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1985

**PUBLIC HEARING**

before

**ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE STUDY COMMISSION**

on

**"The Extent of the Environmental Impairment Liability Insurance Crisis"**

VOLUME I

October 2, 1985  
Room 438  
State House Annex  
Trenton, New Jersey

**MEMBERS OF COMMISSION PRESENT:**

Senator Raymond Lesniak, Chairman  
Senator Lee B. Laskin  
Senator Daniel J. Dalton  
Senator S. Thomas Gagliano  
Assemblywoman Marlene Lynch Ford  
Assemblyman Thomas J. Deverin  
Assemblyman Robert C. Shinn, Jr.  
Assemblyman Robert J. Martin

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**ALSO PRESENT:**

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

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SENATOR RAYMOND LESNIAK (Chairman): Is there a representative from DEP here?

JOSEPH B. WILEY (from audience, not near microphone): I am from DEP, but I will not be testifying. I have been asked to sit in as an observer.

SENATOR LESNIAK: Can you take a message to the Commissioner that I would like someone here from DEP to testify this morning about how the problems of availability of insurance affect the Department's cleanup program? I think this is an important issue that we have to discuss today. I think it is incumbent upon DEP, and it is the Department's obligation and responsibility, to appear today to testify in that regard.

MR. WILEY: Sure.

SENATOR LESNIAK: That wasn't on the record, right?

HEARING REPORTER: If you don't want it--

SENATOR LESNIAK: No, I very much want it to be on the record. Is it on the record?

HEARING REPORTER: Yes.

SENATOR LESNIAK: Okay, then let's start the Commission meeting. May I have Senator Dalton and Assemblywoman Ford come to the fore. Denise, will you please get them? (addressing Aide to the Commission)

This is a public hearing of the Environmental Impairment Liability Insurance Study Commission. Notices were properly sent out. This is a hearing pursuant to Senate Concurrent Resolution 141 sponsored by Senator Dalton, who is a member of the Commission, and who is sitting on my right. Member of the Commission, Assemblywoman Marlene Lynch Ford, is sitting on my left. We had an organizational meeting consisting of all the Senators and Assembly persons on the Commission, and subsequent to that meeting, we scheduled today's public hearing, the purpose of which is to identify the problems Senator Dalton's resolution addresses concerning the availability and affordability of environmental impairment liability insurance, and how that impacts upon various functions of government.

Senator Dalton, DEP has been requested to appear here today to testify with regard to the problems arising out of insurance and their cleanup program. I have been told by a representative of the Department that they do not plan to send anyone here today to testify. I told that representative, who did not identify himself-- I'm sorry, your name, sir?

MR. WILEY: I'm Joe Wiley from the Division of Waste Management.

SENATOR LESNIAK: Joe Wiley from the Division of Waste Management. I asked Mr. Wiley to convey to the Commissioner that I think it is his obligation and responsibility to appear before this Commission, or have someone else appear before this Commission, to testify about what problems have arisen from the cleanup program with regard to insurance.

At this time, I would like to repeat that the purpose of today's hearing is to identify the problem. We will listen to any solutions that anyone has, as well. However, the main purpose of the subsequent hearing -- the next hearing -- at which time both the Department of Insurance and the insurance industry will be asked to testify specifically, will be solutions to the problem. Today, the focus of the hearing will be the problem itself and, of course, in conjunction with that problem, if anyone has any suggestions, they are welcome to offer them.

Senator Dalton, would you like to make an opening statement?

SENATOR DALTON: No.

SENATOR LESNIAK: Assemblywoman Ford?

ASSEMBLYWOMAN FORD: I do not have any statement.

SENATOR LESNIAK: Okay. The first person to testify will be Larry Cirignano. Am I close, Larry?

LAWRENCE D. CIRIGNANO: Not bad. (laughter)

SENATOR LESNIAK: Not close, right? Larry is from the New Jersey Alliance for Action. Larry, will you please begin by telling us what the Alliance for Action is.

MR. CIRIGNANO: Sure.

SENATOR LESNIAK: Please come to the front table. We have just been joined by Assemblyman Bob Shinn, who is third to my left. Good morning, Assemblyman.

MR. CIRIGNANO: My name is Larry Cirignano. I represent the New Jersey Alliance for Action. We are a coalition of over 400 of New Jersey's business, labor, industrial, professional, educational, and governmental associations. We work towards improving the quality of life in New Jersey through the reduction of bureaucracy and the elimination of red tape.

On August 22, 1985, we, along with a number of our members, sponsored a conference regarding the crisis situation which is affecting our State. We forwarded copies of the materials from that conference to this Commission, as well as news clips of the newspaper coverage.

The conference detailed the scope of the problem as testified to by Joseph Wiley, who is the Chief of the Bureau of Contracts Management at the New Jersey Department of Environmental Protection.

SENATOR LESNIAK: This is the same Joseph Wiley who is sitting in the back of the room?

MR. CIRIGNANO: That's right.

SENATOR LESNIAK: He appeared at your conference?

MR. CIRIGNANO: That is correct.

SENATOR LESNIAK: And testified to the scope of the problem?

MR. CIRIGNANO: Yes.

SENATOR LESNIAK: Okay, but he is not here to testify today. Thank you. Please go ahead.

MR. CIRIGNANO: Pollution is spread all over the State.

SENATOR LESNIAK: Excuse me; I'm sorry. He's here, but will not testify today by his own choice.

MR. CIRIGNANO: Pollution is spread all over the State. With 97 Superfund sites and numerous hazardous and toxic waste sites, pollution is everyone's problem. The construction and engineering communities were represented and testified, as did Mrs. Peggy Haskin of the League of Women Voters, who is the Cochairman of the Coalition for a Clean New Jersey.

All of these people testified that there is a need for insurance reform. The lack of affordable insurance, or in fact, any insurance at all, will prevent all cleanup of hazardous and toxic waste sites and will cause cleanup to stop. No reputable contractor, engineer, or architect will work without liability insurance. That, in essence, is the problem. Without liability insurance, there will be no more cleanup.

Mr. Brian Deery, Assistant Director, Municipal Utilities Division of Associated General Contractors National Office in Washington, DC, testified at the conference that the problem was national in scope. He cited HR-2817, which attempts to deal with the problem. This legislation has been proposed, but no action has been taken.

We applaud Governor Kean's decision to place a 90-day hold on insurance companies. However, as Commissioner Gluck has stated, "The Legislature must deal with the problem."

The Governor's action is only a temporary solution to the problem, but it does hold off the immediate threat.

The Alliance continues to offer its services to your Commission at this time. We applaud your actions in holding this public hearing. We urge you to come to a conclusion as expeditiously as possible, and we hope to continue to serve the people of New Jersey by doing what neither government nor business can do on its own.

SENATOR LESNIAK: Are there any questions from the members of the Commission? (no response) Good morning, Assemblyman Deverin, who has just arrived and who is sitting next to Assemblywoman Ford.

Any questions? (negative response) Okay, thank you. At this time, I would like to call representatives from the Utility and Transportation Contractors Association -- Robert Briant, Executive Director, and Steve Brauer, Legal Counsel.

**ROBERT BRIANT:** Ladies and gentlemen of the Commission: We want to thank you for this opportunity to testify this morning. I'm Bob Briant, Executive Director of the Utility and Transportation Contractors Association of New Jersey.

Our Association numbers approximately 540 member firms which do all forms of heavy highway and utility construction and, more recently, in the past four to five years, also do all of the hazardous waste cleanup construction work in New Jersey.

We are greatly concerned about the problem before you because we find recently that most of our contractors' insurance coverages have been cancelled or, in fact, our contractors have been told that policies involving pollution liability will not be written in the future. This creates quite a havoc for our industry because contractors are going to be forced to make two decisions: Number one, not to bid on any of this work in the future, and that is not in the best interest of the citizens of this State, or number two, bid work without having proper insurance coverages, which leaves their companies wide open to all kinds of potential legal actions.

We have another concern about this matter, and that is, the State is about to launch a landfill closure program in New Jersey. Most insurance companies and carriers are going to look at the landfill closure program as being another type of hazardous waste cleanup program, and our contractors who have been active in that work will find, very soon, that they will not have insurance coverage to even do that kind of work. So, we see two programs that are going to suffer greatly, both hazardous waste cleanup and municipal landfill cleanup work.

I have brought with me our Association legal counsel, representatives of our contractors, and representatives of our insurance agents, who can respond to specific questions and give you specific instances of the kinds of problems we have experienced in the past 30 days. With this, I would like to introduce our Association legal counsel, Steve Brauer.

**STEVE BRAUER:** Thank you, Mr. Chairman. Good morning, ladies and gentlemen. Mr. Briant has provided you with copies of the statement I prepared in connection with the testimony and, rather than go into it in detail, I would like to just highlight some of its points.

I'm sure you are going to be hearing from numerous witnesses today to the effect that we have a crisis in liability insurance as it

impacts upon hazardous waste cleanup. Based upon a very recent experience which I had as an attorney representing contractors, I can tell you that the crisis has reached a point where this insurance does not exist in the marketplace. It cannot be gotten at any price. Indeed, contractors have been advised that liability insurers would not be willing to write \$1 million worth of coverage for \$2 million worth of premium dollars. This is symptomatic and indicative of a number of undercurrents and trends which have come to a head and are now manifesting themselves in this State.

As I am sure many of you are aware, not too long ago there was a court decision in Jackson Township involving the pollution of water supplies there. In that case, the insurance industry discovered, to its surprise and chagrin, that its potential liability exposure exceeded what it thought it was writing insurance for. Without commenting upon that decision, I think it is safe to say that the insurance industry now perceives that there is a climate in New Jersey which puts them at risk and exposes them to potential liabilities beyond what they anticipated and beyond what they have charged premium dollars for.

Additionally, when you are talking about hazardous waste removal projects, you are often talking about risks which are largely unknown and potentially unknowable. Many of the sites we are talking about have been repositories of materials for decades, and no one can fairly gauge what's there. Because you do not know what is there, it is difficult, if not impossible, to ascertain definitively what the potential liability is if something that is there is released into the atmosphere or into the water supply. Liability insurers, by nature, do not want to go in and insure risks that they cannot evaluate and estimate. In the same vein, actuarially, if they cannot identify and estimate the risk, they cannot calculate a premium, nor can they calculate what the dollar exposure may be.

In addition to all this, over the past decade, the liability insurance industry has experienced some catastrophic loss situations relating to toxic materials. I'm sure I don't have to say anything more to this Commission than to mention the problems that have occurred

with asbestos in New Jersey. I have been involved in asbestos litigation in this State, and I know that the insurance industry has expended tens, if not hundreds of millions of dollars, in loss payments, loss settlements, and the costs of handling thousands of claims.

Coincidentally, within the last few months, we all observed the tragedy in Bhopal, India, which I think highlighted the kinds of dangers you can encounter when you are dealing with some of these hazardous substances.

For all of these various reasons, I believe the insurance industry has now said, "We are not going to write this business." As Mr. Briant suggested -- and I am sure other speakers will -- without the protection of liability insurance, it is really not fair or realistic to expect that the contractors are going to undertake to do this work. The industry needs protection. Indeed, they need it for themselves and for the public, because without this protection, everyone is at risk.

One other area in which this problem has manifested itself in terms of the construction industry, is the impact which the lack of insurance has had upon the ability to obtain bonding to do public work. As you are aware, under the New Jersey Bond Act, all public construction work must be undertaken with the payment of performance bonds. Increasingly, we are seeing a phenomenon where the bonding companies are questioning whether or not they will write payment and performance bonds, because of the absence of insurance, or the risk that the bond may ultimately be looked to as an insurance policy.

As I indicated in my statement, and by way of identification, I currently chair the New Jersey State Bar Association's Fidelity and Surety Committee, and I do devote some of my practice to fidelity and surety work. By nature, a surety bond is not an insurance policy. It is not written for that purpose, and the surety bonding company that issues such bonds does not have an anticipation of having to act as the liability insurer of last resort. In light of the problem of obtaining more traditional forms of liability insurance, there is a real risk that a bonding company may assume that it will be looked to as an

insurer. It is a risk which bonding companies have expressed an unwillingness to assume.

Because of all of these problems which are coming together now, there is a need for action, I believe, on an immediate basis. It is obvious that the Legislature has recognized that need by formulating this Commission. In my prepared remarks -- although the Chairman indicated we are not looking for solutions today -- I allude to at least three areas--

SENATOR LESNIAK: That is not the primary focus, but we certainly welcome any suggestions.

MR. BRAUER: Thank you, Senator. I allude to three particular areas which I think are worthy of note and consideration. First of all, one of the problems which underlies the anxiety of the insurance industry, as I suggested, is the actions of some courts in expanding liability. From a court's point of view, certainly they are responding to cases before them and they are seeking to protect rights. Individual lawyers bring suits on behalf of individual clients or groups of clients in order to protect those rights and vindicate their interests. However, I think one of the things that has to be considered as a matter of policy is whether or not we can afford to have the same sort of system of individual manifestation or prosecution of rights, if the end result of the prosecution of those rights is the impairment of the system to clean up its hazardous waste situations.

One of the things that I think has to be looked into seriously is the possibility of the Legislature making very difficult policy judgments, and perhaps cutting back or limiting the rights of individuals, under certain circumstances, to pursue claims against people who did not contribute to the underlying problem of hazardous waste, but rather who subsequently came in to try to solve the problem. They may ultimately find themselves exposed to enormous damage claims because of what they tried to do to solve problems that had been festering for years and years.

It should be noted in this regard that even if there is ultimate vindication through the legal process of a contractor who has a claim asserted against him, the costs of being named in a lawsuit and

defending one's self in that circumstance are enormous. I suppose ultimately someone is going to look at the legal profession and level criticism there, but one of the areas that I think has to be considered is the possibility of passing laws to say, as a matter of policy, that certain rights which may traditionally have been available, have to somehow be curtailed in the interest of society's problem in cleaning up waste.

SENATOR LESNIAK: What remedy would you suggest for the contractor who is negligent in performing his duties?

MR. BRAUER: Certainly, Senator Lesniak, insofar as it is demonstrated that a contractor is negligent, and does not do work in the manner that he should in accordance with state-of-the-art techniques and knowledge, he should be held accountable for his errors or omissions. What I am really alluding to more are situations as now exist, where anyone who goes into a hazardous waste site may be held strictly liable in the event that there is some sort of manifestation of injury following work on the site. Indeed, there was a story in the newspaper just the other day about a site currently under consideration, where an attorney indicated he had a number of claimants ready to file suit. Now, a contractor wasn't even there, but certainly there is a potential risk to any contractor going onto that site faced with the knowledge that there are potential claimants out there waiting to file suit for exposures they have been living with for years.

Once you get on the site, it is a practical matter, and once you are involved in any aspect of the process, you have to assume that you are going to be joined in any litigation which emanates because a lawyer doing his job has to make sure that he looks to any possible tort-feasor in protecting his client's interest.

SENATOR LESNIAK: If the State were to indemnify the contractor for damages and for defense on a strict liability claim, but still hold that contractor responsible on a negligence claim, do you think that the insurance industry would be able to write-- Do you think insurance would be available if that were the case?

MR. BRAUER: As a matter of fact, Senator Lesniak, that was the second point that I was going to make by way of suggestions, and is

one that I allude to in my prepared statement. I believe the whole area of indemnification and payment of defense costs for contractors is one which has to be explored, and can be done both as a matter of policy and as a matter of legislative fiat.

In direct answer to your question, I don't know whether the insurance industry would take much solace from indemnification under a strict liability situation or any other situation, to say, "Now we can safely write insurance." But it certainly is a step in the right direction. From a contractor's standpoint, faced with the possibility of not having insurance, or having insurance cancelled, if he at least knew that he was going to be indemnified or held harmless or have the costs of defense borne by the State or the governmental entity for which he was doing work, it would give him protection above and beyond the insurance situation.

I think that some form of indemnification back to the contractor is essential in light of the situation which now exists. As I am sure you are aware, traditionally in public contracts, the indemnification runs the other way. It runs from the contractor to the State or to the governmental entity, where the contractor holds the State, or its agencies, harmless. In a traditional context, although our industry has resisted that because we think there are fundamental problems with it-- Traditionally, that has been a part of these kinds of contracts; the industry has lived with it for years. We are now at a point where unless some relief is provided by way of indemnification, certainly in the absence of insurance -- traditional insurance -- there is a real risk that people will not do this work because they cannot afford the exposure.

The third area that I suggest may be ripe for consideration, is regulation of the insurance industry. As everyone is aware, the Governor, within the last couple of weeks, has enacted an emergency insurance regulation addressing this liability insurance dilemma, not just as it applies to hazardous waste, but broadly as it applies to general liability in New Jersey. From the construction industry standpoint, I think it is safe to say that we applaud the Governor's action because it is a response to a situation which has developed to

crisis proportions. From what I have been told, the insurance industry is, perhaps inevitably, unhappy with the regulation, and I am sure you will be hearing from the industry as these hearings proceed. However, one of the things that I think has to be considered, although, again, it is not an easy problem, is whether or not there is some way of regulating the industry to make certain that it cannot selectively choose what kind of insurance it wants to write and what sort of risks it wants to insure, but rather must bear some responsibility for the bad as well as the good.

I know there was a crisis a few years back with automobile insurance, and that was one of the problems that arose, where carriers did not want to write automobile insurance because it was costing them money, but they still wanted to write other lines of insurance which were profitable. It may well be that on this hard issue, the Legislature, once again, will have to take a look to see whether there is some sort of fair and equitable regulatory scheme that can be put into place to maintain traditional liability insurance for this kind of work, while at the same time allowing insurance companies to assay their risks and decide what sort of business they are going to conduct in New Jersey.

I think in closing I would like to refer the Commission back to my statement, which is more comprehensive on these points, and also indicate that we are really on the cutting edge of a very, very difficult problem. I know from my private practice, and from my involvement with the UTCA, that there are various contracts which are now in process at the State Department of the Treasury and the State DEP. Answers to some of these problems, I would suggest, have to be forthcoming in fairly short order, or else the State and its subordinate entities are going to find themselves without the kind of responsible and diligent pool of contractors that they normally have available to do their work.

The industry is ready to respond, as it has responded in the past. I think that is a safe statement to make. But, in order for it to do so, it requires the kinds of protection which will allow it to do its work in a responsible way without putting everything at risk. That is really what we are talking about here.

Thank you, Mr. Chairman.

SENATOR LESNIAK: Senator Dalton?

SENATOR DALTON: Thank you, Mr. Chairman. Mr. Brauer, just to focus on the emergency regulation announced by the Governor two weeks ago, the emergency regulation has the effect on a contractor that there would be no dramatic premium increases midterm. There would have to be some rationale based upon, I think, a fourfold criteria for not renewing -- misrepresentation of fact, basically a criteria that is already used by the insurance industry for the most part.

From what I understand, however, this emergency regulation in no way precludes the industry from jumping its rates five, six, sevenfold in promulgating a renewal policy. Is that correct?

MR. BRAUER: I am familiar with the regulation, Senator Dalton, and my recollection is that in my reading of it there is nothing which specifically addresses whether or not an insurer can increase premiums. I know there have been stories in the press which have characterized the regulation as being one to freeze premiums. I did not see it in the regulation.

SENATOR DALTON: Neither did I.

MR. BRAUER: That may be an effect of the regulation that is expected or surmised, but I agree with you, I don't think it is in the regulation.

SENATOR DALTON: From my understanding, that has been the effect very recently. Whether they be government entities or private entities, the effect would be that the insurer would immediately write in the pollution exclusion, the comprehensive pollution exclusion, and then jump the rates dramatically.

So, what I am suggesting is, other than providing a market, in many cases, a contractor may not have the wherewithal to meet those premiums.

MR. BRAUER: Senator, the problem is even more pronounced than that. Notwithstanding the regulation -- and I know this from personal experience in a matter that I have been involved with over the past few months -- there are insurance carriers which are saying, in effect, "We intend to cancel insurance if contractors embark upon

hazardous waste work." To put it another way, they are taking the position that the regulation is unenforceable, or that they are going to act in what they deem to be their best interest, regardless of the regulation.

I have to assume that at some point in time in the not too distant future, a case is going to occur which is going to test the regulation, and there may very well be questions as to its legality. I am really not prepared to comment on that. Ultimately some court, I guess, will have to decide that issue. But I think the industry, at least in this area, is of the mind that regardless of any emergency regulation, they do not want to write this insurance, and will not write it unless they are absolutely forced to continue insurance under existing policies.

With respect to the issue of the pollution exclusion, as I understand it, there has been approval of exclusionary language for excess insurance, excluding pollution coverage. But the exclusion has not been approved with reference to general liability insurance, so, arguably at least, there is coverage under the standard form GL policy for certain pollution work, even though there may not be exclusion, there may not be coverage for excess insurance.

SENATOR DALTON: I suspect you can even argue that point. I mean, the bottom line is the companies that are writing general liability policies for public entities are putting in a carte blanche pollution exclusion. Ultimately, some judge somewhere is going to make a determination about whether or not that is an effective clause.

MR. BRAUER: It is my understanding that unless the Commissioner has approved certain forms, there is a real question as to whether or not the insurers can write terms into policies. The regulation, as I read it, envisions a process whereby the Commissioner will develop a body of regulations in order to set forth criteria for cancellation. Until that is done, there is a freeze on cancellations. I don't think anyone knows yet what effect it is going to have. It is just too soon to say.

SENATOR DALTON: Two more quick questions, Mr. Chairman. You indicated that this has not only had an effect on the standard or

*New Jersey State Library*

traditional insurance industry, but, also, as far as surety bonds are concerned. My thoughts there are not only the concerns you mention, but in many cases, a performance bond is just that. It is moneys that are put up regarding, or in conjunction with the hopes of someone performing his or her task. However, the question becomes, in the cleanup cases we have seen around the State-- We have watched, in my back yard and in Senator Laskin's back yard, the Lipari Landfill in Pitman, where the contractor has done the work as outlined by both the Federal and State agencies, and yet we still have a situation where the leaching of hazardous waste continues. So, it is not just a matter of being scared off because no one is going to write pollution under the GL, it is whether you can actually comply with the performance standards set up in the contract.

MR. BRAUER: The rationale of performance bonds, as you suggest, is to -- I suppose very simply -- guarantee performance. Generally speaking, you have a defined and finite responsibility and undertaking set forth in contract documents. There is a point when a job is finished, when it is accepted, when final payment is made, and a bonding company knows what its responsibility and exposure is, based upon those finite parameters. As you suggest, if you have a job which may define finite definition, there is always the possibility that someone, at some point down the road -- and it could be a month, it could be a year, it could be 20 years -- will say, "Wait a second, the contractor didn't finish performing," and on the theory the bond is still in force.

I can relate to you one specific example of this problem, again in my private practice, where a bonding company said, in effect: "We won't issue a bond for a hazardous waste job unless there is insurance," and there wasn't insurance. So, we had to think about alternatives since the insurance was not there. Essentially, what we came up with was the drafting of rather sophisticated language, which was appended to both the bond and the contract to express, as clearly as possible, the notion that the bond was not written as an insurance policy of last resort. It was not being offered as an unlimited and nonspecific guarantee of performance in perpetuity. Even with that,

there is always the risk that some time down the road, some court may say, in effect, "We don't care what you said; this is what the legal effect is." I suppose neither the Legislature nor a lawyer, as carefully as they try to craft things, can ever provide absolute guarantees that there is not going to be some expansion or some interpretation of their best efforts to limit liabilities. That is the way the system seems to work.

But there are efforts being made in the marketplace to deal with the problem, in, I think, rather innovative ways. However, we can only go so far with that because it is just not going to work unless there are some very fundamental, and I think systematic or systemic changes, in the entire process.

SENATOR DALTON: Relative to regulation of the industry-- Regulation of the industry without talking about limiting liability or effectuating other changes would be almost useless, don't you agree? I mean, you have described the problem, I think, fairly well, from an industry perspective. It is very tough to quantify the risk actuarially. Just saying to the industry, "Well, we are going to regulate you in order to bring you back into this area," without some other fundamental changes, would seem to be counterproductive, wouldn't you agree?

MR. BRAUER: Yes, I agree, Senator. I do not want to create a misimpression that I was listing these various things as isolated approaches. I think all of these things have to be considered, and I am sure there are other things I haven't mentioned which have to be considered. But I agree that without some sort of concentration upon the indemnification and liability issues, anything else is kind of a stopgap. It's sort of plugging your thumb in a dike; it does not go to the problem.

In a certain sense, God forbid if there was ever a disaster on a hazardous waste site. The discussion of liability insurance is almost irrelevant because -- I mentioned the Bhopal situation -- if we ever had a catastrophe where something was hit and a cloud was spewed somewhere, and you had \$1 million, or \$5 million, or \$10 million worth of insurance, that would go just as the cloud dissipated in the wind.

The real protection -- certainly as an attorney advising clients -- I would like to see, would be some sort of a system whereby a contractor could go in and know that he was not at risk beyond anything that he did negligibly or failed to do in accordance with standard operating practices or state-of-the-art technology.

Indeed, I very candidly state in my written remarks that when I am asked the question by contractors, as I am occasionally, whether they should do the work, my advice in the current climate is, "Don't do it," because the risks are potentially so great. They may be small to calculate. There may be one chance in 1,000, or in 100,000, that you are going to have a problem of catastrophic proportion, but if you have that problem, the effects are so Draconian, so incredibly great, that it is not excessive to say the business and the personal wherewithal of the contract would be wiped out. Ultimately, I guess people make business judgments as to what they can and can't do, but, as an attorney, I can't make those judgments. But it is a situation, as an attorney, that I look at with tremendous trepidation and appreciation for the dangers.

SENATOR LESNIAK: Thank you, Senator Dalton. Senator Laskin?

SENATOR LASKIN: I see that there are a lot of witnesses, but let me ask you a few questions and maybe others will hear. Commissions in this State have a way of going on and on and on ad infinitum. Every year they come to their expiration date and they are renewed for another year. I don't think this Commission will fall into that category. The crisis problem which I think everyone on this Commission is familiar with-- This is a Commission that was appointed with people who know what this problem is all about. I don't think we can afford to let this one go on and on.

So, we have to have answers. Now, when you and Senator Dalton, who speak a language that I do not understand -- that's the insurance business, and I am not familiar with that -- you can talk about the philosophy of insurance, but I have to understand, in a more basic way, what suggestions can come from these witnesses as to how to solve this problem.

The first suggestion you made was State indemnification. I have a problem with that because when I hear indemnification, I think a contractor may tend not to be as strongly adherent to high standards when he knows that someone is going to pay his bill if he does something wrong. But State indemnification is a suggestion.

You mentioned stronger regulation of the insurance industry. I think the insurance industry in this State, generally, needs a lot of work, not only in this field, but in the automobile field. I was pleasantly surprised to hear you say that the crisis for automobile insurance is over. We didn't know that.

What about the idea -- and this is maybe just a dream thing -- of Federal regulation, as opposed to individual state regulation of the insurance industry? Have you ever given any thought to that? I have.

MR. BRAUER: I have not, Senator, but I would like to speak to the question of Federal regulation in a slightly different way.

