	NH_3	4 Hour Limits	Seasonal Limits	% Rem. Issue	Averaging Period	pH/ Alk.
1	Y	Y	Y	N	Y	Y	Y/N	Y	24 hr.	Y
2	N	Y	Y	N	Y	Y	Y/N	Y	30 day	N
3	Y	Y	Y	Y	Y	Y	Y/N	Y	30 day	N
4	N	Y	N	Y	Y	Y	Y/N	Y	24 hr.	N
5	Y	Y	Y	Y	Y	N	Y/N	Y	30 day	N
6	Y	Y	Y	N	Y	N	N	Y	30 day	N
7	Y	Y	Y	Y	Y	Y	N	Y	30 day	N
8	N	Y	Y	N	N	Y	N	N	30 day	N
9	N	Y	Y	N	Y	Y	N	Y	30 day	N
10	Y	Y	Y	Y	Y	Y	Y/N	Y	24 hr.	N
11	Y	Y	Y	Y	Y	Y	Y/N	Y	30 day	N
12	N	Y	Y	N	Y	Y	N	Y	24 hr.	Y
13	Y	Y	Y	Y	Y	Y	N	Y	30 day	N
14	N	Y	Y	N	Y	Y	Y/N	Y	30 day	N
15	N	Y	Y	N	Y	Y	Y/N	Y	24 hr.	Y
16	N	Y	N	N	N	Y	N	Y	30 day	N
17	N	Y	N	N	N	Y	N	Y	30 day	N
18	N	Y	N	N	N	Y	N	Y	30 day	N

X17