As I understand it, in Superfund jobs which are funded by Federal EPA dollars, there is provision for the type of indemnification I alluded to before. That has not been implemented on the State level. I believe it is -- or if it isn't, it should be -- under consideration for jobs now in the pipeline which are going to be going out, because there is going to be a problem getting contractors to bid and do the work without it.

SENATOR LASKIN: I don't want to take any more time. I just hope that the witnesses realize we are desperately searching for some good suggestions on how to solve this problem. My feeling is that Senator Lesniak, who is not going to let this thing drag on, and on, and on ad infinitum, is going to want to come out with some very strong suggestions on how to attack this problem as soon as possible. I know municipal insurance premiums have gone through the ceiling, and that affects everyone.

MR. BRAUER: This is a problem which really cuts across lines. I think this is bipartisan and multi-faceted. Everyone has the same interest; it doesn't matter whether you are in the insurance industry, the contracting industry, or a public program.

SENATOR LASKIN: All right, thank you.

SENATOR LESNIAK: Are there any questions? Assemblyman Deverin?

ASSEMBLYMAN DEVERIN: Yes. I wonder, does your work with the contractors who work on toxic problems take you anywhere else besides New Jersey? Are you connected with the Northeastern states at all?

MR. BRAUER: No, I am not, Assemblyman.

ASSEMBLYMAN DEVERIN: You are not aware of what the situation is in the other states then?

MR. BRAUER: I am only aware by virtue of what I read and generally what I hear informally from other attorneys.

ASSEMBLYMAN DEVERIN: What do you hear?

MR. BRAUER: My impression is that the problems we have in New Jersey are similar to the problems they have in other states, although I think New Jersey is really ahead of everyone else for a variety of reasons. I think we have identified more sites. We are a small populous State, everyone is very close together, and, in my experience, I think there has been a responsiveness to the kinds of problems we have. That is my impression from dealing with various people in State agencies. I detect a sincere desire to get on with the problem of cleaning up these sites, and a desire to work through some of these problems, which I must say are very, very difficult to work through.

ASSEMBLYMAN DEVERIN: Has the save-harmless clause been considered by any other state that you know of?

MR. BRAUER: I don't know the answer to that, Assemblyman.

ASSEMBLYMAN DEVERIN: Okay, thank you very much.

SENATOR LESNIAK: Assemblywoman Ford?

ASSEMBLYWOMAN FORD: I have one question. To your knowledge, are there contractors who are working without insurance?

MR. BRAUER: Right now, on this sort of thing?

ASSEMBLYWOMAN FORD: Yes.

MR. BRAUER: I do not believe there are any contractors working without insurance right now, although I believe there are contractors who are working with insurance where there may be questions as to whether or not their insurance will remain in force and will ultimately be available in the event that there are claims asserted.

In order to answer your question, Assemblywoman Ford, I think you have to keep in mind that we are in a very, very dynamic situation. I think the situation that abided three or four months ago was a little different than what we have now. When the first project started going, contractors who do this kind of work went to their insurance agents and insurance brokers. I think they had certificates and were able to get insurance. As the insurance companies became more aware of what kind of work was being done and started to factor in things like the Jackson Township experience and some of the other things I have mentioned, I think it occurred to them that there were risks here that they were not willing to blithely undertake, and they started to resist.

One job in particular that I know of was originally to be let back in June or July. At that time, there were certain requirements for insurance, which ultimately had to be changed on a re-bid. Now, some three months later, we find that the assumptions that were made about insurance then are no longer operative because the situation has changed, and has continued to move. I think today -- and we have insurance industry people here with us who perhaps can better respond to this question -- that a contractor who goes out to bid hazardous waste work cannot get liability insurance for that job. It is not available in the marketplace.

MR. BRIANT: Assemblywoman Ford, another point to amplify on what you just brought up is, when a job is advertised now, there are less contractors who can bid the work because they do not have the insurance. What that tends to do is drive costs up, and keep contractors out of the marketplace who are qualified to do the work but who, in fact, do not have the insurance.

One of our contractors does bid work out of state, Assemblyman Deverin. He can respond to your question, if you would like him to, relative to how some of the other states are handling the kind of problem we are talking about today. Would you like him to respond to that question?

SENATOR LESNIAK: Yes, we would. I would just like to tell Dr. Sadat to please be patient, and I would like to thank him for

coming to testify. It will be just a few more moments before I call him.

MR. BRIANT: We have Joseph DeNunzio with us. He is one of our contractors who handles this work and he has bid jobs out of state.

JOSEPH D. DeNUNZIO: My name is Joseph D. DeNunzio. We operate throughout the Northeast--

SENATOR LESNIAK: Mr. DeNunzio, I think you have to move up to the witness table to be recorded.

Mr. Brauer, on Superfund sites you have to have insurance. Isn't that required under the Federal regs?

MR. BRAUER: Yes, I believe it is.

SENATOR LESNIAK: Do you know if it is mandatory in the State?

MR. BRAUER: Senator, I can only respond to that--

(Dr. Sadat speaks from the audience.)

SENATOR LESNIAK: Dr. Sadat told me it is not.

MR. BRAUER: I'm not sure I necessarily agree with what Dr. Sadat said.

SENATOR GAGLIANO: May I have a clarification on that?

SENATOR LESNIAK: We'll wait for Dr. Sadat to come up.

SENATOR GAGLIANO: Yes. I would like a clarification on that because a very large job in my district, Burnt Fly Bog, has not proceeded because-- I thought one of the issues was insurance.

SENATOR LESNIAK: I'm sorry for listening to testimony from across the room. We will give Dr. Sadat a chance to answer that specifically.

MR. BRAUER: Mr. Chairman, would you like me to respond to Senator Gagliano?

SENATOR LESNIAK: Please.

MR. BRAUER: Senator, it is my understanding that insofar as previous jobs which have been put out to bid are concerned, all of those jobs have had requirements in the Requests for Proposals or the bid documents calling for insurance. I do not know specifically what may be on line now or what is planned, or whether there has been any change in the requirements. But, to the best of my knowledge, and this

is based on-- I was involved recently on a project which is currently on the threshold. There were insurance requirements.

SENATOR LESNIAK: Burnt Fly Bog is a Superfund site?

SENATOR GAGLIANO: Yes, it is.

SENATOR LESNIAK: That may be the difference. I don't know.

SENATOR GAGLIANO: You had asked about Superfund. That is why--

SENATOR LESNIAK: We know it is required under Federal regs. The question was, is insurance required for State work as well?

MR. BRAUER: One other point. In Superfund, there is indemnification language which runs in favor of contractors. That may have an impact upon the availability of insurance, although there are insurance people here who I think can speak to that better than I.

SENATOR LESNIAK: Mr. DeNunzio?

MR. DeNUNZIO: Gentlemen, with regard to the Superfund, I think the intent was to indemnify the contractor and the engineer involved in cleanup sites, and to hold them harmless with regard to the effects of any pollution liability not resulting from their own negligence. We are ready to accept our negligence. What the insurance industry thinks about it, I can't answer. But, we are working on hazardous waste sites. We have a serious problem today, in that we have just signed a contract, and we are under threat from the insurance company and expect a notice that they are going to cancel our insurance in 30 days, regardless of what the Governor's order was. I thank him for his order because I think it did help. We would not have gotten the insurance. We had gone all over the world. Lloyd's of London refuses to write it at any cost, even four times the amount of the insurance required.

At our National Board meeting in Washington -- the National Utility Contractors Association -- it became evident about four or five months ago that this had become a national problem. The cost of liability is one thing. It has gone up substantially. Our excess liability policy went from \$5,000 to \$35,000 just in the last month. But at least that is a definable cost. We are under threat -- not only my own company, but every one of the companies I am affiliated with

through my family -- because of some possible assertion that some attorney, sometime in the future, is going to end up bringing in my name because of family corporations. That would threaten that policy, which would put me out of business. We are a public works contractor operating all over the State and in the Northeast, and we require insurance to do that work.

It is a crisis, and we hope, at least on the Superfund sites, that you will indemnify the people working on those sites for that problem. Our excess policy, by the way, has an explicit pollution exclusion and has gone to a claims-made type of claim. You can ask the insurance industry what that means. I am a little confused myself, but it means we are not going to have protection in the future over something that may have happened during the term of the job.

We have contractors who are not bidding because they are not able to get insurance. This inability to get insurance will increase your costs on future projects. There is a direct threat of no insurance.

SENATOR LESNIAK: And that is the same in other states, as well as in New Jersey?

MR. DeNUNZIO: I have subcontractors from out of state with present Certificates of Insurance which are under threat of cancellation. When trying to get certificates for new jobs, they are unable to write them. The company turned them down. When those policies end, they will not be renewed.

SENATOR LESNIAK: Assemblyman Shinn?

ASSEMBLYMAN SHINN: I guess my comment goes to-- I sort of identify the problem in two areas. One, you have contractors who are involved in a cleanup operation, and, on the other hand, you have the municipal/county/State problem. The municipal problem is that municipalities historically had the responsibility for solid waste. I would guess that there are probably at least 50 municipal landfills that have either been closed or are in the process of closure. They have problems with environmental liability impairment.

Counties, which now have the responsibility for solid waste and bringing systems on line, have the problem of securing

environmental impairment insurance. In our case, we are looking at a self-insurance type situation. The State is not exempt because the Hazardous Waste Commission is going to be faced with the same thing -- the environmental impairment situation.

I would like to hear some comment. You spoke about some indemnification. From discussing the problem with several people, I can see from a municipal/county/State level some self-insurance and an upper indemnification so that the insurance company would know the extent of its liability. In essence, you have a layer situation, where a municipality, a county, or the State would insure itself up to a certain layer, hopefully with the private sector. Then maybe there would be some sort of an upper indemnification type situation, so at least you would be able to define limits of liability and a private carrier would have some comfort coming forward with a premium that had some known quantity. As I understand the major part of the problem, there is no way to quantify the liability risk. It seems endless in many regards.

MR. BRAUER: Assemblyman Shinn, with regard to the point of self-insurance, within the past couple of months, on the particular job that Mr. DeNunzio is involved in, we discussed with the State -- I acted as his attorney -- alternatives to traditional insurance, in view of the situation, which had deteriorated to the point where we couldn't get it. One of the things we discussed with them was the question of whether the State might establish some sort of self-insurance vehicle to cover both it and its contractors against some level of risk in connection with hazardous waste work. I know there are risk management people from the State here who perhaps could speak to that issue better than I.

Certainly, from a contractor's standpoint, I think it is safe to say that the industry would be more than willing to work along with the State, if the State could come up with some solution to its own insurance problem. As a practical fact, if we ever get into a situation where claims are asserted against the contractor who is naked -- that is to say, one who does not have insurance -- and the State is involved, the State is going to be dragged right into the midst of any

sort of litigation or claim, regardless of whether or not there are hold-harmless provisions going back in favor of the State.

The State has certain wherewithal that a private contractor does not have. The Attorney General's office has, I suppose, hundreds of deputies who are charged with the responsibility of representing the State and, insofar as they are representing the State, and the State is insuring itself and extending protection to its contractors, presumably that resource, which is already being provided, could be made available to solve the problem as an adjunct to self-insurance.

It is my impression, from the discussions we had, that there is a need for some clarification as a matter of policy as to whether or not the State would engage in some sort of self-insurance scheme. There may also be legal or constitutional problems which arise in terms of control over funds and various other things. I know that any solution, at least in the current state of the law, is going to require input from various agencies and, ultimately, from the Attorney General's office. I think one of the difficulties we have here is, in my experience, when you are involved in that kind of process, it just tends to drag on and on and on, and you go from one agency to another agency, then to the Attorney General's office. You may have to go through half a dozen different layers of people at the Attorney General's office until you reach the sufficiently high or sophisticated level where someone can just cut the Gordian knot and make a hard decision.

We even explored other alternatives in a particular context. We talked about setting up some sort of claims fund jointly with the State, where both State and contractor would contribute. We were looking for solutions to a problem which manifested itself on a particular job. We worked our way through some things, but we certainly have not addressed the problem fully. But, self-insurance is certainly one thing I think the industry would respond to very favorably.

ASSEMBLYMAN SHINN: Do you see a separate approach to the municipal/county/State problem versus the contractor issue on liability impairment? Have you given that any thought?

MR. BRAUER: Well, I am certainly not as familiar with the experiences that the government entities have had with their own insurance situations as they are. It is my impression that the localities in the counties are experiencing the same sorts of problems.

SENATOR LESNIAK: If I may, we have plenty of people here to testify on behalf of the municipalities and counties.

ASSEMBLYMAN SHINN: I just wanted to throw that issue out so we could get some ideas back. One last point I would like to make is, when you try to analyze the costs, the costs always come back-- In any fashion, whether Lloyd's of London is going to do all of the liability, if they will, or whomever, the costs always come back to some governmental level and end up with the taxpayer, either in a premium base, the cost of cleanup, or whatever. I think that is an important issue. I don't see anyone else footing the bill.

SENATOR LESNIAK: Assemblyman Martin?

ASSEMBLYMAN MARTIN: With respect to the indemnification issue you threw out as a possible help in this area, what would be your reaction to some form of insurance whereby the prime contractor would, in fact, have some liability to a fixed limit, and from that point on there would be indemnification by the public body, be it municipality, county, or State?

MR. DeNUNZIO: I think that would help. I think the problem today is that when insurance companies look at private businesses, they don't have a limit of liability. So, within your solution, if you clearly limit that, then I don't think you will have a problem with the insurance industry.

ASSEMBLYMAN MARTIN: The problem as you see it right now is the open-ended liability aspect which prevents an insurance company from--

MR. DeNUNZIO: Absolutely. Our present contract calls for the State to pay for the liability insurance. We could not get a policy for general liability four dollars to one dollar because they said, "Look, you can pay me \$4 million for a \$1 million policy, but it might cost us \$50 million." They absolutely did not want to write it because of the Jackson Township case. Apparently there is a fear out

there that they have an unlimited liability. Certainly, if you limit liability-- I fear 30 days from now having absolutely no insurance.

I did want to address Senator Laskin's concern about indemnification and that we, as contractors, would be looser. Ultimately, we, as taxpayers, always pay our own insurance, as you indicated. However, we, as contractors, ultimately pay -- as a cost -- our insurance. We are rated individually; just as in compensation, our liability and our liability rates go up, and our deductibles go up.

Five years ago, we had a zero deductible. It went to \$250, \$500, \$1,000; presently, it is \$5,000. So, in essence, to some extent, we do self-insure. A lot of that has to do with the size of the project. But there are hundreds of small contractors out there who would love to bid some of your smaller contracts, but they just can't afford to under the present condition.

SENATOR LESNIAK: Thank you very much. There is just one matter of clarification. One of the problems is that if you have a \$1 million coverage policy, the insurance company just can't put that \$1 million on the table and walk away. They still have to defend the case, which could cost them \$15 million, \$20 million, or \$25 million to defend in some instances.

MR. DeNUNZIO: Well, Mr. Brauer mentioned earlier that presently on a site where we intend to go to work, there are already allegations from attorneys who are prepared to sue if citizens have been damaged by that site. As a result, we are faced with lawsuits before we even go under the contract. That is a cost that is really not considered to be insurance, and it is a concern.

SENATOR LESNIAK: Okay, thank you very much. At this time, I would like to call Dr. Marwan Sadat, Director, Division of Waste Management, Department of Environmental Protection. Dr. Sadat, I am glad you're here.

We are anxious to hear the status of cleanup operations vis-a-vis the insurance problem.

DR. MARWAN SADAT: Good morning, Mr. Chairman.

SENATOR LESNIAK: Good morning.

DR. SADAT: I have to apologize to you. We had not been asked formally or informally to testify, so I had some of my staff here--

SENATOR LESNIAK: If that is the case, let me apologize. I thought you had been. In any event, we are glad to have you here.

DR. SADAT: Of course, I would be glad to at least try to answer some of the questions you may have. I think the first thing I have to tell you is we, at the Department, are not in the insurance business. In fact, on any of our contracts the insurance requirements are, generally speaking, determined by the Department of Treasury, the Attorney General's Office, and formerly the Spill Fund Administrator. As far as the Department is concerned, the insurance problems have been a fairly new concern with respect to our cleanups. Last year we had big contracts and had no problem. In fact, I think about a year ago we bid the Burnt Fly Bog contract, and there were six bidders, including Mr. DeNunzio, who had no problem with the insurance.

The insurance problem is developing on a day-to-day basis so what I tell you today may not hold up tomorrow. In fact, we know that when we first let the contract for the PJP site in North Jersey, insurance did not appear to be a problem at the first bid. At the second bid, we were beginning to experience some problems and were also experiencing some problems with bonding.

What the Department has done is work with the Attorney General's Office and the Department of Treasury to develop language which would allow contractors to proceed with the work by relieving them of some of the requirements we had set. We started with a fairly ambitious number-- I believe that two years ago when we started our insurance requirements for engineering firms which were set by the Spill Fund Administrator were \$10 million. That number was reduced to \$1 million. As far as I know, so far engineering contractors, consulting firms-- Right now if we had to proceed on a design or feasibility study contract and they couldn't get insurance, I think we would negotiate some kind of waiver from insurance requirements.

In response to your question with respect to Federal requirements, the Federal regulations do not require States'

contractors which are doing Superfund work to have insurance. That has been a State requirement at the advice of the Spill Fund Administrator, the Attorney General's Office, and the Department of Treasury. It is also a fact that the Corps of Engineers, on the other hand, has insisted on some kind of insurance. I don't know whether they are experiencing difficulties nationwide with Superfund cleanup. It is a little difficult to tell initially because the regions don't always act in a uniformed and consistent matter. That means, one of the Corps' regions may decide they want insurance and another may not. I really can't comment too much on the national picture. However, it is a fact that EPA regulations for the CFI do not require the states to require insurance from their contractors on Superfund jobs. I think that answers your question.

Our recent experience with engineering contracts has been that we have not come across major insurmountable insurance problems. That is not to say that will not happen tomorrow. It is a very dynamic sort of thing that is happening, and, frankly, it would be foolish on my part to predict that we are not going to have problems with engineering projects within the next few months. There is no question that over the last three months we have experienced some difficulty with construction contracts, and with the following sites: At the Cigna trading warehouse in Somerville, the cleanup contractor had some difficulty coming up with the appropriate bonds and we had to work very closely with him to make sure that could be accomplished. It was accomplished and they are proceeding with the work. On PJP -- and Mr. DeNunzio -- I believe they were working yesterday with the Attorney General's Office and the Department of Treasury to come up with language which would allow the contract to be awarded and meet our requirements. I believe that was accomplished. On Burnt Fly Bog, we have some difficulties, but we think we can overcome them. But again, I'm not--

SENATOR GAGLIANO: Excuse me, Mr. Chairman. If I may, Dr. Sadat, I would appreciate it if I could interrupt here and ask you exactly how you intend to overcome the problems of Burnt Fly Bog, because my recollection of it is that this phase was bid and that you

required \$10 million in coverage. The successful low bidder was able to hold onto \$2 million of coverage, at least for a period, and even that was questionable. There was some litigation before an administrative law judge--

DR. SADAT: I don't think we are talking about this contract, Senator.

SENATOR GAGLIANO: What?

DR. SADAT: I'm not talking about this contract. I am talking about an immediate removal action we are planning because we need to proceed with some work and decide--

SENATOR GAGLIANO: Yes, but--

DR. SADAT: Under the different contract. And that contract itself, I think, we have sort of abandoned the idea of receiving that.

SENATOR GAGLIANO: I understand that, but, wasn't the catalyst for the abandonment of that, the issue of insurance? I say that, and I want it to be on the record, because I attended a meeting of the community involvement group at Marlboro Town Hall. I was sitting in the audience, and they invited me to the table, just as you're sitting at the table, and I heard a representative from DEP say, "We're going to award this job in the next few days." Since that time the whole thing has fallen apart, and if I can characterize it more understandably for this Commission, you are now entering on a time and material type job, as opposed to a regular contract to complete the work. By time and material I mean that I think you are reaching out for contractors who have certain equipment and know-how, and you are going to do a little at a time. That's my feeling on the matter. When people were told in my district that there would be one contract and we would go forward, I thought the insurance was the biggest problem. I still hold that belief, and I would like your explanation of that.

DR. SADAT: The insurance was a problem. The responsive bidder was not able to get the appropriate insurance, while on the other hand, the non-responsive bidder was able to get insurance. I think what happened in the Burnt Fly Bog was it got so complicated in terms of whether we would award a contract to what we considered a non-responsive bidder, that we decided to proceed with our

non-emergency contract and do an immediate removal of the materials there. I have Joe Wiley with me who is Assistant Director for Planning and who knows the details of exactly what happened. Joe, do you want to go into the Burnt Fly Bog issue?

MR. WILEY: Yes--

SENATOR GAGLIANO: Pardon me, Mr. Chairman. This is--

SENATOR LESNIAK: I understand. Please, go right ahead.

SENATOR GAGLIANO: (continuing) --a key, current issue, and I think it really can bring all of the issues to one point.

SENATOR LESNIAK: Go right ahead.

MR. WILEY: Senator Gagliano, as you know from the meeting with the citizens group, we stated that we were unable to award the bid contract due to the problem of the lowest responsive responsible bidder being unable to obtain the insurance required at that time.

SENATOR GAGLIANO: That was the \$10 million total coverage, correct?

MR. WILEY: That is correct. As Dr. Sadat indicated, under our system of procurement we did not feel we could award the contract to a what we considered a non-responsive bidder, and there was some litigation on that matter. Basically we were faced with the question of, "How can we quickly move to have some work done during the construction period that we still have available this year?" We looked at our procurement system, and we concluded that there was a means of having some work done under another contract that had been previously bid.

SENATOR GAGLIANO: Fine, but the bottom line on the issue here is, when you do the so-called -- what I call -- time and materials work, are you going to require \$10 million worth of coverage of the contractors who come in with the backhoe and the dump truck, as opposed to someone who you wanted to have come in and do the full job?

MR. WILEY: The insurance requirements for the non-emergency small cleanup contract are not the same as for the bid contract for that particular site. They are, essentially, lower and we will allow the contractors to maintain, in effect, the insurance they had when they bid the contract. That contract was bid last Fall, so at that

time there was coverage available, and they have maintained that coverage.

We certainly don't want to predict what could happen, and the fact is the type of coverage they have may be canceled. I think we are in the same situation there that Mr. DeNunzio described.

SENATOR GAGLIANO: That is what I'm getting to. I think the risk issue is exactly the same. By rewriting--

DR. SADAT: That is what I said, Senator. I said, to predict what is going to happen tomorrow, would be foolish on our part. I think, maybe, what I should do--

SENATOR GAGLIANO: But I think now the State of New Jersey is apparently changing it to a time and materials type job, and therefore, assuming the insurance risk. In light of that, would it not have been better for the Department to have recommended to the Legislature that we did something prior to this point so that we could have a responsible contractor, whoever it might be, do the entire job, and therefore alleviate your own problems in the Department in terms of monitoring the job and also getting the job done?

MR. WILEY: Senator, I just want to clarify one thing about what the job is. I appreciate what you are saying about the possible greater risk involved if we take the responsibility of directing the activities of the contractor and working on a time and materials basis, and that is certainly a valid point. What we intend to do is only a portion of the work that we consider to be relatively straightforward, which is loading some contaminated materials onto trucks, and taking that material to an approved landfill. There is another part of that job that we do not currently have a mechanism to undertake, and that is to get the sludge out of the lagoon. It is a very difficult type of work and, because of its magnitude and difficulty, we did not feel that that is appropriate as a time and materials job under that particular contract. In effect, we had to phase back what we could do immediately in order to use that type of contract with the risks that we would have to assume ourselves.

SENATOR GAGLIANO: What would you recommend? Dr. Sadat or your colleague, if you had a recommendation to make to the Legislature,

-- and I recognize you are not in the insurance business, you are trying to do a cleanup -- what more specifically could you suggest to us that would help you on these jobs?

DR. SADAT: What I would suggest, Senator, is there is presently Senate Bill 3206, which was sponsored by Senators Contillo and Dalton, -- I think it is your bill also Senator -- and we certainly support that bill. In fact, I had prepared extensive comments on the bill to the Commissioner, supporting that bill. I think it would make our lives easier. I am not sure -- I'm not an insurance expert and I don't claim to be -- but I think that bill will go a long way towards solving our cleanup insurance problem. It may need some additional language to deal with insurance issues that I'm not terribly familiar with.

One of the recommendations that we would make, is that the bill extend not only to contractors and consulting engineers, but also to laboratories. We have been advised by some of the laboratories who do work for the State of New Jersey on our term contracts that they are experiencing some difficulty with insurance. We are working with them to see how we can solve that. When we have a problem I think our immediate response is to solve the problem the best we know how with the assistance of the Attorney General's Office and the Department of Treasury, or to look at another way of procurement. Surely, we would support and not oppose legislation to solve this problem.

I have made extensive comments to the Commissioner supporting S-3206, which is the only bill that I am aware of.

SENATOR DALTON: Can I pick up on that?

SENATOR LESNIAK: Go ahead.

SENATOR DALTON: I think Senator Gagliano's line of questioning really gets at the heart of the matter. What you have here is a major fill site, Burnt Fly Bog, -- and we have over 100 throughout the State -- and you have four players: the people who have been or may be damaged as a result of their residing near that site, the State wanting to move forward with a cleanup, contractors unable to get insurance which means you can not to move forward, and an industry that

is not willing to write that insurance, based upon their assessment of the risk. What the Chairman, through the Commission, is attempting to do is-- The Contillo bill is a good bill and is attempting to address the liability of contractors, but it is only dealing with one player out of the whole thing. You still have a number of other players out there. People who may or may not be damaged either prior to or during a cleanup action-- That is certainly a problem. Even if the Contillo bill is passed only a part of the problem is being addressed. I haven't heard anyone from the industry come forward and say, "Well, with the Contillo bill we will write contractors," although I suspect there is that possibility. I guess what I am looking for, Mr. Chairman, from the Department, is their thoughts. We have an overall problem here. We are not going to solve it on a piecemeal basis and we are not just going to address contractors. We have several other important players to bring into this process. So, how do you suggest resolving it?

DR. SADAT: Well, Senator, I think one of the major issues you are concerned about is victim's compensation. Frankly, I--

SENATOR DALTON: That is part of it, correct.

DR. SADAT: Frankly, I think that is an extremely difficult issue to solve. There have been some attempts to solve it through the Spill Fund. I am not sure that solved it completely. If we can't resolve the victim's compensation part, the Superfund effort in the Senate may bog down the whole Superfund legislative effort. It is my understanding that that is a major issue with respect to reauthorization of Superfund. Frankly, I am not an expert in victim's compensation, although I understand some of the implications. My, and I think the Department's, position is that right now we need at least a mechanism to allow us to proceed with a very important job, which is to do cleanups. We have worked very diligently with the Department of the Treasury and the Attorney General's Office to resolve these problems as they have come up. But certainly they are time consuming, they do cause some delays, and I would suggest that maybe this is only one part that we need to resolve, and then we must deal with the much thornier

issue of victims' compensation. I am not an expert in that field, and I would think that you would want to consider very carefully all the implications of victim's compensation. First of all I think from a public health issue it is sometimes extremely difficult to establish a course of relationship between a toxic waste site and health impact. The state of the art is such that it is almost impossible to establish a direct course of relationship. I think Jackson Township was a fairly easy case because there was contamination of drinking ground water and related health effects. But in cases where you have a landfill or a site which contains drums of materials, it may be very very difficult to establish the course of relationship between toxic waste stored at that site and health impact.

SENATOR DALTON: Victim's compensation aside, how do you move forward?

DR. SADAT: I'm sorry, Senator?

SENATOR DALTON: Victim's compensation aside, how do you move forward?

DR. SADAT: Well, I think the--

SENATOR DALTON: You still have contractors without insurance.

DR. SADAT: Well, I think, so far what the Department has done is to move these contracts forward by relaxing the insurance requirements to the greatest extent possible. I think the Contillo bill would help that, but I'm not an insurance expert, and I can't guarantee that if the Contillo bill was passed it would encourage the insurance companies to write insurance policies.

SENATOR LESNIAK: Senator Gagliano.

SENATOR GAGLIANO: Dr. Sadat, again realizing you are not in the insurance business but in the business of cleaning up these sites, have there been any meetings of insurance company representatives who can make decisions and representatives of you Department, the Attorney General, and others with respect to the possible issuance of insurance policies? Do you understand what I am saying?

DR. SADAT: Yeah, I get your--

SENATOR GAGLIANO: High level, hard-headed meetings on this issue.

DR. SADAT: Right. There were a number of meetings with the insurance carriers. I personally was asked about a year ago to attend a meeting which never happened. But, we were trying to set up a meeting with major insurance carriers and Mr. Hunt, who is the Spill Fund Administrator, to have the underwriters write a blanket policy for the State and its contractors, for \$100 million. I don't believe that went anywhere because the meeting never took place and I think the insurance companies just were not willing to do that. I think there has been constant communication between the Department of Treasury, the Spill Fund Administrator, and the insurance companies. I'm not privy to these conversations and as I said, the one meeting I was supposed to attend never took place.

SENATOR GAGLIANO: One other thing. I would like to take just one more minute. Are you familiar with the actions with respect to the Lone Pine Landfill suit?

DR. SADAT: Yes, Senator.

SENATOR GAGLIANO: We might as well have this on the table. It is also in my district, unfortunately. How many defendants would you estimate there are in that case, including municipalities, contractors, people who just happened to be standing by somewhere along the line? Would you say there are 300 defendants?

DR. SADAT: I think originally there were 70. That number may have grown.

SENATOR GAGLIANO: Seventy?

DR. SADAT: Yes. Originally, I think there were 70. The original committee had 70 defendants.

SENATOR GAGLIANO: And that included municipalities, county, and various contractors, correct?

DR. SADAT: Yes.

SENATOR GAGLIANO: Many of whom have not been near the site in probably 15 years.

DR. SADAT: That is correct.

SENATOR GAGLIANO: I happen to know because we represent a municipality or two that had been joined, and most of the people in the municipality don't even remember that there was any dumping or garbage

disposal from that municipality to Lone Pine Landfill. It is so long ago since there may have been garbage removal from the town to that dump site. Do you think that that suit, as much as Jackson, has caused this problem with the insurance companies?

DR. SADAT: I can only guess as to what has caused problems with the insurance companies. I don't think Lone Pine is really a suit that may have scared the insurance companies. My intuition is, and I am dealing not with facts but with intuition, that conceivably Jackson Township and Bhopal, were the two major factors. Frankly, I think, the insurance companies possibly need some medication for the hazards which are associated with the different sites. There are sites where the possibility of a Bhopal are non-existent and really are not much different from other construction sites except for the level of protection for the workers. I think that is something we can deal with and we can qualify. There are other sites which are more dangerous. When you are dealing with drum removal, or sites where the substances are stored in tanks or drums and have not been properly quantified and qualified-- Then, I think, the possibility of a catastrophic event -- certainly not in the magnitude of Bhopal -- is there. The probability is higher. I don't think the insurance companies take that into account. Frankly, although Burnt Fly Bog is not a good site, it certainly cannot be equated to a Bhopal. There is no comparison.

SENATOR GAGLIANO: It is a manageable--

DR. SADAT: That is correct.

SENATOR GAGLIANO: (continues) --situation which, between you and a good contractor, could be taken care of.

DR. SADAT: That is correct.

SENATOR GAGLIANO: That is why I am saying, the bottom line here is the insurance issue and whether or not we as a State are going to stand behind you and whoever does the work and see to it that there is protection. That is why we are here.

SENATOR LESNIAK: Senator Laskin, do you have any questions specifically of Dr. Sadat?

SENATOR LASKIN: I have no questions of the witness. When he is finished, perhaps I can have a couple of minutes to say something.

SENATOR LESNIAK: Okay, after me.

SENATOR LASKIN: I don't want to bog this thing down any more. (laughter)

SENATOR LESNIAK: We needed that. Assemblywoman Ford?

ASSEMBLYWOMAN FORD: Dr. Sadat, I am going to ask you the same question that Senator Gagliano asked you because I am not sure of your answer. Has there been any joint discussions between your Department, the Department of Insurance, and the other agencies affiliated with this? I think what you said before, and correct me if I am wrong, was that yes there were. But as you moved on with your answer you indicated that a meeting had been canceled. Is that right?

DR. SADAT: Let me again state exactly-- You know, repeat what I said.

ASSEMBLYWOMAN FORD: There had been some informal communication but there has been no formal communications?

DR. SADAT: A year ago we were supposed to have a meeting with Mr. Hunt, who is the Spill Fund Administrator, and some of the insurance carriers. That meeting never occurred because, I think, the insurance companies were reluctant or simply refused to even enter into discussions about underwriting a major policy for the State and its contractors. I am aware only through hearsay.

ASSEMBLYWOMAN FORD: So you personally don't know.

DR. SADAT: I, personally am not aware of any communications, but I--

ASSEMBLYWOMAN FORD: So I should pose this question to somebody else at the Department. Fine.

DR. SADAT: That is correct. But I do know and have heard that there are communications with the Department of Insurance, the Department of the Treasury, and the insurance carriers.

ASSEMBLYWOMAN FORD: Has the insurance problem delayed to any extent the speed to which we are proceeding in cleaning up known toxic waste sites?

DR. SADAT: I would say in general what we have done is taken other routes to get around the problem where we have hidden obstacles. For example, in the case of PJP we ran into a problem with insurance. Along with our concern for public health issues the Department's

position was to move on an emergency basis and we asked the Department of the Treasury for a waiver from advertisement which allowed us to go with a sole source contractor to put out the fire. That is what we are doing now. We have moved in every case where we felt there was a public health demand as quickly as we could.

SENATOR LESNIAK: Okay. However, the overall problem in terms of overall cleanup, certainly down the road if not tomorrow, is going to be insurance. It does present a serious problem that we have to address. Is that correct?

DR. SADAT: There is no question, Senator, that we need to resolve this.

SENATOR LESNIAK: And if the Government doesn't address it we are not going to get these sites cleaned up. Would you say that?

DR. SADAT: That is sort of difficult to predict at this point. As I said, we could waive all insurance requirements because, certainly, the Federal regulations would allow us to do that.

SENATOR LESNIAK: But then you may not get the contractors to clean it up in any event.

DR. SADAT: That is correct.

SENATOR LESNIAK: I'm sorry, Assemblyman Shinn.

ASSEMBLYMAN SHINN: It seems like one of the thoughts that might be included in our package is something very simplistic that says the limit of liability of an insurance policy, or the face value of the policy-- In other words, it seems the court is interpreting an endless liability to a carrier so that he does not really know what he is insuring, what his limits are, or what the face value of the policy is.

SENATOR LESNIAK: If I may answer that, the problem with that is even if the carrier says there is a million dollars in our policy, they still have to defend the policy. They still have to defend their insured, which may cost \$15 or \$25 million just in defense costs. So it is not the problem of unlimited liability of the carrier vis-a-vis its policy, but it is the cost of that defense. That is the problem.

ASSEMBLYMAN SHINN: Isn't what I am hearing, part of the problem is that liability awards are going beyond the limits of the policy?

SENATOR LESNIAK: But the insurance company would not have to pay that award. They only have to pay up to the limit of their policy if, in fact, they defended the policy. If they don't defend the policy they will get stuck with the entire amount. Assemblyman Martin.

ASSEMBLYMAN MARTIN: One question, Dr. with respect to the bids that have been submitted through your office, are you able to calculate, at all, the increase in costs because of the liability problem?

DR. SADAT: That is a reimbursable cost. The Department, as part of our bidding procedure, pays the contractor up front for the cost of obtaining insurance.

ASSEMBLYMAN MARTIN: My question is are you able to put any type of price tag on it at this time?

MR. WILEY: I think it is very difficult right now, Assemblyman. However, a point that was made earlier is probably valid about competition being limited because contractors are not able to obtain insurance and therefore cannot compete, which is bound to drive up the bid prices. We have seen bids coming in higher than our estimates, possibly due to that factor. Also the contractor may be looking at the risk of covering his own cost of defense if he cannot obtain coverage through insurance.

ASSEMBLYMAN MARTIN: Can you put any type of percentage range on those increases?

MR. WILEY: There are a number of factors involved and I really don't think we can attribute a given percent to the limited competition or to the cost of defense. It is in the realm of speculation, but it is probably a substantial amount; it is not a negligible amount. It is probably more than 5%. I wouldn't want to say how much more, but it is a cost implication we have to contend with in terms of the carrying out of this program.

SENATOR LESNIAK: Thank you. If I may, just in summary, go over again my opening statement vis-a-vis the procedures of the Committee. I am glad Dr. Sadat, the Contractor's Association, the municipalities, and other groups are here today because we are trying to identify what the problem is. Specifically, we have to address the

extent, the magnitude, and the complexity of it. We have already seen how complex it is in just our first two hours of hearings. I think I can adequately summarize your testimony by saying it has presented a serious problem to the Department, but as of today it is not insurmountable, although it could very well be so in the future, which could even be tomorrow.

I just want to make one statement vis-a-vis strict liability, negligence, and the Contillo bill. Strict liability has been in our tort law and our statutory law vis-a-vis dangerous products and production of hazardous material for quite a long time. What it ensures is a course of doing business, and that companies that are doing business take the proper and best precautions possible. And that that cost, of course, is paid, ultimately, by the consumer or the taxpayer. For that also protects the health and well-being of the people of the State of New Jersey because it is a standard that the companies have to live up to. Maybe, sometimes we will have to relax that concept. It appears to me that the cleanup of hazardous waste is not something that people-- That has to be done. These sites have to be cleaned up. It is not a business judgment where we can say that we are to encourage or discourage this business. It is something that has to be done. We may have to relax that strict liability, even as important as it is to the health and safety of our people. We may have to relax it and find another way to get at it. I want to thank you for being here to testify about the problem, Dr. Sadat.

DR. SADAT: Thank you, Mr. Chairman.

SENATOR LESNIAK: Senator Laskin, do you have a statement?

SENATOR LASKIN: Yes. I don't know if it will fall on deaf ears, but I notice on the list of potential witnesses, most of them represent municipalities or governmental entities.

SENATOR LESNIAK: You mean everybody together at the same time?

SENATOR LASKIN: Well, no. But my guess is that every witness is going to tell this Committee that there is a serious problem out there and everybody is going to tell us how the problem affects them. I respect that and I appreciate that. But there is not one speaker on this list from the insurance industry.

SENATOR LESNIAK: That is right.

SENATOR LASKIN: Was that purposely done that way?

SENATOR LESNIAK: Speaking of deaf ears, Senator, what I said was today the procedure we outlined at our first meeting was we were going to try -- obviously, we can't do everything all at once in one hearing -- to identify the problem.

SENATOR LASKIN: My question was were they asked to testify?

SENATOR LESNIAK: No, they were asked to be here and listen to the testimony--

SENATOR LASKIN: Okay.

SENATOR LESNIAK: (continues) --and to testify at our next public hearing.

SENATOR LASKIN: Okay.

SENATOR LESNIAK: Okay. Thank you. Is the Department of Treasury represented here? Is Lee Sylvester here?

LEE SYLVESTER: Yes, sir.

SENATOR LESNIAK: Okay. Mr. Sylvester, can you say a few words regarding what the Department of Treasury sees as the problem and any potential solutions to it?

MR. SYLVESTER: My name is Lee Sylvester, and I am speaking to you today as a representative of the New Jersey State Department of Treasury, General Services Administration, Division of Purchase and Property. I am the Assistant Chief in the Bureau of Risk Management which is the Agency in the State Government charged with the duty of developing a financial plan, insurance, self-insurance, and other methods to transfer risk to protect the State against any claims made against it or any attempts to alter its physical assets. The Bureau acts as a consultant to all State agencies for the development of contracts and contract insurance specifications, and designs and recommends risk management policies to reduce the State's direct exposure to loss. My remarks are being delivered today on behalf of the Chief of the Bureau of Risk Management, Bob Hunt, who wears the other hat of Administrator of the Spill Fund. Mr. Hunt, at this moment is on his way to London for a series of meetings where he hopes to successfully complete negotiations with Lloyds underwriters to fill in

layers of the State's excess catastrophic liability policy. It should be noted that while the State is a recognized self-insurer who pays routine liability claims via the tort claims fund, we are a corporate entity comparable in structure to an IBM, a Prudential Insurance, a Johnson and Johnson, or any other major corporation with annual revenues and income of \$9 billion or greater. Therefore, with the same need to protect this income against the potential of catastrophic claims.

My testimony today will focus upon the impact to a state resulting from the current non-availability of environmental liability insurance. It should be noted that our own market analysis, which we did almost on a daily basis for the past year, reveals that the current unavailability of environmental liability insurance is the leading edge of a general liability insurance industry crisis.

Restrictions in insurance markets first emerged in July of 1984. Coverage availability has steadily diminished since then, but at an accelerated rate since March of this year. Although predicted earlier, the total elimination of any liability protection for environmental risk seems to have occurred from July 1 up to as recently as the last 1 to 3 weeks. You have heard testimony from people to that effect.

What is or what will be the impact on State Government? The first impact we are discussing is that hazardous waste cleanup contractors can no longer obtain liability insurance. This includes all phases of cleanup, from feasibility design, to laboratory testing, to actual site cleanup contractors. As a result, contractors who once saw this as a profitable business are withdrawing from the field faster than they got in. While a few still remain, these fortunate ones who lasted until the final cut -- that is coverage withdraw -- have only a matter of time before they also withdraw.

Without Legislative reform, the State commitment to cleaning up our environment can only be continued if we agree to indemnify and assume some of the liabilities of all contractors performing any phase of environmental cleanup.

We need only to look at the recent history of environmental losses to guess the financial impact. Jackson Township, \$5 million plus legal costs; Johns Manville, \$500 million plus legal costs; Bhopal, \$250 million plus legal costs. These are but three incidents, and while we don't predict that every waste site will automatically produce liability claims, the State has identified approximately 181 sites, of which 99 are on the Superfund list. A conservative estimate of future liabilities could be in the billions.

Number two: Asbestos removal contractors face a similar dilemma. The only difference is the major financial impact will fall on local school boards and colleges. Financial predictions are the same. Remember, Johns Manville was an asbestos exposure. The State itself is having severe difficulty with purchasing any kind of liability insurance. As mentioned earlier, the State's Risk Manager is still attempting to negotiate portions of our liability program, which expired on July 1.

Insurance underwriters view the State of New Jersey as an environmental loser rather than an environmental leader from their perspective as a risk assumer. Primarily because of court decisions like Jackson Township, which heavily impacted on the interpretation of the insurance contracts, insurers are avoiding governmental risks in New Jersey. They feel that any liability insurance will become environmental insurance by judicial interpretation, and they simply do not want the risk.

I have attached for your review an article from the March 19, 1985 edition of The Wall Street Journal which is a very good, non-technical overview of the problems in the environmental liability insurance market.

In summary, New Jersey needs to become an insurance and environmental leader and the reform of legislation for environmental liability is a good place to start.

Do you have questions, sir?

SENATOR LESNIAK: Sure thing. Can't we very simply as a policy matter, legislatively, say a general liability policy is a general liability policy, and an environmental impairment policy is

that, and thus avoid the problem of judicial interpretation at least with regard to that?

MR. SYLVESTER: Perhaps.

SENATOR LESNIAK: It doesn't solve any problems other than defining the two so at least we know where to start.

MR. SYLVESTER: That may be a solution. They thought they had it defined in the simple portion of the contract of general liability which says they will pay property damage and bodily injury. The court case of, I think it was Reichel versus Travelers Insurance -- and I think it was a Federal case -- said that the general liability insurer is responsible to pay cleanup costs.

SENATOR LESNIAK: Of course, the United States Supreme Court Justice Douglas once said that Congress could not have meant what they said. (laughter) So we always run that risk. Are you saying in your testimony that the State of New Jersey really can't even-- Indemnification is not in terms of the contractors. It is not the sole solution, because even that may be too costly to us.

MR. SYLVESTER: Yes, that is correct. From our corporate perspective that is fine. We can indemnify. I understand just recently -- within the last week or so -- a Deputy Attorney General's or Attorney General's ruling says that we can indemnify a contractor. But that transfers the risk right to us and to our \$9 billion tax base of revenue. From a perspective of risk management that means that monies you have allocated in the Legislature to pay programs may have to be diverted to pay unanticipated or unexpected claims of serious magnitude. That is why we buy or attempt to buy the catastrophe policy to minimize that diversionary effect.

SENATOR LESNIAK: How big a corporation is the State of New Jersey vis-a-vis, for instance, Exxon?

MR. SYLVESTER: We are talking, in round numbers, roughly 70,000 to 75,000 employees which puts us up in the neighborhood probably the size of close to the 300 of Fortune's 200 companies. Our revenues are up in the neighborhood of Fortune's 500 companies. We are not-- I don't picture us being--

SENATOR GAGLIANO: Our assets are tremendous.

MR. SYLVESTER. We insure our assets which are over \$2 billion of real asset value. So, yes, we are very very large.

SENATOR LESNIAK: But in terms of our income, we can't afford to be self-insurers in all regards?

MR. SYLVESTER: My view is, not 100% because our revenues are to pay for public services as much as possible. The money is for programs, human services, and everywhere else. The more dollars we divert from that function to pay for a lot of catastrophic losses -- I'm not talking about the everyday nickel and dime losses -- that may be transferred give us less money to perform our function as a government.

SENATOR LESNIAK: So we have to, in some way, deal with the liability problem. We can't just shift it.

MR. SYLVESTER: Yes, that is correct. If we shift it and we assume it, then how are we going to handle it?

SENATOR LESNIAK: Senator Dalton? Senator Gagliano?

SENATOR GAGLIANO: Yes. Mr. Sylvester, have there been any negotiations between your Division and Department and the insurance companies as to what might be acceptable to them? For example, has there been any discussion suggesting that if the insurance companies would provide municipalities, counties, and school boards with a certain amount of insurance and cover any claim that might come under that, and if we would indemnify contractors up to a certain amount, would catastrophic insurance then be made available? Let me get back. Let us say we are talking about a cleanup, which most municipalities are not involved with but certainly the State is. Let's say we feel reasonably certain \$10 million worth of coverage for all purposes is appropriate. If we indemnify up to the \$10 million, is there any chance that we can discuss with the insurance companies the excess coverage. I know the excess coverage is what really is falling apart because there is no way of knowing what their losses might be.

MR. SYLVESTER: Yes.

SENATOR GAGLIANO: Has there been discussion along these lines? We are kind of in the dark about this. The Mayors are calling us, the county government leaders are calling us, and certainly the

people who want these dump sites cleaned up are contacting us, and all we know is there is no insurance.

MR. SYLVESTER: Yes. You have hit on part of the problem of why there is no insurance, whether it be environmental liability, general liability, or any of the other areas. The reinsurance markets have totally fallen apart. No insurance company that you are familiar with: "The Traveller's," "The Home," the various front-line companies, assume 100% of all the risk. They pass off the general Americanry-- Those markets have just walked away.

SENATOR GAGLIANO: Right. They've collapsed.

MR. SYLVESTER: Yes, they collapsed.

SENATOR GAGLIANO: How can we rebuild that market through some kind of reasonable indemnification on the part of the State?

MR. SYLVESTER: I think that would be better answered by the insurers themselves. Bob Hunt is now in London because the State itself cannot buy general liability. We had a general liability policy up to \$100 million, excess of \$1 million, and that previous policy included environmental impairment. On July 1, our general liability policy reduced to \$3 million ex of \$2 1/2 million. We are trying now just to rebuild it to \$25 million, which we feel is even small for some of the exposures in the State, but is something we could live with in the event of a sharp catastrophic claim which was viable and a judgment awarded. I can't answer your question until Bob Hunt gets back from London, just to see what the Lloyds' underwriters -- who are one of the foremost -- will say.

SENATOR GAGLIANO: The Commission meetings are that timely as far as the State is concerned, too, not just using contractors and not just insuring municipalities, but also in terms of the coverage the State itself has on its own liability issues.

SENATOR LESNIAK: What time does his flight arrive?

MR. SYLVESTETR: He just arrived. In fact his plane is landing just about now.

SENATOR LESNIAK: Well we'll go pick him up.

SENATOR GAGLIANO: He is just getting there.

MR. SYLVESTER: He's just getting there. He'll be back Monday or Friday.

SENATOR GAGLIANO: I don't have any other questions, but I think that is going to be a key to the decisions that we make.

SENATOR LESNIAK: It is possible the Commission will have to go out there and meet with them. (laughter)

MR. SYLVESTER: The industry may have some recommendations on that subject about what they would and wouldn't do.

SENATOR LESNIAK: We definitely will want to hear from them at our next Commission meeting.

SENATOR DALTON: I think the point has to be made, however, that the-- You are talking about contractors and Senator Contillo's remarks were toward that. Again, what you have is a lot of other government agencies out there, and I am sure there is no way to contemplate indemnification of those other government entities as well, which is also part of the problem. We have municipalities in this State that don't have any landfills within their borders that can't buy general liability. They can't purchase it anywhere. So, good luck to Mr. Hunt, but that problem is going to be here regardless of his conversations with Lloyd's.

MR. SYLVESTER: No, he is just focusing on purchasing for the State as a corporate entity, as opposed to municipalities. There is a similar scenario we are wrestling with simultaneously to your environmental impairment which is foster parent liability. That market went to zero.

SENATOR GAGLIANO: Foster parents?

MR. SYLVESTER: That is a separate subject, but--

SENATOR LESNIAK: Let's not bring that up. We have enough problems.

MR. SYLVESTER: We are wrestling with another aspect of liability in the same scenario.

SENATOR LESNIAK: Senator Laskin?

SENATOR LASKIN: Yes. Like a broken record I'm going to keep going back to the fact that I recognize the problems, and I really don't think any of these witnesses today will tell me about any problems that I don't already know. I say that respectfully. I don't mean that as a smart guy.

Your statement, "without legislative reform, the State commitment to clean up our environment can only be continued if we agree to indemnify and assume liabilities." We know that. I'm trying to understand-- This thing with London won't solve any problems. All the London trip is going to do is buy an insurance policy if he is lucky. That doesn't solve the problem. That means that somebody will pay an astronomical premium to get an insurance policy which may last a few months and maybe cancel six months down the line. That's not going to solve the problem.

Let me throw this scenario out to you. This is off the wall, but suppose we adopted legislation to grant immunity from suit to public entities -- municipalities, school boards, etc. -- which is the old common law theory of immunity towards municipalities. That would solve that one little problem. Then public entities would have no problem about astronomical insurance rates, etc. That problem would be eliminated. If we do that, somebody is going to say, "Well how about all of those poor people out there? Who can they sue to recover damages?" If we make public entities immune, the suit would then be directed to the contractor almost exclusively. The reason I say that is because if we start narrowing this issue, maybe we can solve the problem easier. Maybe we can develop some kind of a contractor's insurance program. Immunize the public entities, but still leave somebody to sue, to recover damages.

I'm just trying to cut through all of this in some way to come up with an answer that will solve the problem. I'm just throwing that out to you. I don't even know if we can do this Constitutionally, but suppose we could adopt a theory of immunity to public entities? Now the suits would have to be against the contractor. Wouldn't we be able to solve that problem a little more easily? Do you have any suggestions on how to solve this thing?

MR. SYLVESTER: I won't directly respond to your scenario. I envisioned a similar solution to what we did with the Federal Flood Insurance and with various other major insurance problems. If perhaps we put into effect a national environmental impairment liability insurance fund, similar to the Federal Flood Insurance Fund which the Federal Government put into effect, applicable to the 50 states.

SENATOR LASKIN: But how would that be funded?

MR. SYLVESTER: It would be funded similar to the Federal Flood program. They have premiums paid for by contractors and municipalities, etc.

SENATOR LASKIN: Let's follow that. We still are back to the same issue, which is who will be the insurance company? Will it be the State, like the Federal Flood program, or will you be able to convince insurance companies to back that kind of a concept? We all talk in generalities and I apologize but I like to get to the point. The concept sounds good, but who is going to be the insurance company?

MR. SYLVESTER: Where are the billions of dollars going to come from to pay for the liabilities and the cleanups?

SENATOR LASKIN: All right, this will be the last thing I say. If we follow that logic, the insurance company will be exactly as it is right now, and you still have the same problems. That doesn't solve it.

MR. SYLVESTER: The assets still are not there in the industry.

SENATOR LESNIAK: Let me just say that this is a complex problem and I don't believe it is coming to any simple solution. A simple solution is only going to create more problems. As Chairman, I don't know all the problems. People who testified already today have identified specifics of those problems that I may have only known generally or read about in the paper. I am anxious to hear the other people testify. I don't even have knowledge of all the problems, let alone a solution. Assemblywoman Ford, do you have any questions?

ASSEMBLYWOMAN FORD: No questions.

ASSEMBLYMAN SHINN: Yes, I have a question. I understood you to say that some short time ago the State had \$100 million worth of liability impairment insurance and now has \$2 1/2 million.

MR. SYLVESTER: It has zero, sir.

ASSEMBLYMAN SHINN: It has zero.

MR. SYLVESTER: That is correct. We do have general liability insurance.

ASSEMBLYMAN SHINN: But specifically--

MR. SYLVESTER: \$3 million ex of \$2 1/2 million.

ASSEMBLYMAN SHINN: And the general liability insurance that the State carries is--

MR. SYLVESTER: Reduced as of July 1.

ASSEMBLYMAN SHINN: In what limits?

MR. SYLVESTER: From \$100 million excess of \$1 million and certain other sub-policy limits to \$3 million excess of \$2 1/2 million self-retention, which would then be the court claims fund.

ASSEMBLYMAN SHINN: I think this is very relevant--

MR. SYLVESTER: Without the environmental liability endorsements in the policy.

ASSEMBLYMAN SHINN: In the Bhopal bill hearing which was in my Committee, I specifically questioned the Department of Environmental Protection doing protocols in reviewing methods of operation of a specific chemical company and approving a protocol, and the implication liability that that carried with it if there was an event. I was told that the Tort Claims Law protected DEP from that. Could you just briefly define what the Tort Claims Law protects from this liability? Maybe that is impossible but I think it is an important issue.

SENATOR LESNIAK: I don't know if he could do it briefly.

MR. SYLVESTER: I can't do it briefly. I think the best person to answer that would be one of the DAG's since they live with it day in and day out. I cannot go into the very specifics of the administrative versus ministerial duties and responsibilities of an employee of the State.

ASSEMBLYMAN SHINN: Was that an accurate statement in that case?

MR. SYLVESTER: There is protection there, sir.

SENATOR LESNIAK: For certain acts.

MR. SYLVESTER: For certain acts. The State can become a discharger of the Spill Compensation Fund Act very simply in innocent disposal of chemicals from the print shop.

SENATOR LESNIAK: Assemblyman Martin.

ASSEMBLYMAN MARTIN: So if you are not carrying liability insurance right now you are, in effect, in a form of self-insurance which would just come out of general State revenues.

MR. SYLVESTER: We are carrying \$3 million of insurance at the present, excess of a \$2 1/2 million base self-retention, which is the Tort Claims Act forming that fund of money per occurrence or claim type of coverage. This means if we have a judgment awarded against us, the Tort Claims Fund will pay the first \$2 1/2 million, we will pay the \$3 million above that, then if there is a greater amount above that, we would pay it again out of the Tort Claims Fund or General Revenues. That is the existence of the market today. It would collapse. We used to have \$100 million, excess of \$1 million, so we could cover any possible contingency.

SENATOR LESNIAK: Any other questions? Thank you. Senator Laskin, your curiosity may be peaked by our next speaker, who knows something about the insurance industry, I am told. He is David Rosenberg, from the Environmental Compliance Services.

Mr. Rosenberg, what is Environmental Compliance Services?

DAVID ROSENBERG: I will be glad to explain that to you. Hopefully, I can answer some of the Senator's questions, although I do not represent an insurance company.

ECS Center, to answer your questions directly, is a managing general agency specializing in underwriting a program of insurance for those companies primarily involved in the transportation, treatment, storage, and disposal of hazardous waste.

The coverages of insurance afforded by our company include general liability, automobile liability and physical damage, workers compensation and umbrella liability. As a managing general agency for the National Union Fire Insurance Company of Pittsburgh, we are responsible for underwriting and administering a full program of insurance. We are currently endorsed by five major national associations, and our current book of business includes some 375 accounts involved in the transportation, treatment, storage, and disposal of hazardous waste.

In the State of New Jersey, ECS currently insures 39 accounts. Of these 39 accounts, approximately 10 are involved in cleanup and consulting of hazardous waste.

Most of my remarks, Senator, are addressed to the problems-- and hopefully, I can shed some light on the problems as we see them. I have not prepared solutions to the problems, although I would be more than glad to entertain what we feel are some of the solutions.

It is obvious that the soft market for commercial property and casualty insurance has disappeared almost overnight. The availability for certain lines of coverage, especially in the excess areas, is almost non-existent. During the 1983 underwriting cycle, ECS was able to underwrite the following lines of coverage: general liability, automobile liability, workers comp and umbrella. The general liability and automobile liability, as well as the umbrella policies, were written on a \$1 million dollar limit, on an occurrence-form type policy. The excess coverages were readily purchasable through outside markets for transporters as well as TSD facilities, and contractors, thus putting our clients into compliance with RCRA [Resource Conservation Recovery Act] and DOT-mandated limits.

ECS, however, is not without its problems. Effective July 1, 1985, we have currently lost our authority to underwrite \$1 million worth of umbrella coverage for those accounts involved in the TSD of hazardous waste and transportation. In addition, effective that date, ECS has temporarily lost authority to underwrite consultants and cleanup contractors.

In regard to the transporters and TSD facilities, all coverages have been changed to a claims-made policy, from the occurrence form which previously existed. Effective October 1, 1985, all TSD facilities through our agency will be written with an absolute pollution exclusion. And coverage for sudden accidental, as well as gradual, will be written on what we call a separate pollution liability policy via the National Union Pollution Department. All TSD facilities will now require a pre-inspection and a risk assessment survey, to be completed by an approved engineering firm of the carrier's choice. All costs of risk assessment will be borne by the insured. Inspection fees are ranging from \$4,000-\$12,000 per account.

Regarding the problem in our industry today, a wide variety of explanations have been given for the apparent reduced availability and increased costs of insurance premiums. Traditionally, insurance industry profits, like the stock market, are subject to changing, often cyclical, economic conditions. During the periods of 1979 through 1983, when high interest rates predominated the economy, all carriers were very interested in writing all types of liability insurance, of course, including cleanup contractors as well as any pollution-type exposure account. However, as interest rates began to decline, this cash-flow underwriting, as it is known by the insurance industry, also started to decline. It is estimated during the 1983 underwriting cycle, property and casualty insurers suffered their biggest loss in history, estimated at \$21 billion. In addition, the investment income failed to exceed underwriting losses by approximately \$4 billion dollars.

Some statistics which I point to in my written presentation are the following: The combined loss ratio for the entire property and casualty business as a whole climbed to 118% last year. That is to say that insurers collectively incurred \$118 in claims and operating expenses for every \$100 in premiums collected. The combined loss ratio for automobile policies was even worse, at 130%; workers compensation estimated at 123%; general liability was estimated to be in excess of 150%.

SENATOR LESNIAK: Excuse me. These are national figures?

MR. ROSENBERG: Yes, sir.

SENATOR GAGLIANO: These are national figures, not just New Jersey?

MR. ROSENBERG: That is correct.

Another major factor which we briefly touched upon is the dramatic turnaround in the reinsurance market. During the past five years, insurers got caught in the same cash flow underwriting game as the primary insurers. The abundance of capacity in the reinsurance market was a major factor fueling competition and reducing pricing among the reinsurance marketplace. This capacity was no longer available, as losses began to soar and investment income began to

dwindle. The result has been a tighter control by reinsurers as to the quality of business, and also a severe decrease in the availability of policies written by primary insurers in the affected line of coverages.

Another item which the Commission touched upon this morning is pollution exclusion, which has been part of the comprehensive general liability policy since 1974. The pollution exclusion in your standard CGL policy removes from coverage bodily injury or property damage arising out of the discharge dispersal release escape, and the policy goes on to name a number of toxics and irritants, contaminants, that are released into or on the land, or any water course of body-- body of water-- But the release or escape does not apply if the discharge is sudden and accidental.

Initially, the pollution exclusion appeared to be a promising defense to those types of environmental liability claims resulting from what we term a gradual type release. Consequently, the insurance industry formulated a policy known as the environmental impairment liability policy, which was created to protect companies from liability resulting from a gradual type release. However, the courts have consistently rejected the interpretation recorded by the insurance industry, and in recent cases examining the pollution exclusion, have found very little difference between what is termed to be sudden and accidental, and what is termed to be gradual.

In addition, recent cases have also examined the definition of an occurrence. This is also defined in the CGL policy as an accident, including continuous, repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended, from the standpoint of the insured.

Without belaboring the Jackson Township holding, we very well know what that case did to the definition of the term "occurrence." The underlying claims were brought by citizens from over 97 families. For what the insurance industry felt to be a gradual type claim, it was forced to defend for these coverages that they allege occurred over a period of time and were also-- The court also awarded damages for emotional distress, medical surveillance, and diminished quality of life.

Another problem that we see is the interpretation of the Federal Superfund and the implications of joint and several liability. Superfund, as we know, was passed by Congress and signed into law on December 11, 1980, and was specifically designed to address the need for a comprehensive system to respond to releases of hazardous substances into the environment, and impose liability on those responsible parties for such releases. Superfund does not address financial responsibility.

Superfund legislation was enacted in the closing days of the Carter administration, in direct response to the Love Canal incident. Perhaps the most interesting and controversial provisions of Superfund are the liabilities imposed upon responsible parties. Responsible parties are named in the legislation to be owners, past owners, operators, generators, and transporters associated with facilities from which hazardous wastes are leaking. That includes cleanup contractors.

While the fund is utilized as a last resort to pay for cleanup costs, the primary payers are owners, operators, generators, transporters, and cleanup contractors of hazardous waste products. The real teeth of Superfund come from recent case law. The courts have consistently allowed the application of joint and several liability upon several responsible parties for the cost of cleanup, although joint and several liability is not specifically named in the law.

The application of strict liability, or liability without fault, has also been consistently applied to Superfund. Under strict liability, the defendant can be held liable regardless of the existence or absence of care or negligence, in good faith.

The final problem as we see it, and again, as the Committee has discussed, is the cost of litigation. The litigation burden in the United States is truly staggering. In 1984, there was one private civil lawsuit for every 15 Americans. Since 1979, Federal civil filings by private parties have increased 50%, while State filings have increased 20%. The cost of legal defense for third-party commercial general liability claims is now more than \$2 billion per year, 34 times the 1960 total. Just handling the paperwork associated with civil

suits is estimated by Forbes magazine to cost the taxpayers in excess of \$360 million per year. That is for calendar year 1984.

Many of the problems, Senator, as you touched upon, are a direct result of our civil justice system and stem from the expanded judicial interpretation of the duty to defend assumed by insurers under the current CGL policy. In addition, policy holders have little or no incentive to reduce defense costs. Under the current CGL policy, defending a lawsuit costs the insured nothing directly; as a policy does not spell out monetary limits for costs of defense. The insured's own funds are not at risk until the policy's indemnity limits have been reached.

SENATOR LESNIAK: Who selects the attorneys for the defense?

MR. ROSENBERG: Usually, Senator, that is selected by the carrier.

SENATOR LESNIAK: So the attorney engages in prolonged discovery-- Don't they have control over the defense as well?

MR. ROSENBERG: That is assuming that the insurance industry has control. It is hoped that the industry has control. The problem is that the insurance industry is usually on the defense side, and the plaintiff's side is brought by private parties, or families such as in the Jackson Township case, and the insurance carriers are forced to--

SENATOR LESNIAK: I thought you were saying that the insured, though, engages in prolonged discovery and increases the costs. It is not the insured that is increasing the litigation costs.

MR. ROSENBERG: Well, I am not familiar with the financial arrangements that insurance companies make with their counsel, but the insured is prolonging litigation by increasing the discovery period. That is part of the problem, as we see it, with the increased costs of litigation.

SENATOR LESNIAK: The insured, actually, is responsible for running up defense costs?

MR. ROSENBERG: The insured, that is correct.

SENATOR DALTON: It depends on who you are talking about as far as the insured.

MR. ROSENBERG: In any type of litigation, of course.

SENATOR DALTON: I mean, if you are the defendant, and you are the insured, it is not in your best interest to--

MR. ROSENBERG: The point, Senator, is that there is no cap for the insurance industry on the cost of defense. That has been previously outside the policy limits, and the insurance company is forced to defend without regard to limitations.

SENATOR DALTON: But if I am the company defending my insured, I have an incentive to keep costs down.

MR. ROSENBERG: That is correct.

SENATOR DALTON: So it is the plaintiff that does not have the incentive, is what you are saying?

SENATOR LESNIAK: That is right. His testimony says that the defense actually does that, but I would tend to disagree with that.

Go ahead, I'm sorry.

MR. ROSENBERG: That concludes my testimony. Again, the testimony was limited to some of the problems as we see them, being involved with insuring the hazardous waste accounts for the last four years. We hope that this will provide some insight into the problems. We have not prepared written testimony as to some of the solutions to the problems, but I would be glad to entertain any questions that the Commission might have.

SENATOR LESNIAK: Well, first of all, if you do have any proposed solutions and you want to put them in writing, please feel free to submit them for the record, and for us.

Would you say-- Because of the increased liability, that companies are also undertaking more safety precautions, risk analysis, and inspections than ever before?

MR. ROSENBERG: Yes, and largely mandated by the insurance carrier, the insurance company that we write business with. As evidenced by the written testimony as well as the oral testimony, certain classes of hazardous waste accounts, treatment, storage, and disposal facilities must currently undergo a risk-assessment done by an approved environmental engineering firm. This was never done before, and a lot of the blame for the problem must be directed at the insurance community itself. I must state very candidly, I am not a

representative of the insurance companies, although I act in the capacity of an agent for the National Union Fire Insurance Company. Risk assessments were not known prior to this underwriting cycle, and part of the problem was, the insurance companies did not know what they were insuring. So that will be a very important part of sound underwriting which hopefully will continue, even when the soft market reappears.

SENATOR LESNIAK: So part of the problem is that we are paying the piper for maybe decades of neglect or lack of concern, and just not identifying the problem that has come to bear during these years.

MR. ROSENBERG: That is correct. The nature of the insurance industry is a cyclical business. This is not the first time that the insurance industry has seen a restricted marketplace and a reduction in capacity. I think it is the first time that we are seeing a crisis of proportion as exists today, especially with respect to the pollution type risk. That is largely attributed, I feel, to the legal environment and the interpretations of policies which were intended to cover a certain pollution incident and have been interpreted by courts to cover something different.

SENATOR LESNIAK: Would you say, therefore, that one of the things that we can do is legislatively define specific risks that are not defined, and are subjected to judicial expansion? That this could help in specific areas in terms of at least being able to define what the risk is, and then assessing the cost of that risk?

MR. ROSENBERG: That certainly can help, and I would like to expand upon that, too, because the insurance industry has offered what they feel to be some solutions. And I would suggest that two organizations the Commission might want to touch base with are the American Insurance Association out of New York, as well as the Independent Insurance Agents, also out of New York. They have provided testimony directly to Congress in light of the current problems associated with insurance risks.

The insurance industry has offered some solutions to the problem by switching to a claims-made policy, effective January 1,

1986. It has been proposed by the insurance industry that switching to a claims-made policy will limit what we call the detail of liability associated with hazardous waste type exposures.

SENATOR LESNIAK: But only if you can get insurance coverage.

MR. ROSENBERG: Well--

SENATOR GAGLIANO: How is that going to help solve anything with respect to a municipality, for example, that buys the insurance but still could be responsible for something that happened 15 years ago, and the municipality could have been in existence 200-300 years? The claim may have arisen whatever-- 10, 20, 15 years ago--

SENATOR LESNIAK: Well, actually, claims-made, I guess, would help. The occurrence policy would not help in that matter.

MR. ROSENBERG: An occurrence policy coverage is triggered by when the alleged incident occurred. What is happening with your general liability carriers that have been forced to defend or pay claims for the Jackson Township case-- Insurance general liability carriers 20 years ago were brought into that matter because it was alleged when, in fact, did the occurrence take place? On a claims-made policy, your claim is triggered by a written receipt by the insurance carrier of the claim; not notice of claim, but of the claim itself. There is a pin I should put in that. Claims-made policies are usually written with a retroactive date, and there is a buy-back provision for the insured that he can purchase a claims-made policy with past coverages included in that policy. We are seeing most, if not all, of the carriers today writing claims-made policies, i.e., your environmental impairment liability policies, with a retroactive date upon inception. So, the insurance carrier can predict with certainty, with more certainty than previously, that the carrier is on the hook from January 1, 1986, through January 1, 1987, and if the claim is not received during that policy period, coverage is not triggered for future events.

SENATOR GAGLIANO: Right. So if that policy is in effect-- For example, in a three-year cycle with Municipality A, at the end of the three-year cycle, Municipality A goes to another carrier, and the

claim comes in in writing during the fourth year, the new carrier is the only carrier that is responsible.

MR. ROSENBERG: That is correct, Senator.

SENATOR DALTON: Mr. Rosenberg-- Just another question, Senator. Are you suggesting that this claims-made coverage will be available in this State as of January 1, 1986?

MR. ROSENBERG: I am suggesting more than that. I think that it will be written by carriers effective January 1, 1986. The Insurance Services Organization, which is an organization established by the insurance industry to publish forms and manuscript forms for the insurance industry, has proposed that pollution liability be excluded from your general liability forms effective that date, and that insurance carriers write a claims-made policy for pollution coverage on a separate pollution liability effective January 1, 1986. Whether in fact that is offered by the insurance carriers, I do not know.

SENATOR DALTON: Yes, I think that is my point. We can talk about occurrence, we can talk about claims-made, but unless we get a guarantee from the industry that they are going to come in and write it, this is all very nice, but it is not very relevant.

MR. ROSENBERG: Our agency -- and ECS is a general managing agency, we write through a national network of brokers, so we have accounts in the State of New Jersey, as well as the State of California, throughout this country -- can currently write policies on a claims-made form for transporters and TSD facilities. Now, I have to put a pin in that too, because obviously, the people that we report to are not very happy with the Governor's-- I guess, legislative actions, as far as mid-term cancellations and increases in premiums are concerned, so we are waiting to hear from them as to how they are going to react. We have heard -- which has not been confirmed -- that their response to the Governor's actions would be solely not to write in the State of New Jersey, similar to what the insurance community previously has done in the State of Minnesota, in regard to the punitive damages which the State said must appear in an environmental type liability claim.

SENATOR DALTON: So again, to reiterate my previous question -- There are no guarantees relative to a claims-made form that the industry will come in and be writing classes of business such as municipalities in January 1, 1986.

MR. ROSENBERG: There are no guarantees. Lloyd's does not want to write pollution-type risks for municipalities. I can't speak as pertinently on that issue. Until this whole problem shakes itself out, the problem with the reinsurance markets-- They do not want to write pollution-liability type accounts. I think part of the solution would be to do what Minnesota has done, and essentially what the State of Minnesota has done is rewrite the Superfund law. They have eliminated the retroactive implications of Superfund to the date the law was passed, which I believe was January 1, 1980. That law was rewritten effective July 1, 1985. That would encourage people to come back into this marketplace. My carrier would look at cleanup contractors if the standards of joint and several liability and strict liability did not apply to the cleanup contractors.

SENATOR DALTON: And we could also make that-- Make application for that with our State laws as well. We have our spill fund, we have our landfill closure fund, and if we go back to limit any liability concurrent with the enactment of that law, that may be helpful as well.

MR. ROSENBERG: That is correct.

SENATOR LESNIAK: Senator Laskin?

SENATOR LASKIN: Let me pose this not as a total solution, but as an attempt to arrive at one. Suppose there was a total immunity of public entities from liability, making municipalities immune from suit, coupled with a change in the standard from strict liability to ordinary negligence. Would we then be flooded with insurance companies wanting to do business in New Jersey?

MR. ROSENBERG: Senator, quite candidly, I don't believe so. Not at this time. The problem with the insurance industry -- as again, we touched upon -- is that the insurance is only contingent upon what type of reinsurance can be purchased in the marketplace. Currently, all your major carriers are renegotiating their reinsurance treaties,

which expire on January 1, 1986. I don't think that we would be flooded. I know that for my purposes, I would be able to write a cleanup contractor, which I am not permitted to write in the State of New Jersey--

SENATOR LASKIN: Because of the strict liability problem?

MR. ROSENBERG: That is correct.

SENATOR LASKIN: So if we went to the ordinary negligence standard, and we immunized public bodies from suit, wouldn't that go a long way toward solving this problem?

MR. ROSENBERG: Absolutely. I, of course, can only speak for my carrier.

SENATOR LESNIAK: Are you talking about cleanup, or are you talking about--

SENATOR LASKIN: Everything. Anything to do with environmental issues.

SENATOR LESNIAK: Recognize the sacrifice you are making.

SENATOR LASKIN: Oh, I am not saying do it. I am just throwing that out as a question. If we immunize the municipalities and go back to ordinary negligence, I would think that would solve the whole problem.

SENATOR LESNIAK: With other changes, I am sure it would.

SENATOR DALTON: You create a bigger problem, because somebody is going to have to pay the damages. There is a flip side to that.

MR. ROSENBERG: That does not speak for the problems of the past, either. I think that we must recognize the pollution problems are largely a societal portion, and I think the problem with the insurance industry is that it is willing to act as a mechanism of financial responsibility but not to incur the entire costs of cleanup of the environment when those costs should be really categorized as more of a societal problem.

SENATOR GAGLIANO: With respect to that, could there be a combination of the change in the statute of limitations laws, as well as some immunity? Would that help? Has that been studied?

MR. ROSENBERG: Well, I think that what we previously stated as far as the retroactive date for the past, recognize that at a certain point, you cut off liability. Prior to that, you have some type of funding mechanism available for the cleanup of these hazardous waste sites. The hazardous waste site that was a state-of-the-art yesterday is not state-of-the-art today. All landfills leak, and why should the transporter, who is transporting to a state-of-the-art facility in the State of New Jersey, be saddled with the cost of litigation as well as the cost of cleanup, as the current law provides?

SENATOR LASKIN: May I ask you a question? Why should the transport develop a better-- State of the art to you may not be state of the art to me. Why should I build a better mousetrap? That is the other side of that coin.

MR. ROSENBERG: That is the other side.

ASSEMBLYMAN SHINN: Just a question. The claims-made concept that you are referring to-- If you have a claims-made policy from January 1, 1985 to January 1, 1986, and you get a claim in February 1986, then you, in essence, have no coverage because the claim was not filed in that coverage period of time?

MR. ROSENBERG: The trigger is when the insurance carrier receive notification of claim.

SENATOR LASKIN: No, no, no-- Wait a minute. Answer the question for Bob. The answer is, you have no claim against that insurance company who wrote for that year. Now, your next insurance company, who succeeded February 1, would then be responsible for the claims-made theory, since it is carrier at the time the claim is made.

ASSEMBLYMAN SHINN: It does not relate to when the incident occurred, it relates to when the claim is made.

SENATOR LASKIN: That is right.

MR. ROSENBERG: That is correct.

SENATOR LESNIAK: Okay. Thank you very much. I know there are a lot of people that testified. We expect to hear from everybody; we may pool some groups in terms of municipalities, but everyone who is on the list and wants to be heard, will be heard.

We have a representative from Jackson Township, which created all these problems for us. (Laughter) Thank you very much for coming down. This is David Miller -- Bill Schreiber, Bill Santos, and David Miller.

Do you have official capacities in the township?

**WILLIAM L. SCHREIBER:** Let me explain that. I am a sitting Township Committeeman; I was Mayor last year. Mr. Miller has served the Township in a number of capacities; he is currently Township Clerk, that means he is also responsible for our insurance situation. Mr. Santos has served the Township in several capacities. He is currently Administrator. I think the gentlemen will be able to answer any specific questions if they come up-- I hope.

I would like to also--

**SENATOR GAGLIANO:** Mr. Mayor, I am sorry, I did not get your last name.

**MR. SCHREIBER:** William Schreiber. I was Mayor last year, but I still like the way it sounds.

**ASSEMBLYWOMAN FORD:** I was prosecutor last year too, Bill, so don't worry about it.

**SENATOR LESNIAK:** Once a Mayor, always a Mayor.

**MR. SCHREIBER:** I would like to also mention that I was also a member of the Township's Board of Health from 1976-1980, which happens to be the time the Legler case broke. So, I was familiar with the details of that before it achieved any national prominence.

I am also going to mention that I also happen to hold a Ph.D. in chemistry, and have had significant responsibilities for safety of chemistry in my professional life, so there may be some technical questions I can help with in that respect.

I thought-- Do you have any particular preferences on where to start? Otherwise, I would like to just follow some--

**SENATOR LESNIAK:** Whatever you feel is best.

**MR. SCHREIBER:** Well, first of all let me just say that this hearing strikes me as a ray of sunlight through the clouds, because it is really good to see that the Legislature is attacking this problem and also providing this opportunity. I had heard that Jackson Township

sort of gets mentioned every other sentence in this business. Mr. Miller was at an insurance seminar yesterday, and Jackson was mentioned every other sentence. I think there are a number of misconceptions there.

First, by the way, in spite of what you may read in the papers, Jackson is a nice place. The sun is shining there, just as it is here right now, and over 26,000 people live there happily-- practically all of them. We are really doing very well. I certainly think anyone should drive by to see that for themselves. Unfortunately, we do get some bad press.

The Legler case-- As I saw it, the initial reaction to this case by the insurance companies was to run away from it. And consequently the Township had to appoint a special counsel. I would also say that perhaps-- This was a landmark thing, as it turned out. And it was certainly a struggle for Township officials -- I was one of them, as Board of Health Chairman at the time -- and others to know how to deal with the public and their concerns about this sort of thing. The nature of the pollution there was very, very slight, and only found intermittently in some of the wells, not in all of them by any means. In fact, I don't know that it was ever really proven that the pollution originated from the Jackson Township landfill, or certainly, that it all originated there, because there was other dumping on private property in the area.

I am getting a little out of order, but I want to say that something Dr. Sadat said really concerned me. He said there was groundwater contamination and health effects. In fact, there were no proven adverse health effects, and nothing in that entire judgment giving any money for medical damages. I was shocked to hear him say that, in fact; I think that we have had a lot of problems with that sort of thing; and the comment about Jackson Township and Bhopal as causes of our insurance problems-- I really took offense there. And I would just remind people that Bhopal was a chemical factory, dealing with some pretty nasty materials.

SENATOR LESNIAK: I think, though, he meant that Jackson Township decision, certainly not Jackson Township.

MR. SCHREIBER: I understand that. Even so, I would like to put this in perspective. Both the-- There is a great difference between a chemical factory where materials are manufactured and stored for use, and a dump site where they are put in the ground and diffused. Let me let it go at that, but I just felt I had to respond.

At any rate, in the Legler case-- The initial response of the insurance companies was to back away from it and say that coverage was not-- They were not obliged to provide coverage and legal defense. And the Township did hire a private attorney. I think the result of that was that we ended up-- Well, first of all, we ended up having to file suit against our insurance companies in order to obtain coverage. It is sort of like insurance-- Now, I have a lot of insurance people sitting behind me, but I'll just go right ahead and take my chances, anyway. It is sort of like, insurance is just fine to have, but when you need it, you have to turn and file suit against your insurance companies. This has happened in a number of non-environmental cases we have had as well.

At the same time, the Township had to retain its own attorney to represent it in the Legler case. And I have to say, without commenting on people's professional qualifications, as a result, I think we probably ended up with an attorney who was less experienced in this type of matter, than if the insurance companies stepped in. And I am not looking to get into an argument on how the case was handled, but just the fact that the insurance companies, by initial reaction, put the Township in an incredibly difficult situation. We were dealing with a landmark case, so in addition to trying to make sense out of the tremendous legal tangle that resulted, the attorney we hired had to go after the insurance companies. Initially, he was successful in achieving a coverage for the defense, which I think has cost somewhere between \$750,000 and \$1 million, at this point, which is a lot less than \$15 or \$25 million, the kind of numbers that you referred to, Senator Lesniak.

I feel that, had the insurance companies come in with their experienced people -- attorneys and whatnot -- at the outset, that they could have reached settlements, and could have dealt with this thing

the way cases are generally dealt with every day, by settlements out of court and for some sum of money which is far less than any of the figures which are generally bandied about. Then, this Jackson Township case would have never received the national notoriety that it has. It never would have become a major expense to the insurance companies. But what they basically did was leave the Township, which was certainly not a specialist in settling these type of cases-- They left the Township hanging out in mid-air.

The judgment was initially for about \$15.6 million or something like that, plus interest, so consequently, people said it was \$16-\$17 million. The interest, by the way, at that point was about \$5,000 per day.

Now this resulted in two further legal actions. Of course, there was an appeal to the Appellate Court on the case itself, which also required the Township to again sue its insurance carriers to be responsible for the judgment. So you can see these incredible tangles developing here. We at least won on the first round, and this was the matter of occurrences that was brought up before. If you simply say that each family involved was a separate occurrence, then our insurance coverage was adequate. So, at least in initial court challenge, it was stated that we had coverage for the \$15-plus million judgment. And in the meantime, that judgment itself -- a part of which had to do with the Tort Claims Act -- has been reduced by the Appellate Courts to \$5.6 million dollars. I should state that none of us here are attorneys or insurance specialists; we have to leave that up to the right people.

So far, the insurance companies have paid out close to \$1 million in legal defenses, and I think a small part of the judgment, so people are not out \$5.6 million or \$15 million at this point. Of course the suit -- the original case that had been reduced to \$5.6 million -- is being appealed by the plaintiffs at the Supreme Court level, so that will go on, and of course the insurance companies are appealing the ruling that they are responsible, so they are still going against the Township in this matter.

I think it is also useful to point out -- I may have to rely on Mr. Miller for this -- but I believe that the coverage that was

obtained with the number of occurrences was from our regular insurance policies and not the umbrella policies, and yet it seems to be there are a lot of problems with umbrella policies. The Township currently does not have one. Yet it was not the umbrella policy that was invoked.

ASSEMBLYWOMAN FORD: Bill?

MR. SCHREIBER: Yes.

ASSEMBLYWOMAN FORD: I don't meant to interrupt you, but what does Jackson Township do now, when it wants to go out and buy an insurance policy to protect itself again this?

MR. SCHREIBER: Well--

ASSEMBLYWOMAN FORD: Do you have insurance against this?

MR. SCHREIBER: This is why I am very glad that Mr. Miller is here.

**DAVID MILLER:** We were fortunate enough to get an policy renewal this year, but the premiums went up at least 300% over last year. But the umbrella policy was canceled out in the middle of the year.

ASSEMBLYWOMAN FORD: So what do you pay now for insurance?

MR. MILLER: The umbrella that we had canceled out went from last year's \$13,000 to this year's \$70,000. The general liability of last year, at \$29,000, went to \$91,000 this year.

ASSEMBLYWOMAN FORD: Have you made any arguments to your carrier, based upon the appeal, that your exposure-- I mean, that the appellate decision knocked out the greater part of the awards: the medical surveillance, the pain and suffering aspect of it?

MR. MILLER: Well, I think these premiums probably were generated on the general exposure to the whole of municipalities across all of New Jersey. We were just tossed into the pot.

ASSEMBLYWOMAN FORD: Yes, across the board, not necessarily Jackson Township.

SENATOR DALTON: That is an assumption. There are some people who will tell you that they are generated on a willy-nilly basis right now, that there is no actuarial justification for these increases.

MR. SCHREIBER: I think it is interesting that in fact, Jackson Township was able to get insurance, where you might have thought we would have been the first place to have been--

SENATOR DALTON: I was going to mention that. I have municipalities in my district that don't have a landfill within their borders that can not get general liability insurance, so--

SENATOR LESNIAK: After the meeting you'll tell Senator Dalton the company who wrote the insurance.

MR. SCHREIBER: In fact, that is an interesting point, because Jackson, of course, felt-- And I think the reason the pollution exclusion did not apply is that Jackson was considered the operator of the landfill, not an active polluter. Of course, we are not the operators of the landfill anymore; we are going to get hit with all sorts of closing costs for that that we can not recover, and that is another problem for this Commission to deal with. But, of course, when you are in this environmental area-- As I was listening to so much other testimony, I was wondering why most towns do not operate a landfill, why they are into the same problem? Maybe no towns have landfills anymore?

SENATOR LASKIN: You don't need a problem to get astronomical insurance premiums in New Jersey.

MR. SCHREIBER: I don't know--

SENATOR LASKIN: Because we have the worst system in the country when it comes to insurance. Our premiums go through the roof every other day, depending on the weather.

MR. SCHREIBER: What I was-- I had finished most of what I wanted to say about the Jackson case itself, except that my last question here-- Now again, given that it has not been paid out, is still on appeal, and has been reduced to one-third of its original amount-- Is this grounds for the nationwide insurance problems that we have been hearing about? I, frankly, don't understand that, because it would only affect the one company, if this itself were the reason. Maybe the reason has something to do with falling interest rates.

I think the insurance representative who was here was certainly correct in lamenting the litigious climate that we live in. We have a lot of other problems along those lines, and I guess they really are not the province of this Commission. An example is the case of a former worker who along with about five or seven people, filed suit against the Township. Each of these is entitled to his own attorney, so a simple case can build up tens of thousands of dollars in legal fees. I wanted to sneak that in on you, even though it is not environmentally-related, but I am sure it is still part of the growing cost of insurance.

I would like to just stop for a second and see if there are any questions about the Legler suit judgment before bringing up some other problems.

SENATOR GAGLIANO: I guess what you are saying, Mayor, is that, based upon everything that you have seen so far, as a former Chairman of the Board of Health, as a former Mayor, and as a present member of the Township Committee, that based upon your Jackson Township case, you do not find justification for what has been happening to insurance costs and insurance availability in the State of New Jersey.

MR. SCHREIBER: Certainly, not from the Jackson case. There are certain other overwhelming societal factors, but I just think that -- And one of the reasons I am here, is to point out that this is ridiculous, our being used as a scapegoat time and time again. Certainly, we are not through with the Jackson case, yet. But I also feel that the insurance companies are responsible; they bungled it initially and if they had handled it the way they-- If they had taken an active role initially, it would not have ever have come to this point. The total cost of the whole thing would have been less than just the legal costs.

Let me say, I want to say all these things without in any way minimizing the suffering that has occurred, that the inconvenience and mental trauma that occurred to people who lived there was certainly real.

SENATOR GAGLIANO: I think many of us followed it in the local Monmouth and Ocean County papers, and I think that years ago, if

there had been some means devised -- put water mains down those streets -- maybe none of this would have occurred, but we don't know that.

MR. SCHREIBER: The thing is you would have to see the area to realize that is just -- it is kind of an impractical-- Well, we have done it, of course, but we were held up a lot by the State DEP in getting that in, and that delay, of course, added a lot to the costs.

SENATOR GAGLIANO: And we paid for a part of the costs, as I recall-- the State of New Jersey.

MR. SCHREIBER: A loan.

**WILLIAM A. SANTOS:** A low-interest loan.

MR. MILLER: Jackson Township was carrying the cost of that.

SENATOR GAGLIANO: I guess it is a whole combination of events that have culminated in a very severe problem, but I tend to agree with you that it is blown out of proportion to the point where now, the State of New Jersey does not have coverage itself. We now have situations where contractors can not get coverage to do cleanup work. It seems to me this would cut down on the possibility of future problems, because you have them too-- illegal landfills, and we have them, certainly, in our two counties, and I am sure that every county represented here has them at some point. Proper cleanup will eliminate that problem 50 years from now, or 25 years from now, and yet, we can not get the insurance to cover them while they are doing the cleanup.

MR. SCHREIBER: I don't understand the-- I agree with you and as I say, the insurance companies say that there are financial difficulties. I don't have reason to doubt that, because of this particular issue. And--

SENATOR GAGLIANO: Maybe they are trying to get our attention.

MR. SCHREIBER: Well, I think they have done that. (Laughter) I don't know what is necessary, but somehow, we have gotten tied up in knots, and made it very difficult to move on to the real problems that should be solved. This whole case -- the Jackson Township -- was just a disaster for its municipal government. I was not a member of the governing body during those years, but I know it

was just a crippling thing. And we are a growing community, we need our resources for other things, too.

Any other questions about this Legler business?

ASSEMBLYMAN SHINN: I would like to go back to your liability and environmental impairment insurance coverage. You said you had general liability, but you did not have environmental impairment. Is that accurate?

MR. SANTOS: I think it had the same exclusionary clauses as were issued to any other municipality. That is when the suit was ultimately brought by citizens of that section of Jackson. The insurance carrier revoked that, which of course is why we had to go into court, to get a determination as to whether that exclusionary clause was there or not. I am pretty sure it was there as part of the general liability policy.

ASSEMBLYMAN SHINN: So you do not have a specific policy in effect now for environmental impairment?

MR. SANTOS: Correct.

ASSEMBLYMAN SHINN: But you do have a general liability policy--

MR. SANTOS: For all other matters.

ASSEMBLYMAN SHINN: --with an exclusion -- With or without an exclusion for environmental impairment?

MR. SANTOS: I am not sure.

ASSEMBLYMAN SHINN: Okay.

MR. SCHREIBER: I think it might be interesting, actually -- Mr. Santos has a breakdown on the cost of the defense, which was court ordered, I might say.

SENATOR LESNIAK: Actually, it was ultimately provided by an insurance company.

MR. SCHREIBER: Yes, but not until there was a court order.

SENATOR LESNIAK: Did you have an attorney assigned by the insurance company, or did they just pay your attorney's expenses?

MR. SCHREIBER: We do now. Once the case had been -- After the second time we had to go to suit against our insurance companies, the case -- because first there was the defense, then the judgment --

after the second time, the insurance companies, of course, did become quite interested. We got their attention, you might say.

SENATOR LESNIAK: At what stage in the proceedings did you have an attorney who was assigned by the insurance company?

MR. SCHREIBER: I think it was not until after the second suit against them, mid-1983. It was after the judgment.

SENATOR LESNIAK: Oh, it was after the trial?

MR. SCHREIBER: After the judgment. After the trial.

Now, I am sure the insurance companies had their attorneys following maybe--

SENATOR LESNIAK: No, no, actually defending the municipality in court.

MR. SCHREIBER: Not until after the trial and after the judge said that the insurance companies were responsible for the judgment. You see, Jackson Township was left hanging out on our own. This is a town in the middle of New Jersey, in which a lot of people live peacefully among the trees and stuff. All of a sudden the governing body was asked to handle this thing that became a landmark case and at the same time the insurance companies, who would have brought in lawyers with the appropriate expertise, were not there. Again, I am saying this without getting into a comment about the way the case was handled.

ASSEMBLYWOMAN FORD: You can not assume all defense attorneys are good.

MR. SCHREIBER: Let's say they are all good, but they are better at their specialty.

Anyway, here is an idea, that for example, the Continental-- Is it okay to mention the names of companies, just to give you an idea of a breakdown?

SENATOR LESNIAK: Sure. It is a public record.

SENATOR DALTON: Do you have your liability insurance paid up? (Laughter)

MR. SCHREIBER: I am reading from a court order, so I hope that is not considered slanderous.

Continental Insurance, which covered the tab for, let's say, March 1972-1973, had to pay 11 %. United States Fidelity and Guarantee covered the Township from mid-March 1973-1979, and then again in 1980. That is 75% of it. It was sort of apportioned with the wisdom of Solomon that way. And that was just the legal.

So at any rate, to come back to your question, the Township did not have an insurance company appointed attorney until well after the trial, and at that point we also had some input into it, but they had the main choice, because they were responsible at that point.

ASSEMBLYWOMAN FORD: Did you have two attorneys, two separate law firms representing you through the case prior to that? Were there two law firms involved, or was there just one?

MR. SCHREIBER: During the trial?

ASSEMBLYWOMAN FORD: Prior to the trial, even.

MR. SCHREIBER: No, there was just one.

ASSEMBLYWOMAN FORD: There was one law firm. Okay.

MR. SCHREIBER: And there was a tremendous amount of expert testimony, by the way, that had to be acquired in the course of the proceedings.

SENATOR LESNIAK: If you want, you can submit the defense course for the record. You don't have to do it now. We could enter it into the record.

MR. SCHREIBER: I think it is interesting as well as disastrous.

SENATOR LESNIAK: We are going to adjourn for 45 minutes.

(RECESS)

#### AFTER RECESS

SENATOR LESNIAK: Mr. Dressel, what do you want to do?

WILLIAM G. DRESSEL, JR: Is Jackson Township going to summarize?

SENATOR LESNIAK: They are not back yet, so let's not worry about them. You're on. (At this point, representatives of Jackson Township return to room.) Jackson Township, your five minutes are cut back to two because you're late.

MR. SCHREIBER: No problem. Out of respect for the fact that you--

SENATOR LESNIAK: We start on time.

MR. SCHREIBER: --are very businesslike and appear to be determined to get somewhere on this, I don't want to take any more time, except to make the last few points.

I hope one of the things which came out in the testimony before was, I don't think the idea of inestimable liability is valid. In fact, the Jackson Township case could have been handled the same as many others and settled within the realm of a fairly typical insurance settlement. I don't know what other precedents there are, but something like Bhopal just doesn't apply because that was a chemical factory, not an environmental dump site. So, I hope that is something that people may think about a little differently. There is not an absolutely inestimable degree of liability.

A fairly easy thing to bring up is the fact that insurance is the fastest-growing and most uncontrollable cost townships are facing these days. We have a resolution which I will hand to you. We just did this to urge this Commission on. One of the things it calls for, in addition to taking whatever action is appropriate, is also to consider that maybe there should be some sort of a cap exemption because of the effect these increasing insurance rates are having.

SENATOR LESNIAK: We'll bring that up to Senator Russo.

MR. SCHREIBER: Okay. I would just like to pass this along as part of the record. Also as part of the record, I would like to pass along a letter to Dave Miller from our insurance broker. I would like to read a very small part of that letter. This is where we lost our umbrella coverage.

"As you are aware, the landmark suit in Jackson had a dramatic effect on the entire insurance industry nationwide. The mere mention of the name of the town, and underwriters decline. We have contacted every known market available to us and have consulted with associates, but at this point in time Jackson has a stigma which will undoubtedly take a long time to erase." So, that is about umbrella coverage.

On that matter, our Mayor, Pete Carlson, has made a suggestion in a letter to Senator Connors -- we will also pass that along to you -- recommending that the State of New Jersey set aside a portion of its surplus to set up a pool to make umbrella liability insurance available to those municipalities which are unable to obtain same.

I have heard a lot about indemnifying municipalities or contractors. This particular recommendation would really refer to the umbrella coverage, not the main coverage. That is another concept.

As I mentioned before, I would again like to point out that Jackson Township was really left out on its own in an extremely difficult case, something that turned out to have national significance. I don't know where the matter should be taken up, whether with this Commission or others, but there ought to be a way that the State, or at least municipalities, could get together when there is a case that comes up before one town which affects all of them.

SENATOR LESNIAK: I'll leave you the address and telephone number of my law office.

MR. SCHREIBER: Oh, okay.

SENATOR LESNIAK: I'm only kidding.

MR. SCHREIBER: Okay. The last point, and what I think is the only thing that will begin to lessen the problem, is to-- I think this Commission has to look -- as has been brought up before, and I am sorry that Senator Laskin isn't here right now -- at the fact that the extension of immunity restoration and the extension of immunity to municipalities and municipal officials is essential. Having the State provide insurance coverage, or some kind of a pool, or whatever, will, in fact, still favor the litigation that is plaguing all of us. It is sort of a law-of-supply-and-demand thing. If there is more insurance money, there are going to be more people going after it. The only thing that will begin to lessen this climate is the extension of immunities, which will essentially lessen the amount of insurance coverage needed.

SENATOR LESNIAK: And it will also lessen the amount of protection to people as well.

MR. SCHREIBER: I think it has to be done carefully so that people are protected against negligence. I don't want to be immune if I do something stupid and hurt someone, but there--

SENATOR LESNIAK: It is a little deeper than that, too. There are great benefits that arise, in certain instances, out of strict liability. It is a balancing act that this Commission is going to have to look at very deeply and soul-searchingly.

MR. SCHREIBER: Sure, but as an example, by the way, when Jackson was running the landfill, it was operated under the rules of the State Public Utilities Commission, and was forced to take over 100,000 gallons of waste per day. In fact, the Township never wanted to do that. That was mostly coming from out of town. We were absolutely unable to bring the State into the litigation. The State was immune, yet we were operating under State rules. So, clearly there is a line which has to be drawn somewhere. I just think that the line is too far in one direction.

That concludes what we have to say.

SENATOR LESNIAK: You're absolutely right. We will take all of your suggestions under advisement.

MR. SCHREIBER: We really appreciated the opportunity to present our side of this at the hearing.

SENATOR LESNIAK: You made some very good points.

MR. SCHREIBER: Thank you.

SENATOR LESNIAK: Okay. Now we will hear from the New Jersey State League of Municipalities.

MR. DRESSEL: Thank you, Mr. Chairman. I have a formal statement which I would like to read into the record. Then I would be available for any questions. There are still a number of municipal officials here who were here this morning who would like to testify, and they may amplify further on some of my formal testimony.

My name is Bill Dressel. I am Assistant Executive Director of the State League of Municipalities.

On behalf of the League, I would like to thank the Commission for all of its efforts in soliciting local input on the availability and cost of environmental impairment liability insurance coverage in the State.

As you know, the State League of Municipalities represents a broad spectrum of municipal concerns in the 555 municipalities which comprise our membership. My remarks today will provide an overview of some of the problems confronting municipalities in the environmental insurance market, and I will outline some recommendations for possible legislative consideration in this area.

In the last few months, municipalities throughout the State have been experiencing difficulty in obtaining adequate insurance coverages at an affordable cost. A recent League survey revealed that approximately 30% of the municipalities may lose their present insurance coverage. It appears that the communities which were fortunate enough to find a carrier who would insure them, experienced unusually high premium increases. As you know, on September 17, Governor Thomas H. Kean approved an emergency regulation to prohibit insurance companies from terminating entire lines of insurance coverage, or imposing midterm premium increases or midterm reductions in coverages on municipalities. The League recognizes the enactment of this emergency regulation as only a first step in addressing the availability of insurance coverage, at least on a temporary basis.

This Commission should be aware of a couple of problems that remain which deserve immediate action. First, what happens to the communities which received cancellation notices prior to September 17, the effective date of the emergency regulation? Representatives of some of those communities are here today. Those municipalities are not covered by the regulation and, in effect, have been orphaned by insurance companies because the industry has expressed reluctance to extending coverage to municipalities since they would be required to abide by the provisions of the emergency regulation.

Another concern is affordability. There is nothing in the regulation that prohibits an insurance carrier from quadrupling an insurance premium when the policy comes up for its mandatory renewal, as set forth in the regulation. The cost of providing environmental liability insurance, or any other type of municipal liability coverage, has skyrocketed, making it almost impossible for local governments to afford. This is not the forum to discuss budgetary concerns in this

area; however, the League has gone on record before the Local Expenditure Limitations Advisory Commission requesting that consideration be given to exempting high premium increases from the cap computation. The real tragedy here is that local governments, regardless of whether insurance costs are in or out of the cap, still have to make difficult decisions relative to either cutting vital service delivery programs or increasing local taxes to pay insurance premiums.

Let me assure you that our insurance problems are not singularly related to municipal risk management practices here in New Jersey. On the contrary, it is a national problem that is plaguing all levels of government. Although I will not take time to get into some of the economic theories of the insurance market trends that are being discussed in the media, I have attached as a part of my formal testimony, a copy of an article that recently appeared in Newsweek titled, "The Naked Cities: Rising Insurance Costs Force Officials to Pay or Pray." I also included an article from the National League of Cities publication, Nations Cities Weekly, titled, "The Liability Insurance Issue: Another Crisis for Cities - Is It Manageable?" for additional background information. In addition, I have included articles from newspapers throughout the State that discuss the problems many of our communities are confronting in the whole insurance area.

In part, the reasons for our State's insurance woes are attributed to the landfill pollution law case involving Jackson Township. You heard from representatives of Jackson Township earlier. The exorbitant amount of that legal award sent -- this is what we believe, and what we have been led to believe -- shock waves throughout the insurance industry, resulting in companies pulling out of the municipal insurance market due to a fear of the higher risk.

The insurance dilemma is extremely complex and there may very well be no panacea or cure-all that will grant us immediate relief. However, a number of legislative remedies have been proposed to address the problem, and they deserve mention.

Two bills, Senate Bill 2545, sponsored by Senator John Lynch, and its companion measure, Assembly Bill 3073, sponsored by Assemblyman

Thomas Foy, provide that liability of a public entity or public employee for a "pollutant incident" is to be based on a standard of negligence. Presently, the standard for determining liability of any person or entity for a pollutant incident is "strict liability"; that is, liability will be established only upon showing that the person or entity caused the pollutant incident. No proof of negligent conduct is required. The rationale for liability based on negligence, expressed in the sponsor's statement, is that governmental entities undertake actions which may result in the release of pollutants as a necessary function of their public responsibilities. These actions are not voluntarily assumed nor do they result in profit to the entity. The League approved these two measures on the rationale that it is appropriate that the liability of governmental agencies be based on the reasonableness of their conduct, rather than on "no fault" concepts, such as strict liability. Both of these measures are currently awaiting further legislative action, and we are hopeful they will receive approval in the near future.

Another legislative initiative recently introduced, is Senate Bill 3305, sponsored by Senator Peter Garibaldi. This bill caps a municipality's liability for damages resulting from a claim of negligent contamination of the environment, such as the contamination of well water due to a seepage of toxic waste from a municipal sanitary landfill, at \$500,000 per incident and \$50,000 per claimant. It does not waive any of the immunity provided by the New Jersey Tort Claims Act or any other law. This is another approach different from the aforementioned bills, in that it places a monetary threshold on liability limits in environmental pollution lawsuit cases. We believe that this legislation is also worthy of consideration, since it may address the high rates insurance carriers are quoting for coverage against claims due to environmental actions.

Whenever there is a discussion of possible solutions to the insurance dilemma, joint self-insurance or pooling is mentioned. There may very well be some logic for a State-administered self-insurance pool that would be narrowly designed to provide only environmental liability impairment insurance coverage for municipalities. Surely

there is a need for this specialized kind of insurance, and the State may be able to put together or package a program that would address that need. We urge this Commission to discuss this option further with representatives of the State Department of Insurance, and officials affiliated with the municipal self-insurance pools presently operating in Bergen County, since they have demonstrated expertise in this area.

In conclusion, we are in desperate need of a legislative remedy that addresses both the availability and affordability of environmental liability insurance and all other insurance coverages. We are confident that if a legislative solution can be implemented to address the environmental liability insurance problems we are experiencing, there will be a spill-over benefit of addressing our other liability insurance problems. We have asked a number of municipal officials to be present today to discuss their particular problems in the liability insurance area. I am sure their testimony will be of interest to you.

I would like to thank you for the opportunity to present the League's feelings and thoughts on the very important issue before you today. I would be glad to answer any questions you may have.

SENATOR DALTON: Bill, how many municipalities in the State are presently not covered through a general liability policy?

MR. DRESSEL: Our survey, which I alluded to in my formal testimony, was administered in August -- about the mid part of August -- and then a follow-up survey was sent out in the first part of September. It appears that approximately 30%-- Statistically it has come out that approximately 30% of the communities would have some problems or difficulty in-- This is general liability insurance, Senator. We did not get into the environmental end specifically. What has happened though is, since the--

SENATOR DALTON: Thirty percent without coverage?

MR. DRESSEL: Approximately 30%.

SENATOR DALTON: Without any general liability coverage, okay.

MR. DRESSEL: What we have also found is that after September 17, the day the insurance regulation was signed into law by the

Governor, we have not heard from too many communities. We sent a follow-up, but I don't know if that had an effect or not. We felt this was going to bring on an onslaught of people indicating they were having problems. But we haven't heard that since September 17.

SENATOR DALTON: So, approximately 170-some odd municipalities presently do not have liability insurance in the State.

MR. DRESSEL: Well, the exact wording in our questionnaire, if I recall correctly, was, "Has your carrier indicated an unwillingness to insure your liability?" and 170-some communities indicated--

SENATOR DALTON: What I am trying to get at is, you have carriers who have indicated that as of January they will not renew. However, my question is, how many municipalities are presently without general liability?

MR. DRESSEL: I can't really give you a firm number on that. A number of the communities were, in fact, covered by Selected Risks. They represent a large number of communities, I think nearly 20%, which deal in the general liability/environmental liability lines. A number of our communities which responded were part of that coverage.

SENATOR LESNIAK: You don't think that the Governor's regulation is actually going to encourage insurance companies to rush in and give coverage to those municipalities that don't have it, do you?

MR. DRESSEL: I don't see that happening, Senator. There are -- as I refer to them in my statement -- some orphans out there, and there are some orphans here, representatives of communities which have had some difficulty in trying to get insurance coverage. They, too, would like to testify here today. They can amplify further on that very real concern.

SENATOR LESNIAK: How about in the long term? Do you have any opinions on how that type of regulation will affect the insurance industry's willingness to provide coverage in the long term?

MR. DRESSEL: I'm not sure this was designed for a long-term solution.

SENATOR LESNIAK: No, no, no, but it may have effects on a long-term basis if the industry is fearful that at any point in time, instead of a real solution, regulations are developed in a crisis situation that could have a serious impact upon their business and their ability to generate profits from that business, as every business has a right to do.

MR. DRESSEL: I have spoken to insurance representatives, and they indicated that they are not in any real hurry to get back into the municipal business in light of this regulation. I think this morning's Star-Ledger made mention of an insurance group that expresses the same concern over the regulation. I think we have a problem. The regulation was meant to be a Band-Aid to address the availability issue in the short run. I agree; I do not think it is a long-term solution. I think we need something to address the availability, and the bigger issue we have mentioned, the affordability issue, as well.

ASSEMBLYMAN SHINN: You mentioned the concept of self-insurance, the State possibly providing a vehicle to supply self-insurance to participating municipalities, or counties, or whomever, I guess. Do you have any further thoughts on the mechanics of how that might work?

MR. DRESSEL: No, not really. I think it should be patterned after other state plans which are in effect. I think there is one in Pennsylvania; I think there is another one in Ohio, although I am not sure. I could get you additional information. I believe there could be a voluntary call that municipalities could participate in statewide, that would at least allow them an option. It seems to me that by spreading the risk across 555 municipalities for this one specific line of insurance, it could very well be an option worth considering.

In my testimony, I allude to an experience in Bergen County. As you know, since 1982, there has been a State statute that provides municipalities, on a voluntary basis, an option to join together to self-insure all lines of insurance, except health benefits. I think that concept might very well serve as a bench mark or as a basis for devising a State plan, having the State administer it, and being able to possibly reinsure the excess.

ASSEMBLYMAN SHINN: Do you have any feeling toward a total self-insurance program potential versus a layer potential? In other words, maybe a township would clean up the first million, or something like that which would define limits of liability, and then the State would have a layer potential. Do you have any thoughts on either of these options?

MR. DRESSEL: There was a concept discussed a few years ago by another commissioner for setting liability limits. The municipality would have, you know, a ceiling, a threshold level, whereby they would insure themselves, and then the State would pick up the excess, as you mentioned. I think \$1 million was the threshold at the local level, per incident. As I recall, there was a feeling in the insurance industry that that would make them feel more at ease. At least they would know going in, what the municipality's limit would be. From the municipal standpoint, it would address the affordability issue because you would know what your limits were by having a threshold level that was reasonable, but responsible. That would take a lot of negotiation and discussion by people a lot more intelligent on insurance issues than I.

ASSEMBLYMAN MARTIN: I am interested in the same area of questioning, the concept of self-insurance. Do you think it would make sense to have it in a smaller arena than the State, that is, through the counties or some other regional arena?

MR. DRESSEL: Assemblyman, I think self-insurance is a tool, another option, that municipalities may want to use. The legislation was signed in 1982. We found one experience in Bergen County -- 23 communities in the northern part of Bergen County -- and I understand there are 15 communities on line right now to perform the second Bergen County pool. It is not administered by the Bergen County government, but it is in the Bergen County geographical area.

Their numbers certainly show that there is a savings to be derived. I think it is a voluntary decision that the municipalities have to get together and explore. I don't believe self-insurance is a panacea; I don't think it is going to solve all of our insurance woes, but I think the municipalities should have that option before them. I

think it is certainly something that needs exploring on the environmental end, just that one specific line, as far as a State-administered pool would be concerned.

ASSEMBLYMAN MARTIN: What is your general reaction to the indemnification concept that was put forward this morning from the private contractors that they wish to either be held harmless or provided indemnification by the municipalities or by the State?

MR. DRESSEL: That they be indemnified for their actions?

ASSEMBLYMAN MARTIN: Yes.

MR. DRESSEL: I think I would have a big problem with that. I think they should be responsible. I don't think we can indemnify them.

ASSEMBLYMAN MARTIN: Suppose the State provided indemnification. Would that change your thinking, or is it that the approach bothers you?

MR. DRESSEL: It might be something worth exploring, but I would have to get more information on it. I think there might be a problem with the concept.

ASSEMBLYMAN MARTIN: One other question. With the municipalities in your survey which indicated they were having difficulty with their insurance, did you find any pattern in terms of what types or sizes of problems those municipalities had that might link them, as opposed to those which did not experience problems?

MR. DRESSEL: That is a very interesting question. No, what we found was that municipalities, regardless of size, geographic area, or whatever-- There was no evident common denominator associated with their problems. We thought there was. We did an initial survey back in September, 1984. We heard in Bergen County that there were a number of insurance companies fleeing the municipal insurance market. The League did a survey in cooperation with the State Department of Insurance. The results of that survey showed that there was not a problem statewide, but that regionally there was a problem and, if I recall correctly, it was in the Bergen County area. So, we backed off. We thought, "Well, at this point, we are not going to call for any legislative remedy or any action by the Governor. We'll see what

happens." Then in the spring, as policies came up for renewal, we started seeing more of a problem. On July 1, we really started seeing that critical curve go up. That is why we are here today.

SENATOR LESNIAK: Do you want to ask some individual mayors to come forward?

MR. DRESSEL: I would like to call Fred Walters up here. He is the Administrator in Ewing Township. I know he would like to testify. Then, Mr. Chairman, I would just follow your list, or ask for municipal representatives. I certainly appreciated the opportunity. Thank you.

SENATOR LESNIAK: Thanks, Bill.

FRED R. WALTERS: Mr. Chairman and members of the Commission: My name is Fred Walters. I am the Business Administrator for the Township of Ewing.

Initially, I think I would like to state that my comments will be brief in the hope that this will put me on a positive note with the Commission in this ongoing saga of gloom we have heard all day today.

Ewing Township is one of those communities which the Senator to my left alluded to as being one that has absolutely no liability insurance whatsoever at the present time. On May 20, 1985, we received a notice which, in effect, told us that we had been canceled out of our liability coverage. At that particular time, we were in the second year of a three-year agreement with our insurance carrier. That particular coverage obviously had within it the coverage of all of our municipal buildings for fire and damage, personal property, and general liability. At that time, our insurance coverage called for a \$1,000 deductible. The premium cost in our 1985 budget was \$19,300, with an additional audit cost of approximately \$1,700.

We received this notice of cancellation in April and, in turn, had to look back to see what we could do to obtain coverage. Also, our reinsurance coverage was canceled immediately thereafter. We did not receive notice of that until May 23. Our reinsurance coverage allowed us up to \$5 million. Our particular premium for that policy in the 1985 budget was about \$7,500. The thing that was most

difficult for us to understand was the fact that our experience factor in Ewing Township was excellent. That was confirmed by our insurance agent, as well as the insurance companies. They had no problem with any particular area of our liability, but we were still canceled out.

We immediately advised the State Department of Insurance of our problem, and on May 3 I spoke to them and was advised that their folder in this regard was becoming rather voluminous. Every day it was growing more and more with these types of complaints. Consequently, on May 13, 1985, we submitted a formal complaint to go on record with the State that we were having this problem. The Township immediately began searching for some kind of liability insurance coverage through our agent. Obviously, time was of the essence. We were running out of time before the cancellation was to take place. Our agent advised us in no uncertain terms, which rather shocked us, that there was virtually no liability insurance available for Ewing Township.

Finally, we were able to obtain -- and I put it in quotes -- a "quote" from a self-insurance company, which offered us a package. They told us they would provide us with fleet insurance, Workmen's Comp, and general liability under a self-insured program; however, we would have to cancel out the particular fleet insurance we had at that time -- which would cost us a 15% penalty fee -- and under this policy, the Township would be responsible for the first \$100,000 of any one claim -- from a \$1,000 deductible to a \$100,000 deductible. Over this amount, the policy would cover up to \$900,000. We would also have an aggregate coverage of \$350,000 for a period of one year. For this particular coverage, our premium would be \$104,500 -- from \$19,700 to \$104,500. Of course, that did not include the administrative costs, which were an additional \$35,000, for a total cost of \$139,500. This, again, does not even include the reinsurance coverage. This is a simple liability package.

Our reinsurance coverage, our umbrella coverage, would, in turn, cover us up to \$4 million -- you'll note that our initial policy covered us up to \$5 million -- and for this underlying coverage we would have to pay a premium of \$92,500 -- from \$7,500 to \$92,500. The figures were astounding, to say the least. I must also add that this

coverage excluded public officials' liability and pollution liability. Both of those were excluded.

Further, the plan did not cover our municipal building for fire or damage, nor did it cover burglary, nor did it cover windstorm, which our previous policy had covered. With this in mind, the Township looked back and said, "Well, what would it cost us to get that coverage?" Well, that would be fine, we could get that too, but that would be an additional \$16,325, with an additional \$5,000 deductible. It was just incredible the amount of differentiation in the coverage between what we previously had and what we were going to receive in this new package.

We very quickly did a cost analysis to see just how much of a differentiation it would be and what the community would have to come up with in 1985 to obtain this type of coverage. Very briefly, it would have cost us an additional \$65,000 over what we had budgeted. Obviously, we didn't have it. In effect, with the \$350,000 deductible, and with just the simple liability coverage, excluding the reinsurance-- The \$350,000, plus the \$139,500, in effect what we were saying was that the Township of Ewing would have to pay out an initial \$489,500 before we received one insurance dollar. That is astounding.

We would also be forced to obtain permission from Local Government Services if we were forced to go out for an emergency appropriation to obtain the additional amount of money for the coverage we hoped to obtain.

I would like to throw out just one other quick note right here, that being that our fleet insurance for 1985 was increased by 100%, from \$42,000 to \$82,000.

In our analysis, we found that we simply couldn't afford the additional costs, so in June, 1985, the Township Committee decided we would be forced, at least for the remainder of this year, to go under total self-insurance in our liability coverage. However, we advised our insurance agent to continue to try to seek out, to the best of his ability, some type of coverage within the reasonable amount of money we could afford. Up to the present time, we have not been able to find that coverage.

We talked a little bit about pooling; it was mentioned just a few minutes ago. In Mercer County, we are presently looking at a pooling situation with all 13 municipalities. We have had an initial meeting, and we are trying to devise the particulars and get everything put together so possibly we can enter into this kind of a situation for all of our insurance. We just don't know how that is going to work out yet, but you must remember that at the present time, this Township still does not have liability insurance.

I might just conclude by telling you that we are one of the orphans that Mr. Dressel mentioned in his comments. Ewing Township has no liability coverage at this time.

SENATOR LESNIAK: You certainly can't blame Jackson Township for your increase in fleet insurance coverage, right?

MR. WALTERS: I'm glad you mentioned Jackson Township, Mr. Chairman, because I am amazed. You know, I am ready to go back to my municipality today and say, "Let's develop a landfill, go through a lawsuit, and I will be able to get liability insurance."

SENATOR LESNIAK: There you go; maybe that is the answer. Senator Dalton?

SENATOR DALTON: Who was your carrier, sir?

MR. WALTERS: Insurance carrier?

SENATOR DALTON: Yes.

MR. WALTERS: For the liability, it was North River, and for the reinsurance, it was Crum and Foster.

SENATOR DALTON: What was your experience under your GL? You indicated it was good.

MR. WALTERS: Rated excellent. We had one claim in the last eight to ten years which had an environmental impact, and that was when we had some vandalism take place at one of our department locations for gas. One of the pumps was left on and there was a spillage. I believe the total cost to correct that was about \$35,000. That was some five years ago, I believe. That is the most we ever had with any kind of a claim.

SENATOR DALTON: What was your experience on your fleet policy?

MR. WALTERS: Terrific. We have never had claims in our fleet beyond \$20,000 -- \$22,000 to be exact. We had years where we spent as much as \$1,400 or \$1,500.

SENATOR DALTON: So, as a result-- Did North River indicate they would handle your fleet policy?

MR. WALTERS: North River didn't have our fleet. North River had our liability.

SENATOR DALTON: Who had your fleet?

MR. WALTERS: The fleet was-- Oh boy, it escapes me at the moment.

SENATOR DALTON: They said they would stay on your fleet, but they would double the premium.

MR. WALTERS: I might add that the initial--

SENATOR DALTON: With a good loss ratio.

MR. WALTERS: Yes. The initial contact was a \$109,000 premium which we negotiated down to \$82,500.

SENATOR LESNIAK: How long have you been the Business Administrator?

MR. WALTERS: Seven years.

SENATOR LESNIAK: Was there a period of time within those seven years when your premiums went down?

MR. WALTERS: Yes, they did.

SENATOR LESNIAK: Dramatically?

MR. WALTERS: During the soft market, everyone's went down. Investments were good; interest rates were high. Insurance companies were making money.

SENATOR LESNIAK: What are the proposed rates in relation to the previous rates before they went down? Are they comparable -- not comparable, but--

MR. WALTERS: Tripled.

SENATOR LESNIAK: Well, they doubled over what they are now, but they were higher at one point in time.

MR. WALTERS: I think the most we ever paid in the last seven years, was \$46,000, for example, on our fleet insurance.

SENATOR LESNIAK: Then it went down?

MR. WALTERS: It went down to \$38,000 or \$39,000. You're correct, it was \$23,000 at one time. Then it gradually worked itself back up to where the big hit came in 1985.

SENATOR DALTON: In effect, the rates may remain the same. What you get hit with are surcharges. You are hit with a surcharge that is based on -- whatever, some underwriter's indication. In many cases, that is, in fact, what drives the costs up. The flip side of that is, in good times you get hit with reductions. But it is a determination made by an underwriter in the company.

MR. WALTERS: One point, just to piggyback on that comment if I may, Senator. One thing we keep getting thrown back into our face is that we really weren't paying legitimate premiums. During these past few years, municipalities were not paying legitimate premiums. By that obviously they mean that because things were good in another area of the insurance company and they were doing well financially and their premium factor was down -- "the soft market again" -- municipalities were allowed to have lesser premiums. If we were really not paying the true premium, that's hard and very frustrating for administrators, mayors, and municipal officials to accept, because that is not our problem. Our problem is the budget for whatever it is going to cost us. If we can negotiate a good premium, so be it; that is what we are there to do.

SENATOR DALTON: It's interesting how we deregulated commercial insurance, i.e., competition be the standard, and then they tell you you were not paying true premiums. I don't understand the correlation.

MR. WALTERS: Exactly. It's hard to deal with.

SENATOR LESNIAK: Well, there are cyclical effects in the business. I think what we have to do is look at those aspects that are noncyclical in nature, those which are institutional in nature, and deal with them.

SENATOR DALTON: That's correct.

ASSEMBLYMAN MARTIN: I suppose this will be a tough question for you to answer, but do you think there is any relationship to the work your agent is doing? I have difficulty, as do you, trying to

figure out how Jackson Township can get insurance and you can't. Is it a product of one agent working harder, or is it contacts or relationships with certain insurance companies? How does that fit into it?

MR. WALTERS: That is a good question. I truly believe that if we were in a total minority in that regard, then I would have some suspicion. But we are not. There are other municipalities. One Senator alluded to the fact that he has heard from some himself who simply cannot get liability, whether their experience factor is a plus or a minus. They simply can't get it. We're in the same predicament.

I can't relate to it being specifically oriented toward our agent. I think it is just the nature of this crazy insurance situation we're dealing with. I don't think they have sat back -- meaning the insurance companies -- and analyzed, or done a study, because I assume it is costly, to see which communities really are in good shape and why they should not be penalized to the degree they are. It makes no sense. There is no correlation between Jackson Township and Ewing Township. We have a tremendous experience factor. They have had some problems. As indicated a little while ago, maybe not as major as they have been publicized in the media and represented to the people, but certainly they have had some problems. We have not. (Mr. Walters knocks on the table.) I must do that because I am superstitious.

ASSEMBLYMAN MARTIN: I have a related question. If you got into self-insurance with other Mercer County towns, would there be a problem with the towns which have experienced greater liability problems in the past and the towns, such as Ewing, which have a very good record? How would that hinder your intent to have a pooling network?

MR. WALTERS: One of the prime concerns of the consultant is to do an analysis and a study. Consequently, we won't be able to resolve this situation much before the first -- probably sometime after the first of the year, next spring. One of the prime concerns he has is to develop and gather information from all of the communities to see if there is an experience rate that will affect our ability to pool.

From the various municipalities we have been talking to, including Trenton, there does not seem to be a problem. They indicate that they do not have a major problem in the experience factor. They have a multitude of other problems, but not in the particular issue we are dealing with. So, I don't expect there will be a problem, but until the consultant can put all of this information together and analyze it, he won't know himself. He may come back and tell us, "Forget it, fellows, it's not worth it."

SENATOR DALTON: May I just follow up? Obviously, you didn't have all of your insurance with one company. There were a number of companies that wrote you. Is that correct?

MR. WALTERS: Yes, sir, over a period of time.

SENATOR DALTON: You mentioned Crum and Foster, which handled your package and umbrella, and you had another company handling your fleet policy. I am just wondering, did you ever hear whether the company wanted all of your lines of business, and then they would write you?

MR. WALTERS: The only one that gave us that was the self-insurance package I just alluded to.

SENATOR DALTON: In other words, you bring all of it to us, or, you know-- So, it wasn't that.

UNIDENTIFIED MAN FROM AUDIENCE: Excuse me. Crum and Foster, North River -- they're all the same company. Crum and Foster is the group. North River is just one of their companies. They have six.

SENATOR DALTON: Thank you very much.

MR. WALTERS: Let me add one thing, they don't cover our fleet, or some of our other insurances.

SENATOR DALTON: But there was never an offer made by the company, through the agent, saying, you know, "We want all the lines"?

MR. WALTERS: No, sir, there wasn't.

SENATOR DALTON: Okay.

SENATOR DALTON: Are there any further questions? (negative response) Thank you very much.

MR. WALTERS: Thank you very much.

SENATOR DALTON: I would like to call Mr. Bill Murray, Risk Manager, City of Camden.

**BILL MURRAY:** I would like to thank the Commission for the opportunity of appearing here this afternoon on behalf of the City of Camden. I would appreciate it if the Commission would relay to Senator Laskin that I left my prepared text in my briefcase, and I am not going to burden you with the insurance problems of the City of Camden. They are probably as horrendous as Ewing Township's.

Instead, I would like to discuss the possibility of some solutions, which have been briefly touched on. Self-insurance, in my opinion-- Oh, I should give you my background first. I have been in the insurance field for over 30 years. My field is primarily risk management, loss analysis, and loss consultant; presently, I am the Risk Manager and Insurance Consultant for the City of Camden.

My experience in self-insurance goes back 15 years. I found that self-insurance is satisfactory in certain fields. Those fields which are strictly regulated by legislation can be satisfactorily done under a self-insurance program. I am not totally satisfied that self-insurance, such as pooling, while it may be the greatest thing since sliced bread at this point, and everyone thinks it is going to be their savior, four or five years down the road, I don't think it is going to work out. I think it is a stopgap measure which is of benefit to the municipalities involved at present, but on the overall long haul down the road, I don't think it is going to work out.

Instead, we touched briefly today on a cap-type program. I would suggest two programs to the Commission; one is three-phase and the other is four-phase. The final phase of my suggestion is difficult, in that it means dealing with the Federal government. But I think we should all consider and acknowledge that the problem of environmental damages is a problem of our society. It has been created by our society, by everyone. I think to stand and point fingers and say, "Well, it's your responsibility," or "It's the insurance company's responsibility," doesn't solve the problem in any way.

I think the equitable distribution of responsibility would probably be the best solution, and I would suggest the following:

A cap should be placed on municipal liability. A cap should be placed on the excess insurance liability. Following that,

indemnification by the State, with a cap. Following that, indemnification by the Federal government. It can also be done three-phase, with a cap on the municipality's liability, a cap on the State eliminating excess insurance, and then to the Federal government area.

Now, I offer that as probably the most equitable suggestion because of the manner in which this has all come upon us. It has been caused by everyone.

SENATOR DALTON: Through you, Mr. Chairman, Mr. Murray, what do we do if the Feds don't act? There is no way for us, being one of 50 states, to insure that the Federal government will act. So, eliminate the Federal government. What would you do?

MR. MURRAY: Well, I don't like to eliminate the Federal government.

SENATOR DALTON: The thing is, we're a State government.

MR. MURRAY: I realize that to sit here and say the Federal government, is a simple thing for me to do. I realize it takes a great deal of work to get the Federal government involved. However, I do not honestly believe the State of New Jersey can solve the environmental damage problem. I don't believe we can do it. There isn't enough money. The courts have already made us aware that they are going to award damages, and I do not honestly believe the State can do it itself. I believe we are going to have to have Federal assistance.

I offer those solutions. If anyone has any questions, I will be happy to answer them.

SENATOR LESNIAK: That's a good point. There are too many in Washington who, I guess, could deal with that.

MR. MURRAY: In conclusion, I would ask that you move as quickly as possible. I have today's newspaper for my area: "GEMS water contaminated." We already have five or six suits filed against us, and we didn't even dump there.

SENATOR DALTON: Well, that is the biggest town in my district, Mr. Murray, so your headache is shared. (laughter)

SENATOR LESNIAK: Assemblyman Shinn?

ASSEMBLYMAN SHINN: You were talking about a cap on municipal liability. How would you arrive at the cap amount?

MR. MURRAY: Well, that is a point of discussion; maybe a quarter of a million dollars. That would be an invitation for the insurance companies to come back. They would know their position; they would know where they stood.

ASSEMBLYMAN SHINN: Are you saying that this would go to a fund with a proviso upper layer?

MR. MURRAY: Well, maybe we should go from there to an upper layer, yes.

ASSEMBLYMAN SHINN: They would come to the municipality first for "X" number of dollars, and then go into a fund to subsidize the balance of it?

MR. MURRAY: Yes. I understand, from reliable sources, that the excess market in New Jersey is going to be dried up by January 1.

ASSEMBLYMAN SHINN: Do you have any thoughts about where the revenue would be generated from to form a reserve for that cap effort?

MR. MURRAY: No, I really don't, Assemblyman. As I said, I tried to be brief here. I had thought of this formula for several days, and to me it is an equitable formula. It is one that distributes the responsibility, but also invites the insurance companies back into the market.

ASSEMBLYMAN SHINN: What kind of liability coverage does Camden have?

MR. MURRAY: Presently, we have a \$500,000 limit of liability, but we have a \$25 million umbrella.

ASSEMBLYMAN SHINN: Twenty-five million on what?

MR. MURRAY: Umbrella; excess.

ASSEMBLYMAN SHINN: And that includes environmental impairment?

MR. MURRAY: No. That is excluded by endorsement.

ASSEMBLYMAN SHINN: And there is no specific environmental impairment coverage?

MR. MURRAY: No, none. We can't get it.

SENATOR LESNIAK: Assemblyman Martin, questions?

ASSEMBLYMAN MARTIN: Yes. Would you be amenable to indemnifying a private contractor? I have not heard where he would fit into your concept.

MR. MURRAY: I don't see why not; I don't see why they shouldn't be included. It is obviously a serious problem in the State; it is obviously pushing up costs on State contracts. So why shouldn't they be included?

SENATOR LESNIAK: Thank you very much.

MR. MURRAY: Thank you.

SENATOR LESNIAK: We may hear from the other Mayors very shortly, but for brief comments Jim Lanard from the New Jersey Environmental Lobby is going to give us a different perspective, I presume, or in two minutes solve all of our problems.

**JAMES LANARD:** Mr. Chairman, members of the Committee, thank you very much for the opportunity to discuss this matter with you. Let me start with two initial comments. The first is, we acknowledge there is an insurance crisis in New Jersey concerning environmental impairment insurance liability. We also want to condition our comments by making sure that you all understand that we don't pretend to be experts in this area.

What we have heard so far today is that municipalities have become the victims of high insurance rates. I want to talk about the other victims in this whole situation, that is the victims who have been exposed to toxic chemicals that are leaking from municipal landfills and Superfund sites. There has been almost no real consideration in any of the discussions so far, about how are we going to address the concerns of the victims who have been exposed to these chemicals.

Most of my comments will relate to municipal liability and how we propose to address that problem. Let me tell you what our suggestions are, if two very very strong conditions are included in the proposal. We would support limiting municipal liability for municipally run landfills. There are very strong conditions on that. I am hesitant to even mention this without going into the whole thing for fear it will be taken out of context, but I will hope it isn't.

You have just heard about legislation moving through the Legislature by Senator Lynch with S-2545 and by Assemblyman Foy with A-3073, which would indeed limit municipal liability and basically

completely shield them from any liability. We could not live with that, nor could the residents of those towns where landfills are leaking. The legislation that is proposed would result in the following scenario: If a municipal landfill leaked and a resident's well was polluted, and the resident could prove that pollution came from that landfill, the resident would not be able to sue the municipality for any type of recovery, whether it was just to repair the well, or drill another well, or for damages due to health problems.

The breadth of the legislation that has passed the Senate, and is close to coming up for a vote in the Assembly, has not been fully analyzed by the Legislature.

SENATOR LESNIAK: Unless they could prove negligence.

MR. LANARD: But it goes to the New Jersey Tort Claims Act, and it is not negligence, it is negligence of ministerial duties. So that, for instance, if the negligence was a discretionary act-- That is the Town Council gets together and says, "Do we want to hire 5 cops to make sure the toxic waste doesn't come into our solid waste facility, or do we want to hire 5 cops to walk the streets and make sure our citizens don't get mugged," and they make a good decision and make sure the citizens don't get mugged and the toxic waste comes in, that is not an actionable offense.

SENATOR LESNIAK: That is right, they are immune from that.

MR. LANARD: They are absolutely immune, and--

SENATOR LESNIAK: So it's not just changing the standard of liability from strict liability to negligence, it is also establishing immunity in certain aspects.

MR. LANARD: You know a ministerial act in a landfill situation would be if a guy left the landfill at night and forgot to turn the switch for the leachate pump to start pumping. That is a ministerial act. If they decided not to put a leachate pump in, that is a discretionary act. They had the discretion of whether they want that kind of pump operating. If they say no and the stuff starts leaking out, they are not liable at all. But, remember, we started out saying that we are going to propose a solution so that we can shield them from liability.

Those pieces of legislation are clearly not the answer. What I am going to give you at the end is a letter that we sent to Assemblyman Herman whose Committee was hearing those bills. It really addresses that issue in great detail and is in one of the packages that we are going to give you today, so we don't need to spend too much time on it.

Let me tell you what the conditions are for shielding municipalities from liability especially for solid waste. I think that--

SENATOR LESNIAK: Are we limiting this to solid waste?

MR. LANARD: Yes, I want to limit it to solid waste. I haven't thought through where it goes but I think you and your staff can clearly see how it could apply. I'm more comfortable talking about a municipal operation specifically because they're not doing it to make money and there is no profit, it is a public necessity. As we have heard today, we know that all landfills leak. Therefore, we know that some pollution is inevitable.

SENATOR LESNIAK: Jim, how many municipalities operate landfills in this State?

MR. LANARD: Municipalities or counties?

SENATOR LESNIAK: Okay, well how many?

MR. LANARD: Senator, I really ought to--

SENATOR LESNIAK: We're talking about municipalities now. How many municipalities--

MR. LANARD: I don't know.

SENATOR LESNIAK: Very few, though.

MR. LANARD: I want to add incinerators there and talk about it at the county level as well.

SENATOR LESNIAK: Okay. I'm just trying to put this into perspective. It occurs to me that this is going to have to wait until our next meeting on the 15th but we should ask the insurance industry what the relationship is between the environmental impairment liability insurance coverage when a municipality operates a landfill and when they do not. That is certainly a--

MR. LANARD: Be an interesting chart to put up.

SENATOR LESNIAK: (continuing) --nexus there that doesn't seem to have rhyme or reason. Willy-nilly was the word? (laughter) Okay.

MR. LANARD: Also, just so I am a little bit broader than I was and I don't mispeak, think about this whole scenario for the operation of incinerators, too. I am sure there is going to be insurance questions related to the insurability of garbage incinerators. We don't know what the risks are. We think we can guess, but--

SENATOR LESNIAK: Let me tell you right at the onset that I haven't thought about what bringing them into the Tort Claims Act did in terms of immunity from design type of standards which can be the most catastrophic decisions that are made.

MR. LANARD: I'm happy to report to you that when I spoke with Senator Lynch and Assemblywoman Ford, who are the sponsors, they said they wanted to see what the study commission came up with and that is in my testimony today. They do not intend to move until you report. At least that is my understanding.

It was also clear to me that they were not trying to pull a fast one on anyone. I think they were a little surprised when I had a chance to speak with them about it.

Here are the two things that the Environmental Lobby wants to do when we look at this issue. We want to prevent human exposure to toxic chemicals, and, in the event that the State or the government fails and there are exposures, we want to make sure there is an adequate compensation scheme for those innocent victims. That is our agenda. Now let me tell you how we propose to do that.

I am also limiting my comments to non-sudden pollutant releases. I would not propose that municipalities be shielded from negligent acts related to a sudden accident if they were operating some type of chemical plant or water treatment plant where a chlorine tank exploded. I have some different feelings about that which I haven't completely finalized out yet, so I will just give you one piece of the puzzle here.

If we were to limit liability as I said we might be willing to do, the biggest question that comes up is what incentive is created for the operators of those facilities to run them with state-of-the-art technology? What incentive do they have if they are judgment proof? If they don't have liability and can't be sued, we have to create a whole system of incentives and oversight programs to make sure that because we don't have the "Sword of Damocles" hanging over their heads with these lawsuits, they don't just relax and go to the ballpark when they should be operating a landfill or incinerator. There are basically 4 or 5 ways we propose to prevent this from happening. Here they are:

The citizens need the right to inspect. We propose enabling legislation that creates citizen task forces that have the right of entry into these solid waste facilities that are government owned or operated, so that the citizen task force can go in there and see what is going on.

The next step is we want the citizens to have the right to hire experts to go in, because none of us is really competent to examine a facility without the aid of an expert. We want those experts funded by the government. The community and the municipal residents should not be expected to hire their own experts, so there should be some enabling legislation to allow citizens to bring experts with them on these tours.

We need a better citizens "right to sue" provision. Right now we do have the Environmental Rights Act which allows, primarily, law suits not for damages for personal injuries, but for enforcement and compliance with the law. I'm glad to see legislation by Senator Russo to extend the recoveries that the attorneys and experts can have, moving through quickly. That is absolutely essential. We are talking about some very expensive lawsuits which citizens are involved in whose attorneys are going to need adequate compensation.

We need an enforcement program that involves the citizens, and my proposal would be some type of bounty system which encourages citizens to get involved and become, so to speak, pollution police, where they get a reward if they are the tipster that leads to some type

of prosecution or violation issued against the operator of the facility. We have that in the hazardous waste area -- in the Hazardous Waste Facility Siting Act -- and we have it with some criminal-like bounty provisions, and maybe now we should think about moving it to the civil aspect.

The last thing in this regard, as far as creating incentives to operate facilities in a good way, is that we develop a whole string of criminal penalties and enforcement that has teeth in it and is effective so that these folks know if they screw up, they are going to pay personal fines and penalties, or they are going to jail.

Being a typical environmental advocate, my interpretation to some of your reactions, Senator Lesniak, is that I am going too far. Let me tell you, if I am going too far--

SENATOR LESNIAK: Did I say that?

MR. LANARD: I just interpret your body language. Anyway--

SENATOR LESNIAK: I don't think too far--

MR. LANARD: Let me tell you why.

SENATOR LESNIAK: I don't think too far is the right word. I think different--

MR. LANARD: Well, then--

SENATOR LESNIAK: I may go too far--

MR. LANARD: I have been accused of that before, too.

SENATOR LESNIAK: I may go too far, but in a different way. Different--

MR. LANARD: Let me say that I think that--

SENATOR LESNIAK: (continues) --and maybe somewhat difficult to understand whether it is going to be effective or not, but certainly thought-provoking.

MR. LANARD: Okay. The concept is that the best incentive, right now, for compliance are these lawsuits. If we take them away we have to think of another system. I think taking away municipal liability is such a radical thing -- and I'm really surprised it is the Environmental Lobby talking about it here before you -- that we have to meet it with something as aggressive. You haven't heard anything yet, because now I am talking about what happens after this whole thing fails and victims have been exposed.

SENATOR LESNIAK: I think maybe the best word to describe my body language is skeptical at this point in time. It is new.

MR. LANARD: I know that you are open, and we can lobby you. I have a couple of two by fours that may--

SENATOR LESNIAK: You may need them.

MR. LANARD: Suppose it doesn't work out? Now we have citizens who have been exposed and need some type of compensation. The answer, in our view, is victim's compensation. In a sense what I am telling you now is the lobby would be willing to trade municipal liability for two things. Up-front citizen participation in the development, operation, maintenance, and closure of a facility. And citizen compensation if all of our efforts -- the Legislature, the Government, the local operator -- fail, we have compensation for those illnesses.

I'll just run through seven points of victim's compensation, which is written here in a little more detail. (referring to statement). I will tell you that this has been developed by two professors with whom I taught a class at Rutgers, and advanced students. First, it will capitalize the funds from Dan Dalton's favorite source, the tipping fee on solid waste disposal.

SENATOR DALTON: That used to be my favorite source. (laughter) There is a Republican in the front office so it is no longer my favorite. It's his favorite source now. (laughter)

MR. LANARD: Let me tell you also that, I think, this really saves the taxpayers a lot of money. Remember that any insurance policy they are paying for this extra impairment liability is being raised through property taxes. By wiping out the need for that type of insurance coverage, we are saving the municipalities money which saves the property tax from the need to keep increasing. Therefore, we are going to put it in that pocket while taking it out of the other. I don't know the numbers, and I won't give you numbers today, but my guess is it is probably close to a wash.

SENATOR DALTON: It is the same pocket, Jim. Landfill closure is the same pocket.

ASSEMBLYMAN SHINN: It is full circle.

MR. LANARD: It's tipping. Okay, so--

SENATOR DALTON: It's tipping, so it is a property tax.

SENATOR LESNIAK: If I am a resident of the City of Elizabeth and I pay an extra tipping fee to fund this victim's compensation, but if there is an injury to someone in Pompton Lakes from a private landfill as opposed to a municipal landfill, then I'm not covered.

MR. LANARD: That is right. They would still-- Because I am limiting my comments here to the government--

SENATOR LESNIAK: Pompton Lakes' taxpayers would be paying.

MR. LANARD: No, actually privately-- If you talk about Pompton Lakes as a municipal facility, and I would agree with you.

SENATOR LESNIAK: You are next, Pompton Lakes, that is why I did that.

MR. LANARD: We are not limiting liability to private--

SENATOR LESNIAK: The question is the tipping fee. Would that be across the board for every municipality?

MR. LANARD: Yes, because the fund is going to be a State fund.

SENATOR LESNIAK: But it would only pay for victims of municipal landfills as opposed to other landfills.

MR. LANARD: That is right. Privately owned landfill would not be subject to--

SENATOR LESNIAK: Even though their garbage is not going into those municipal landfills.

MR. LANARD: Because, again, we distinguished between the governments that are doing it on a not-for-profit basis and businesses that have decided to take the risk in hopes of earning a profit.

SENATOR LESNIAK: We may have to spread that out.

MR. LANARD: Second, the eligibility for relief would have to depend on the nature of the illness. We have a definition of illness which we think works for non-sudden pollutant releases. Claims have to be filed in a timely manner. We are talking about two years from time they knew or should have known of the illness. I was speaking even today with people who think that needs to be broadened a little bit. The concept is there, and we have to figure out when can you sue, and

when the statute of limitations runs out. The awards should fully compensate a victim. We want to make sure there are payments for loss of income, loss of profit, full medical expenses, relocation expenses, if necessary, emergency relief, and a couple other types of payments.

But here is the kicker, and this is a very major change in the way that courts and lawyers do business. The victim's burden of proof would be less than in traditional court proceedings. We all know that trying to prove a cause and effect relationship with toxic substances, other than what I call "fingerprint chemicals," where they do one type of damage, such as asbestos and mesothelioma and some other chemicals that just go to the liver or the kidney or whatever. There are very few of those. We don't have the technology yet to be able to fingerprint chemicals. Victims are getting sick, having types of illnesses that we think are related, and intuitively know are related, but in a court of law can't prove that they are related. So we are going to relax the burden of proof. I'll read you the three points:

The claimant may recover, if there is evidence that:

1) The victims suffers from a qualified disease as we've defined it.

2) There is reasonable likelihood that the facility caused or was a significant factor in causing the disease. That is pretty radical stuff. Reasonable likelihood that it caused or may have caused.

3) The victim was in fact exposed to non-sudden pollutant releases from the facility.

So that tightens it up a little, but there is still a lot of flexibility, and there is more than when you try to defend a Tort case. The victim's compensation fund would be managed by an autonomous board appointed by the Governor with the advice and consent of the Senate.

I'm just about done. I found one of the most interesting dialogues today led by your question, Senator Lesniak, to Mr. Rosenberg. You asked if companies were being more careful to avoid accidents? His answer was, "It is now being mandated by the insurance companies. There must be an audit, and this was not done before. Risk

assessments were unknown. The insurers did not know in the past what they were insuring." And one of the previous speakers indicated sort of what was happening was a money-grab. It was a good climate to get money fast, invest it, and make money.

I have a question, and I wonder if it is just coincidental, that rates are going up at the same time that for the first time insurance companies are doing real environmental audits? Are insurance companies finding out that there really is risk out there? We haven't learned that from this morning because we are seeing rates go up where there are no landfills in the municipality, but that is a question that I hope receives further study. Is there a relationship there?

The question of the caps seems to be popular with a lot of the speakers today. If you were to put a legislative cap on municipal insurance, you still have your problem, Senator, of them having to defend the cases anyway, which is really where the insurance companies are very afraid of costs.

We have been working on this issue. We met with the Governor's Council over a meeting with the Insurance Commissioner next week to keep developing this thing. This is very important to us. It is not a right-to-know type of campaign where lots of people get trying to achieve some of our other agendas, but really to make sure the public is fully represented and protected.

That concludes my testimony. I'm going to submit for the record the New Jersey Conservation Foundation statement. Dave Moore is on your list of witnesses, but he had to leave. I will tell you one thing in his testimony that is very interesting. What they do at the Conservation Foundation is buy property and eventually deed or sell it to the State and preserve it for open space forever. Dave Moore's testimony says that as of January 1986, they will be forced to stop buying all property because if anything they buy has toxic contaminants on it, they could be subjected to bank account breaking liability, which would put them out of business and probably also subject their board of directors to personal liability. So they are, in a sense, going to go out of business unless you guys figure out a solution that addresses that concern. He postulates at the end that other commercial

landowners are going to find that same problem. You have people in syndicates that may want to buy property in New Jersey for holdings and may not be able to because of the insurance question.

SENATOR LESNIAK: I have a client who was negotiating to buy a piece of property that a landfill was formally on, and you just convinced me to tell him to forget about it.

MR. LANARD: Thank you very much for your attention.

ASSEMBLYMAN SHINN: My speaker doesn't work, but I don't think that makes any difference. I am a guy who has a problem with a waste-end tax, and I think I am probably in conflict with DEP and everyone else, but--

MR. LANARD: We'll join you on that one.

SENATOR LESNIAK: He has changed his position from four years ago, he is on your side this time out.

ASSEMBLYMAN SHINN: Oh, okay.

SENATOR LESNIAK: The DEP is against the waste-end tax as well.

ASSEMBLYMAN SHINN: Well they are proposing it and--

MR. LANARD: Senator Gormley just proposed it again.

ASSEMBLYMAN SHINN: Yes. I'll go to tipping fees because they are a waste-end tax by another color. The problem that I have is the higher you drive disposal costs at landfills, the more incentive you provide to dispose of waste at other than landfills, which my rural county has had tremendous experience with. I see it as more of a problem than hazardous waste areas because we have facilities in parts of the State -- and I'm speaking particularly of DuPont -- which have very comprehensive hazardous waste disposal facility. If we plug the waste-end tax and hazardous waste, we are going to drive people to try to get a handle on their own waste with manifest systems and so on and drive people out of State with hazardous wastes. Then you have problems with your whole manifest concept. I see tipping fees as a way to distribute cost and generate revenue, but I also see a lot of problems on the other side of that coin. If your disposal costs, which by the whole virtue of where we are trying to go in solid waste -- you know, going out of sight -- at the same time we are going to encourage illegal dumping.

MR. LANARD: I agree with you on the hazardous waste 100%. If it is a trial balloon, and it is slow and doesn't hurt too much it would be okay. But I know you are struggling with it and I know that you personally have a great commitment to mandatory recycling -- and you have gone to forums all across the State on that because I've seen you at a couple -- so on solid waste I would suggest we really make sure that we have mandatory recycling. I would go the next step by mandating that all household toxic waste be separated before collection and would have legislation that mandates that. The problem with landfills is that the household toxics and illegal entries into the landfills leaching out. I don't really worry too much about my newspapers and food waste going to the landfill. I don't think that is going to create too much toxic problem. I'm worried about the hair sprays, and the paint thinner and turpentine that we also throw away. If you take that out of the landfill, -- and now with waste treatment I don't know how you would enforce it -- and you have mandatory recycling for the glass and whatever, you are lowering the volume, and I don't think you will see a real perceptible increase in cost, even though we may have this tipping fee tax.

ASSEMBLYMAN SHINN: The other issue you brought up which I think was raised here today and is something we aren't recognizing is non-availability of environmental impairment insurance for towns that do not have landfills. I think a lot of that goes to buried fuel tanks and fuel leakage, because fuel spills are a very large item which have popped up recently with various ground water problems. They are a big company concern when they are writing municipal insurance because of buried unleaded, leaded, diesel fuel, etc. tanks that can pose a very large cost of cleanup.

SENATOR LESNIAK: That is an excellent point. To a great extent that really answers one of the questions I had.

SENATOR DALTON: How about if you have a municipality that has no landfill and has never experienced a fuel tank leak and can't get general liability?

SENATOR LESNIAK: That's another good point. (laughter)

SENATOR DALTON: I think the Assemblyman--

ASSEMBLYMAN SHINN: Some of the things they are starting to look at is if you have fuel tanks, when were they put in, what material are they? If all those answers are yes, they are 25 years old and they are steel, and are they tested annually and the potential for--

SENATOR LESNIAK: That is the single greatest source of underground water pollution.

SENATOR DALTON: Can I pick up on one of your questions? Once you segregate out the household toxins, what do you do with them?

MR. LANARD: Well, by the time that law is fully implemented I would hope we would have at least one, maybe two new waste facilities in New Jersey.

SENATOR LESNIAK: Perth Amboy. Send it to Perth Amboy.

SENATOR DALTON: No, I have constituents calling me who talk about the fact that they have an insecticide that kills termites. What do they do with it? Well, we called the County Department of Health and they don't know what to do with it. They told me to tell the constituent to sell it to an exterminator.

MR. LANARD: You know there have been counties around the State that have these voluntary drop off days for just that type of situation. You need a tremendous amount of education and publicity to make them worthwhile.

SENATOR DALTON: You also need a place to put it.

MR. LANARD: Yeah.

SENATOR LESNIAK: I posed that question to the Siting Commission, Senator, and they have a small source committee that is supposed to come up with some recommendations. I don't think Rick Gimello is here anymore with some recommendations regarding that type of disposal. I haven't seen anything yet.

ASSEMBLYMAN SHINN: Mr. Chairman to pick up on Dan's comment, the DEP has recognized this problem and has been encouraging these hazardous waste disposal days. We have one in Burlington County on October 26 where, just for that specific purpose, by appointment we were open from 9 to 2 o'clock, and we encouraged farmers and residents to bring turpentine and paint thinners, and whatever they have in the toxic category. We have the appropriate receivers there to take those

carriers to proper disposal. We are going to try to do that on an annual basis. I think that is at least a step in the right direction. Somewhere down the line I see a potential for a collection.

SENATOR LESNIAK: By the way, what are you going to do with it once you get it?

ASSEMBLYMAN SHINN: We have 50/50 cost sharing grant from DEP, and we have a disposal that will segregate those various chemicals and put them through a proper disposal process at DuPont or wherever for proper disposal.

MR. LANARD: You know this is interesting because your insurance liability is-- As soon as you start doing that you become involved in hazardous waste disposal. Where it goes with the Federal Superfund stuff--

ASSEMBLYMAN SHINN: You can imagine my discomfort when we found that the State only had \$2 1/2 million worth of liability. I was counting on them.

MR. LANARD: We'll sell the new DEP building.

SENATOR DALTON: Jim, I don't think conceptually your recommendations relative to citizen's participation are really that radical. In fact, some of that should be encouraged to dispose of the distrust that surrounds these facilities, if nothing else. One of the things that bothers me about one specific recommendation is my concern that in many cases a whole community of environmental consultants has now grown up almost overnight with regard to a lot of these facilities. And in listening to some of these people back in my district, I find their background and credibility to some extent, dubious. But it is a great way to make a buck all of a sudden. I know you are a lawyer not involved in private practice, but if my son was going to go into law school and I was a father concerned about how much money he was going to make, I would steer him towards environmental law. This whole area has become a great area for rip-off artists, for people whose credibility is dubious at best, and who are out to make a quick buck. Some of the things that you have heard this morning about plaintiffs prolonging a court case are based upon lawyers and consultants getting rich. That recommendation, to me-- I would

have no problem with allowing the municipalities to establish a group of consultants that a citizens group can choose from.

MR. LANARD: Oh, I think that is great.

SENATOR DALTON: Yes, but I think this willy-nilly, get my consultant from Osh Kosh Tech who graduated with a degree in history but all of a sudden is an environmental consultant because he has put that under his name.

MR. LANARD: I agree. We have seen some of these people going to Villanova University, for instance, and getting consultants. But the point is the framework for picking the consultants is an easily negotiated one, and could be legislated. I hope that you and the Commission could come with some recommendations and maybe we can all move some legislation quickly on that because the public relations aspect is as important as the environmental protection aspect. Bringing citizens in there and seeing how these things operate is really good.

SENATOR LESNIAK: I would concur with what Dan said. I see the basis of doing something here, but we have-- It appears to me that for the insurance industry, doing a risk assessment with the specter of making or losing money, catastrophic loss or making a profit for your shareholders, does a better job of risk assessment than someone who is paid and has no real responsibility hinging over them in terms of what they come up with. That is a more difficult thing to regulate than having the marketplace regulate it.

MR. LANARD: The issue was -- as I started out -- that we have to make sure the victims have rights if they are exposed and get sick. There is such a movement now to shield municipalities.

SENATOR LESNIAK: That's after the fact though, Jim.

MR. LANARD: Yes, but if we are going to shield municipalities, then we have to bring the citizens into the up front part of it.

SENATOR LESNIAK: I hear you if loud and clear.

MR. LANARD: Okay, thanks.

ASSEMBLYMAN SHINN: I would just like to make one comment because a lot of what you are saying-- Some of which is embodied in

the New Jersey Solid Waste Management Act in the SWAC provision where you have a Solid Waste Advisory Committee to the Board of Freeholders as the authority. We have gone one step further with the Solid Waste Facilities Advisory Committee which is a small group composed of a representative from each municipality involved in our case, and an environmental member and two from the County. It goes in the same direction and probably goes one step further than the act does in that once you get the broad representative body down to an operational review group -- once you get out of the Supreme Court, that is -- to try to make logical decisions and input on the operation of the facility to the Freeholders. I think that is probably where you are going, and I think some of that direction is already in the act, and could probably be expanded.

MR. LANARD: I don't know how it works, but I'm going to propose to take the next step, which intuitively works best for me, and that is that I don't want the municipalities selecting the members of the task force. I don't know how it works but somehow we have to create a mechanism where the citizens pick them. For instance, when we go to the Lipari Landfill, the citizens committee that has been negotiating with EPA wasn't appointed by the town, but got elected by all coming to the Lipari Committee as volunteers. And that is what we see in most of the dump site areas. Those are the activists. Those are the people who are your most concerned anyway, and they're the people we want to start bringing in on the inside, to help participate. The appointees generally are not the people making the most trouble for government, they are not the ones speaking the loudest; they're generally in allegiance. If Pitman had appointed a committee -- the Lipari Citizens Advisory Committee that they put together still exists -- there would be this distrust because it was government appointed rather than citizen elected. I don't know exactly how it works, but in practice we see it working at Superfund sites all around New Jersey. Those are the best people we work with, and somehow we have to get them more involved in this process.

SENATOR LESNIAK: Thank you.

MR. LANARD: Thank you.

SENATOR LESNIAK: Mayor Donald Krom, -- oh -- Administrator of Pompton Lakes.

DONALD KROM: Yes. I have someone with me, Al Josephson. I'm Donald Krom, the Administrator of Pompton Lakes, the prettiest section of Passaic County. We have all beautiful tree lined streets, the Wanaque River, the Pequannock River, and the Ramapo River that are either within our town or border it; it is aesthetically beautiful but gives us all kinds of problems with litigation.

SENATOR LESNIAK: Senator Graves hasn't solved all of your problems yet?

MR. KROM: A few of them, the Senator has been good to us. However, it creates the problem. I have listened to many things here today other than insurance but it seems that they all lead to insurance problems. Solid waste, is the problem that we have in the form of a major suit because with the proper rainfall these three beautiful rivers become raging giants and we are being sued because of this. Everyone from the Police Chief, myself, the Mayor, the Council Members, our volunteer firemen, and our volunteer ambulance corps are all listed in these suits.

SENATOR LESNIAK: It is for flooding?

MR. KROM: Yes, and the contention there is that all these people in elected positions and otherwise had the ability to do something to stop it and they haven't. Also included in there is the North Jersey District Water Supply, the Passaic County Water Supply, the Hackensack Water Company, and all the municipalities involved in flooding within the Passaic River Basin. Also in the solid waste area, in many towns the historians will tell you they all had municipal solid waste disposal areas which they brought up to grade and instead of building mountains they built parks and developments out of them. And if you speak to some of the older citizens of the town they'll tell you here they were.

The way this is going now with organized movements to start litigation-- Some organized group will get together and sue just about every municipality in the State by searching for some minor municipal landfill that has been there for years. We're all in the same boat. I

felt coming down here today I would find a crystal ball to look into and you could come up with a solution for the entire problem so I could go back and tell my town's governing body and the electorate that the problems are all solved in Trenton, so let's send them a salute and get on with our business of the day.

SENATOR LESNIAK: This is a slow day, you'll have to understand. (laughter)

MR. KROM: Enough of that. However, our main concern is cost. We had a budget for insurance of some \$130,000 and we have an increase of some \$70,000 which brings us up to \$200,000 for the year. We're one of the fortunate ones since we have the coverage, and we have had it through the years without change except for increases in cost and some limits in coverage. Surveys were taken and they come in and check the age and composition of our storage tanks and those things. It is a little different coverage from what we had before, but we have complete coverage and we have good coverage under the present day's conditions. However, as far as the State is concerned, I think if they should go into covering the broad umbrella ranges whereby there are limitations set on suits that could be filed against municipalities, or eliminated completely. In my end of the business, my main concern is dollars and cents because if you budget in the beginning of the year and in July they come along and say the price just went up, well, a new bill for \$70,000 is hard to cover in a municipality of less than 12,000 people, and you start worrying about it.

SENATOR LESNIAK: Are you going to come to us and complain if the price goes down?

MR. KROM: I'm not going to take a lot of your time, I just wanted to be here and hear what the others have said. I feel from what I have heard that we're probably better off than most.

SENATOR LESNIAK: It appears that you may be. Assemblyman?

ASSEMBLYMAN MARTIN: I'm familiar with your rivers. Hopefully, with some of the flooding bills we may resolve some of your problems, so it doesn't become an insurance and liability problem for you.

SENATOR LESNIAK: Well it already has. We're into that.

ASSEMBLYMAN MARTIN: I understand.

MR. KROM: And I have a personal suit in that I have personal responsibilities because I'm in a position that they say is a legal position, and I should know better. I know better now.

SENATOR LESNIAK: We're going to take a look, Denise, (speaking to aid) and you are going to have to get some information from the insurance industry regarding municipal officials and their individual liabilities and exposures. It seems to me that you have a multiplicity-- I know, by the way, from personal experience. I am an attorney with a law firm and we are involved in some suits which have 30, 40, 50 defendants who are public officials. These are civil rights suits, so according to a Federal Court's decision they each have to have their own attorney, and there is duplication and expenses that don't have to be incurred. We're stuck with that situation in terms of Federal Civil Rights suits, but we are not to be stuck with that situation in terms of municipalities. That is one of the things we'll be looking at based on the what you have mentioned today.

MR. KROM: Well, there are instances where individuals in a personal suit have a real concern.

SENATOR LESNIAK: Sure.

MR. KROM: Because if the court rules against you, why, there are areas where you can't even buy insurance coverage.

SENATOR LESNIAK: Sure. Thank you very much.

AL JOSEPHSON: May I--

SENATOR LESNIAK: I'm sorry.

MR. KROM: Mr. Josephson.

MR. JOSEPHSON: I just wanted to add to what Donald Krom has said.

SENATOR LESNIAK: I'm sorry, what position do you hold? Mayor, or--

MR. KROM: He's our insurance consultant.

SENATOR LESNIAK: Insurance consultant.

MR. JOSEPHSON: I write the Borough of Pompton Lakes and several municipal risks out of our office. One of the things that wasn't mentioned here today that perhaps at this time might be well to bring to the attention of your Committee, is the illumination and the

difficulty in placing not only the pollution and environmental hazard on renewal policies, but also the police professional aspect of a general liability policy. We had continued difficulty over the years in writing law enforcement liability as part of the general liability. It is a specialty coverage and we are finding on the pollution and environmental hazard insurance, where there has been a total market withdrawal, it is a very unusual happening in our office to have anyone talk to us in positive terms about police professional liability insurance, which is an important part of a comprehensive general liability policy.

As I have indicated, in our office we have had a total market withdrawal for municipal insurance. I'm talking about new business now, I'm not talking about risks that over the years we have carried and the companies have inspected and looked at the tanks in the ground and how the town is managed and the different things that were talked about today. If anyone in this room came to me today as a Mayor or Councilman, and said, "We have a very very fine town, it is well managed, our loss ratios are excellent, etc. and we have made money over the years. Is there any market that you have in your office for municipal insurance?" my answer is an unqualified "No," and I don't know of any place they could go. Donald mentioned something about Pompton Lakes, and I would like to take 30 seconds or a minute to tell you about it. We had a flood last year. How do you stop a flood? We're involved in a suit now and are defending a suit now, and the courts--

SENATOR LESNIAK: Do you want an answer?

MR. JOSEPHSON: I would love it.

SENATOR LESNIAK: Well I think it is proper planning that may or may not -- and I don't know the Pompton situation at all -- but there is an answer to that question. That is not a rhetorical question.

MR. JOSEPHSON: I don't know--

SENATOR LESNIAK: I don't want to get involved in that controversy but I don't want to leave that unanswered. There may or may not have been a legitimate answer to how you stop or prevent it.

MR. JOSEPHSON: The results of that suit against nine to eleven municipalities in our area probably will give us our answer. We have now anywhere from 600 to 700 plaintiffs involved in a class action suit, and the minimum law suit on any one of those plaintiffs is listed at \$1.5 million. Now if you talk about \$10 million or \$12 million worth of insurance coverage, we are talking a \$600 million plus suit involved in this. Of course the cost to defend that is of great concern to everybody involved. The Township of Wayne is involved, Pequannock, Pompton Lakes, Fairfield, and six or seven others. But my point is, and it was mentioned here before, something about indemnification of municipalities.

I wonder if we lost sight of Title 59, and I am wondering if one of the recommendations that could come out of this Committee, or perhaps be considered by this Committee, is an expansion of Title 59. I don't know, but Title 59 has something to do with municipal immunity. I'm not an attorney, but I know as far as the defense of anybody including a municipality today is concerned, it doesn't seem to be something that holds much water in a court of law anymore.

Someone mentioned this morning something about the national environmental and pollution coverage possibility similar to that of the National Flood Association. I think that is a very good suggestion. The National Flood Insurance Association has premiums paid to them, and the losses people experience in the flood areas are paid out of a National Flood Insurance Program.

SENATOR LESNIAK: It is also subsidized by the taxpayers.

MR. JOSEPHSON: Yes. It is subsidized by the Federal government.

SENATOR LESNIAK: Well the taxpayers.

MR. JOSEPHSON: Yeah. Nevertheless, it is a remedy, a thought, a positive thing perhaps, and maybe that might suggest some relief for national environmental and pollution coverage. I think, really, you need some legislative reform consideration with reference to what insurance companies can and can't do. Of course, Governor Kean's moratorium spoke to that, and one of the interesting parts of that is--

SENATOR LESNIAK: Excuse me, how is that?

MR. JOSEPHSON: Last week.

SENATOR LESNIAK: Yeah, how is that?

MR. JOSEPHSON: On his insurance crisis situation with reference to what insurance companies can and can't do on renewals in the State of New Jersey, and midterm--

SENATOR LESNIAK: Until November 12.

MR. JOSEPHSON: Right. Fine, not a cure-all, but perhaps a step in the right direction. But I do think that legislative reform is something that is long overdue. His moratorium was mentioned this morning, but only one person mentioned the fact that while insurance companies can't cancel, and while they cannot do anything about midterm, they don't say anything about what insurance companies can do on renewal. They have to offer the renewal. But when you go to a Mayor or a council or the taxpayers in a town, and you are talking about a 300% increase in offering a renewal, there is some heavy thinking involved. I wonder what you are really offering.

SENATOR LESNIAK: Any questions?

MR. JOSEPHSON: So, I leave that with you.

SENATOR LESNIAK: Thank you very much.

MR. JOSEPHSON: Thank you for the opportunity.

SENATOR LESNIAK: I appreciate that very much. Mayor Ball, from Califon. Where is Califon?

**JAMES A. BALL:** Well, that has been a question that has been discussed with the governor a couple of times. We are up in Hunterdon County, at the northern end of Hunterdon County. My reason for testifying here is so I will be able to put in a voucher. (laughter)

I have actually rewritten my notes; I had torn them up. I left the room, and I'll see what I have here. I had a few points I would like to mention concerning the insurance, actually, which is the reason we are here, although I think we have lost track of it somewhere along the line. I feel that if there is any insurance rate increase at all, that the insurance premiums paid by the boroughs or the towns should be taken out of the cap, which is the budget line, because you don't know what the final line is with any increase, whether we have to

go with it or not. All insurance premiums that have to be paid, actually, should be taken out of the cap part of the budget, because in a small municipality, which I represent, and I think there are enough of them throughout the State, a large increase--

SENATOR LESNIAK: I appreciate your comments, Mayor, but we do have a Cap Reform Commission. I don't think--

MR. BALL: Oh, I see. I just wanted--

SENATOR LESNIAK: I don't think we are going to be dealing with that on this Commission. But I understand that point.

MR. BALL: All right, thank you.

That was one of the things that I had in mind, but I think as you all know, and it has been well testified to, that it is a burden on the entire State of New Jersey, also a burden-- I have been in contact with other states, and I don't know whether our Commission has been cross-referencing what the other states are doing, but I think it should.

The main thing I would like to say in parting is that when you do come up and have more meetings, a lot of the solutions that are rendered by the State tend to be very outstanding, but they cover a great deal of territory, and seem to forget the little man down at the bottom, that small little borough. I think the small towns and boroughs should be considered at the hearings and also be included, as they were today. The rulings that sometimes come up-- They are very fine, they are easy to put into effect in Camden, Newark, New Brunswick-- Mayor Holland has an easy job in Trenton. When you get down to the small towns, it is very hard to follow those regulations, and I think we would like to be heard.

SENATOR LESNIAK: Mayor, hopefully what we come up with will be applicable to the biggest municipality and the smallest municipality.

MR. BALL: Well, that is very good.

There was one thing I wanted to mention to the environmental-- lobbyist, I think he was. He mentioned having these people who are active in the different towns elected to the board. I don't agree with that recommendation, whether the Commission likes to

hear it or not, because sometimes those active are too one-sided. I would rather have somebody that can go either one way or the other, and is not led right down the primrose path by something they are entirely sold on. That is all I can say, and it has been a lovely day.

SENATOR LESNIAK: Okay. Thank you Mayor, I appreciate your coming down.

We have two other municipal officials, Councilman Alan Schneerman from Oceanport-- Is he still here? Schneider, I am sorry. Have to get those vouchers.

**H. ALAN SCHNEIDER:** I will take offense at that. I would not think of submitting a voucher for my day here.

I am slightly upset that I had to spend the whole day here.

SENATOR LESNIAK: Excuse me?

MR. SCHNEIDER: I said I am personally upset--

SENATOR LESNIAK: What about the person that testified earlier this morning, if that person were here this afternoon, would that person be upset?

MR. SCHNEIDER: Well, I think some of those people are probably paid lobbyists.

SENATOR LESNIAK: I don't know, Mayor, that was not my decision. Some of my decisions today were based on what the Commission felt were the most important aspects that we were dealing with at that time. If you do not want to testify, that is your right.

MR. SCHNEIDER: No, I have waited all day--

SENATOR LESNIAK: I don't make decisions based on who is paid and who is not paid, sir. My decision is based on the need to know. And if you are a public servant, you should be satisfied with being here all day.

MR. SCHNEIDER: I am here. My suggestion might be that some sort of a time frame could be created so that you would know you were going to speak between 2:00 and 4:00, or maybe--

SENATOR LESNIAK: Absolutely. I appreciate that, but I have been in this business for a few years--

MR. SCHNEIDER: You have been here much longer than I have, and I appreciate that--

SENATOR LESNIAK: --and I can tell you there is no way of knowing ahead of time how long testimony is going to take, and in which direction it is going to go, especially when you are dealing with as complex and important a problem as we are dealing with today. So I am listening, I am anxious to hear what you are going to say.

MR. SCHNEIDER: You are probably not going to hear a lot that is new. I am a Councilman in Oceanport, in Monmouth County on the Jersey shore. I guess you have heard many personal or town war stories as to who has coverage and who does not have coverage. I think on the sheet that I handed you, you could see what we had last year and what our proposals were this year, and what our choices were. We were faced with 130% increase, in one aspect; and if we were to take other choices, including a 1,350% increase in the umbrella coverage, go from \$2,000 to \$29,000 with the potential of an exposure of \$70,000. On a self-insured, reinsured policy, our premium increase could have been 400%. That is going from \$400 to almost \$160,000.

Substantial-- Now, we have coverage. Ewing Township, whom you heard from earlier, did not have coverage. We at least have coverage, and we feel fortunate that we do. Ewing probably has a couple more zeroes after the numbers, and our numbers are much smaller. We have a much smaller town, but the impact on our town is just as great for the number of residents that we have.

Obviously, the problem is to get adequate coverage at a reasonable cost. I think part of the solution for us all is going to be higher taxes. That is what it is going to have to be. In connection with that, I know-- I heard the comment, but I am going to say it anyway. The premiums for insurance coverage must be removed from the cap. I realize I am in the wrong forum, but that is a necessity. Otherwise, every one of the 500-odd towns is going to have to go to referendum next spring.

I don't know if you have any questions about the sheet that I handed you. Our coverage includes a comprehensive-- The comprehensive really does not include any police vehicles, because there is a \$25,000 deductible. The only vehicles that would be covered are where it costs us more than \$25,000. Our policy now is for \$975,000, and a \$25,000

deductible. We did not opt to take the umbrella. We did not take that umbrella, going from \$2,000 to \$29,000.

SENATOR LESNIAK: The only thing I would comment upon -- There are increases here that are cyclical in nature. That is--

MR. SCHNEIDER: Absolutely.

SENATOR LESNIAK: That is something that-- That is the way business goes, and life goes on. This Commission is trying to address some of the institutional problems that we have, specifically, with regard to the environmental insurance and how the environmental insurance problem impacts upon your general liability, because they go hand in glove in many respects. But that is what we are going to be looking at, and that is what our questions are geared to today.

MR. SCHNEIDER: In regard to the gentlemen that I heard earlier, about putting the caps on general liability, on the umbrella liability, having State and Federal government get in-- I think your comment regarding the cyclical nature does away with that. It blows it right out of the game, right out of the park. You don't need such coverage if it is a cyclical affair. It won't be necessary.

ASSEMBLYMAN SHINN: Do you have environmental liability impairment?

MR. SCHNEIDER: No. Totally excluded.

ASSEMBLYMAN SHINN: Do you have a closed landfill, or--

MR. SCHNEIDER: In Oceanport, no.

ASSEMBLYMAN SHINN: No closed landfill.

ASSEMBLYMAN MARTIN: Are you involved with any of the landfills that Senator Gagliano referred to, Lone Pine--

MR. SCHNEIDER: They are not in Oceanport, no.

ASSEMBLYMAN MARTIN: But you were not involved in any suits in any capacity?

MR. SCHNEIDER: No. We have never had any environmental lawsuit.

ASSEMBLYMAN SHINN: Did your carrier give you any specific reason why they were not offering environmental impairment insurance to your specific municipality?

MR. SCHNEIDER: It was just something that they were not going to do. They just were not going to offer it; and again, as I am sure with many towns, we were told we were going to be non-renewed, and they scrambled and scrambled to find us coverage. It was a midnight decision on the night before the policies were to expire, that they came in with a binder that was going to cover us, as long as we signed on the dotted line and paid them.

SENATOR LESNIAK: As long as you had the check.

MR. SCHNEIDER: That's right.

ASSEMBLYMAN MARTIN: When was the last time you had the environmental liability insurance?

MR. SCHNEIDER: I am new as a Councilman, sir; I do not know.

ASSEMBLYMAN MARTIN: You don't know whether it was covered last year, or when prior to that, was the last year they had environmental liability insurance, as opposed to just general liability?

MR. SCHNEIDER: I have to admit I do not know.

SENATOR LESNIAK: Thank you, Councilman.

MR. SCHNEIDER: I want to thank you for letting me appear, and I hope my earlier comments were not out of context, but--

SENATOR LESNIAK: That's okay.

MR. SCHNEIDER: --it's been a long day.

SENATOR LESNIAK: Considering the time of day, that is understandable.

Now, let's see. This guy is really going to be mad, now. The Borough of-- Fieldsboro?

MR. DRESSEL: (Speaking from audience) Mr. Chairman? I think all the municipal representatives did leave, and on behalf of them, on behalf of the League, I would like to thank you for listening to our municipal representatives.

I would like to request, Mr. Chairman, that at your next hearing, whenever that is, I believe the 15th--

SENATOR LESNIAK: It's October 15th.

MR. DRESSEL: If it is appropriate that ample time be set forth to allow some of the municipal representatives who were here, but did not stay, to present their comments.

SENATOR LESNIAK: Let me say this. We are going to hear, at that meeting, from the Department of Insurance and from the insurance industry. I would think that it would behoove many of your members to listen to that testimony, quite frankly. I hesitate to-- I think it would be more beneficial for them to say something after they have heard that testimony. So maybe what we should do is to think about a third hearing, rather than combine those two, because that is going to-- If you think this day has been busy and complex, that day is going to be busy as well, so we will have to look at another forum.

MR. DRESSEL: We would urge you to do that.

SENATOR LESNIAK: Maybe even by the time your League has the convention, we will have a package ready to present, and maybe that would be a good way to present it as well.

MR. DRESSEL: If you want to do that, we would be glad to work through you or through your staff to set something up.

SENATOR LESNIAK: They may be a good idea. Maybe we should work on that.

MR. DRESSEL: I have some formal testimony here from the City of Vineland, and the Boroughs of Princeton and Park Ridge I would like to submit a part of the record.

SENATOR LESNIAK: Please do.

We have now those paid guys we heard about, the American Society of Civil Engineers.

Thank you for sticking around. Bill Fleming and--

JOHN HENNINGSON: Bill Fleming is not here today.

SENATOR LESNIAK: Okay. You are John Henningson, then.

MR. HENNINGSON: And I would like to stress that I am not paid.

SENATOR LESNIAK: Not today, anyway.

MR. HENNINGSON: I am here on behalf of the Association, but I am not being paid to be here, nor was Mr. Fleming, who was here all morning.

SENATOR LESNIAK: Nor, needless to say, are any of us here.

MR. HENNINGSON: I am John Henningson. I am a licensed professional engineer in the State of New Jersey. I am here to speak today on behalf of the Consulting Engineers Council of New Jersey.

SENATOR LESNIAK: John, by the way, I am glad that you stayed around so that we can hear your testimony, because this is a multi-complex problem. I know that some of the legislators here -- and not the Assemblymen over here -- think that in certain areas, this is a simple matter. But we have complex problems involving municipalities, the cleanup of dumps-- There are other aspects of the problem that we have not even heard of, and this is going to be one of them, I think.

MR. HENNINGSON: That is precisely why I stayed, because you had not heard from this sector at all.

The CEC of New Jersey is a professional association that represents the firms and individuals who practice engineering in private practice in the State of New Jersey. The CEC is associated with the ACEC, the American Consulting Engineers Council, which has national representation and headquarters in Washington. And I testified last fall, and again this spring, before Senate and the Congress in Washington on the Superfund reauthorization.

I am also Vice-President of Malcolm Pirnie, Inc., of Paramus, New Jersey. That firm is not a quick-buck-expert firm; we have been practicing engineering nationwide for the last 75 years. In fact, 75% of our clients are repeat business. We have had an office in New Jersey -- Paramus, New Jersey -- since the 1960s, so we are not someone who came in to take advantage of some money that was lying around to be picked up.

The staff of our firm is multi-disciplinary, including engineers, scientists, architects and planners. I am going to use Malcolm Pirnie as an example of a firm that provides a service to the State of New Jersey and the public in many ways. Malcolm Pirnie specializes only in solving environmental problems. In the early years, meaning 75 years ago, we dealt on horseback with problems like typhoid epidemics and things like that in water supply. Sometimes the engineering solution was to burn down a structure. Later, the business became involved in treating wastewater before that waste reached water supplies. More recently, our efforts have focused on solving problems associated with solid waste and hazardous waste, which now represent approximately 15-20% of our gross revenues, but certainly not the most

significant part of our revenue. That is of concern to us because the current strict joint and several liability problems threaten our whole business, although the hazardous waste portion is maybe 15-20% of our business.

The professional engineer really forms a critical bridge between a public or private sector client who needs a problem solved, and the contractor who actually builds or implements that solution. In many cases, the laws actually mandate that the design, or more specifically, the plans and specifications for a certain activity be prepared by a licensed, professional engineer. Examples are the Federal Clean Water Act, the Resource Conservation Recovery Act, and the Environmental Compensation Act here in New Jersey.

The intent is to assure that the public is protected from catastrophic failures which would occur and cause damage to property, or injuries, or environmental impacts. In addition, the PE usually acts as the client's agent in monitoring construction to assure that the project is completed as planned.

Senator Dalton mentioned the concern about quick-buck consultants. Unfortunately, it is true that currently, engineers are suffering an image problem. The high, Federally funded work levels of the 1970s did spawn a great increase in the number of firms practicing in various areas. The slowdown in the 1980s has created a very competitive climate in the engineering industry. Many clients are now using this situation to force price competition between professional engineers, or among professional engineers on projects, rather than make a selection based on experience, expertise, or reputation. Clearly, this plays into the hands of the quick-buck expert. Can you imagine shopping around for a lawyer to defend you against vehicular homicide charges, or shopping around for someone to operate on your son for open-heart surgery? That is what is happening with professional engineering today. I can not see where it makes any more sense to shop for someone to design a building or a bridge or a pollution control facility that would affect hundreds of people. Engineers now find themselves forced to reduce the scope of services to a bare minimum in order to be competitive. This pressure to reduce the factor of safety

is clearly not in the public's interest, which then exacerbates the insurance and liability problem we are discussing here today.

It is important to recognize that most engineering firms are relatively small service organizations which do not have significant financial or other assets. Therefore, the major basis for satisfying claims involving professional engineers are errors and omissions, or professional liability insurance policies that are similar to the so-called malpractice policies for other professionals such as medical doctors.

Since last year, our firm's premiums for professional liability insurance have doubled. Further, the proposed pollution exclusions will preclude coverage for claims resulting from pollution, even where the incident is ancillary to the specific project, i.e., highway or building construction. Without complete coverage, many, if not most, professional engineers will avoid projects where there is even a remote possibility of claims resulting from pollution.

SENATOR LESNIAK: Excuse me. Could you go over that again? What proposed--

MR. HENNINGSON: Proposed pollution exclusions that have been proposed by the insurance industry.

ASSEMBLYMAN MARTIN: They are written into your insurance; they are professional insurance--

SENATOR LESNIAK: They are not now.

MR. HENNINGSON: There are not now. What has been proposed will prevent coverage for us for any incident involving pollution.

SENATOR LESNIAK: How has it been proposed? Is your policy nearing an end?

MR. HENNINGSON: They have made it know that when our policy is removed, that exclusion will be attached on to it.

SENATOR LESNIAK: Who is "they"?

MR. HENNINGSON: Our insurance representatives, and they are just passing along what they are told by the re-insurers. Without complete coverage, many, if not most professional engineers will simply avoid projects where there is even a remote possibility of pollution occurrence.

SENATOR LESNIAK: Your liability is not a strict liability, though, is it?

MR. HENNINGSON: Well, I'll get to that.

SENATOR LESNIAK: Okay.

MR. HENNINGSON: At a minimum, if this curves, many important environmental programs in New Jersey will be curtailed, if not stopped. We have been involved in work in over two dozen Superfund sites nationwide, and it is clear that the problem is national in scope. Several weeks ago, I met with a group of 50 engineers in Washington to discuss Federal legislation, self-insurance, and other possible actions. But it is clear that State tort law can not be overcome by Federal legislation, and the State must take action on its own behalf. Governor Kean's emergency order might provide a short-term stabilization for some engineers, but won't help those firms who have not been able to get any insurance, or renew their policies before his action. Clearly, legislation is the only long-term solution.

It is essential that the current, broad applicability of strict joint and several liability resulting from court interpretations be limited through legislation on both the State and Federal level. Traditionally, the written law -- or the laws that have been written by legislatures -- have held engineers to a negligence standard. Most engineers would willingly accept that standard. We are willing to be held liable for our negligent acts, and I believe that if that were done, the insurance companies would be much more liable to come back into the market to support us, in professional liability insurance.

In addition, the insurance crisis might be mitigated through indemnification--

SENATOR LESNIAK: Let's back up a little bit. What decisions hold professional engineers liable on a strict liability basis?

MR. HENNINGSON: Well, that is-- There has not been a specific decision to this point. The insurance companies are of course running--

SENATOR LESNIAK: So you are asking for-- One of the things I can envision us doing is defining aspects of liability and aspects of coverage to eliminate the risk of judicial interpretations, so you are

saying that is what is needed. What they fear, somewhere down the road is that professionals are going to be held strictly liable for their actions.

MR. HENNINGSON: Absolutely. In fact, when I sat and participated in the hearings in Washington -- I believe it was in April -- the Justice Department said absolutely, they wanted everyone who could possibly be drawn into the liability chain, to be drawn in. That was the Federal Justice Department's position.

ASSEMBLYMAN MARTIN: Are there other professionals? We heard from the contractors this morning, but we really had not, at least I had not, thought of players other than what Senator Dalton had mentioned earlier. I would assume there may be professional architects and other individuals--

MR. HENNINGSON: Yes sir. This pollution exclusion clause that has been proposed has been interpreted by our legal staff and our architects to apply if an architect designed a building, state of the art -- whatever was best -- and 20 years down the road, it was determined that there was something in the water that was venting into the air -- in the cooling tower -- that caused something, the engineer would be held strictly liable.

ASSEMBLYMAN MARTIN: The engineer?

MR. HENNINGSON: The engineer who designed the system.

SENATOR LESNIAK: Wait a second. Let's get something straight. An insurance policy can not decide who is liable--

MR. HENNINGSON: What I am saying is--

SENATOR LESNIAK: --and on what basis.

MR. HENNINGSON: What I am saying is that the courts have redefined an engineer's liability, when it comes to hazardous waste.

SENATOR LESNIAK: Where? You just said there has not been one decision.

MR. HENNINGSON: The insurance companies are concerned that the current direction of the court will result in a redefinition.

SENATOR LESNIAK: It has not happened yet, thought.

MR. HENNINGSON: It has not happened, but I certainly have heard the Justice Department testify in Washington that they would

consider it a perfectly valid interpretation of the engineer's liability.

SENATOR LESNIAK: Okay.

MR. HENNINGSON: But if the insurance companies feel this is going to happen, they don't want to write the insurance.

SENATOR LESNIAK: Absolutely.

MR. HENNINGSON: It seems to me there are two issues here that have been discussed: first of all, what to do about the insurance situation, and secondly, which we as professionals have been trying to address, is how to redefine the extent of liability. From our standpoint, if you can deal with the second, you will have dealt, in many ways, with the how the first affects our industry.

There are a number of remedies. Clearly, it is a combination of insurance reform and, I think, a redefinition of liability where necessary. But I can tell you quite clearly that if something is not done in the State of New Jersey -- and every other state -- the current environmental programs will not have responsible, experienced engineers who are willing to risk their whole business to design remedies.

I have a couple of other comments. There was a question about protecting public entities. I would think that, at some point, there has to be some limit on the extent of claims. That is one approach taken in New York State with medical malpractice suits, where at least there was a limitation on the lawyers' fees. It makes a "disincentive."

SENATOR LESNIAK: There is. We have that in New Jersey.

MR. HENNINGSON: But it is not applicable to this sort of an environmental lawsuit.

SENATOR LESNIAK: Sure is.

MR. HENNINGSON: It is?

SENATOR LESNIAK: Absolutely.

MR. HENNINGSON: Okay. I was not aware of that. That is the best news I have heard in awhile.

SENATOR LESNIAK: In the court rules.

MR. HENNINGSON: I would also like to clarify one other point that was discussed somewhat, and that is the claims-made policy, which was presented here as some sort of a magic formula that would help everything. We are very concerned about claims-made policies; we have been paying insurance for as long as there has been insurance available to professional engineers, and if it goes to a claims-made basis and our insurance stops the following year, there will be no protection for the public at all, even though we have paid premiums for decades, including during that period. So I don't see claims-made policies as being a solution. Yes, there would be insurance on the table, but it would not be a solution.

SENATOR LESNIAK: I don't want to get into the issue with you too much, but I think you have to look at the whole picture. The idea is that the claims-made policy, in addition to everything else, is bible, which creates-- You are not going to have the problem of not having coverage for the next year, and the premiums that you paid still cover you on the occurrence basis, for any actions that were in the past.

So I really don't think that the claims-made policy, inherently, is a problem. As a matter of fact, it could be a part of the solution, as long as it is part of the whole package.

MR. HENNINGSON: Excuse me, Senator. You are saying that it would--

SENATOR LESNIAK: No, you have premiums that you have paid--

MR. HENNINGSON: --be a claims-made policy--

SENATOR LESNIAK: No, what I am saying is that the premiums that you pay protect you from the past, when you had the occurrence policies. But those premiums do not go down the chute--

MR. HENNINGSON: If I still have that insurance.

SENATOR LESNIAK: No, no.

MR. HENNINGSON: Oh, you are talking about the interpretation that, even though I am no longer insured by that firm, that firm must come in and defend--

SENATOR LESNIAK: No, no. I am just saying that, you pay the premiums that cover you on an occurrence basis, and that you are still covered for occurrences during that period.

MR. HENNINGSON: Okay.

SENATOR LESNIAK: Forever. You are covered forever.

MR. HENNINGSON: Yes, I know what you mean there.

SENATOR LESNIAK: So that is not the problem. That may be part of the solution, as long as it is going to be available to you and is part of the solution, then that is fine. If it is not available, then it does not help you at all.

MR. HENNINGSON: I also have testimony from Mr. Fleming, which I will leave with you. I won't read it; many of the comments are the same; and I have a copy of the Good Samaritan -- well, I'll use that term -- provisions of the Minnesota environmental law.

SENATOR LESNIAK: I thought you said that you were willing to accept your own negligence.

MR. HENNINGSON: That does not cover us for negligent acts. It just reaffirms what the standard is for--

SENATOR LESNIAK: As I understand it, the Samaritan was-- they protect you from your own negligence.

MR. HENNINGSON: Not the way it is being applied in Minnesota, and we are currently doing mediation in Minnesota. But there was a feeling that because of the Federal strict joint and several liability wording, that it needed to be redefined in the State of Minnesota, to limit only to negligent acts.

SENATOR LESNIAK: It may need to be refined here as well, from what you tell me.

MR. HENNINGSON: I think so.

SENATOR LESNIAK: Okay.

ASSEMBLYMAN MARTIN: Just a quick question. As opposed to the fast-buck artist you and Senator Dalton made reference to before-- Is there something in any licensing in any state that can separate the unscrupulous, in any way?

MR. HENNINGSON: No. The point here, as I really would hope that -- as in New York and in some other states and on the Federal basis -- legislation could be passed that is a Brooks bill type of legislation, where selection is made on qualification, expertise and experience. Then, negotiate with the most qualified firm to do the

work. If one is going to look for the cheapest price, I think you are headed down the road of having professional services that are questionable. The public does not do it with any other public professional service, but it is happening now with professional engineering.

SENATOR LESNIAK: Thank you very much.

MR. HENNINGSON: You're welcome.

SENATOR LESNIAK: Anyone else here to testify today? Yes, sir? You're not on my list, are you?

FRED SACCO: No, Mr. Chairman.

SENATOR LESNIAK: You had better be good. (Laughter)

MR. SACCO: What I have learned is on the 15th, you were going to leave it to the insurers-- I was going to come on the 15th, Senator, but I am only going to take a couple of minutes.

SENATOR LESNIAK: Sure.

ASSEMBLYMAN MARTIN: I don't know who you are.

SENATOR LESNIAK: This is Fred Sacco, Assemblyman, from the Fuel Merchants Association. He is from Union County, so I am sure he is good.

MR. SACCO: We represent a group of people who move motor fuels throughout New Jersey. We probably supply two billion gallons of the three billion gallons that are consumed in New Jersey. We supply about 90% of the home heating oil in New Jersey--

ASSEMBLYMAN MARTIN: When you say "we," you are referring to--

MR. SACCO: The merchants of our organization.

What we have learned-- We learned this in early spring, late winter of last year. Virtually every petroleum marketer in New Jersey would lose, from his umbrella coverage, pollution liability insurance. We are not in as bad a shape as many of the municipalities are, because we move very quickly and we work with a national organization, where we would have the opportunity for pollution liability coverage for our members, although the costs of that are astronomical, as you have learned from of the municipalities. The problem with that is, even though we have done this, it is a very fragile situation, primarily

because of -- and you heard it from the prior speaker -- this joint and several liability aspect that we are now facing under the Superfund discussions. We have been lobbying in Washington to make sure that petroleum is not a part of that; that gasoline -- petroleum -- does not become a hazardous waste by definition, because that puts us in a very dangerous light with the coverage that we have now. We probably could lose that.

The other aspect that we are really concerned about is, we have worked for about seven years to put up an emergency response team in almost every county, in the event of some incident where petroleum was spilled. It is a cooperative venture. We had an incident in South Jersey, not too long ago, where a car sideswiped park cars, pulled into the path of a fuel oil truck, which swerved to avert, capsized, then spilled a whole lot of product. At least six companies responded with people through our emergency cooperative effort, to resolve the problem and it was eliminated very quickly. What we are concerned about now is under the joint and several liability aspects that we are facing, they would all be under jeopardy now with their insurers, should they become involved in a lawsuits. They are liable to be pulled into a lawsuit because everyone who was involved is now being targeted by the lawyers who are representing the claimants. That is the kind of thing we are becoming very much concerned with.

I think most of this hinges on this -- and unfortunately sir, I am not a lawyer and I am not an insurance expert, but the joint and several liability--

SENATOR LESNIAK: I am tired of hearing about these insurance guys.

MR. SACCO: --to a greater number of people, and I believe that is what has happened to the municipalities. Because they have underground storage, because they have landfills, because they are in cooperatives with sewerage authorities, and this joint and several liability hangs over their head, that insurance companies are backing away--

SENATOR LESNIAK: I am glad you raised that issue, because it is something we have to think about.

In closing, I do want to say one thing. We can not lose-- And I am saying this for the record, obviously; there are so few people here. We can not lose sight of the fact that there are improvements that are being made now, today; and have been made over the last five years or so that are going to protect the public for generations to come -- our children and our grandchildren -- that were not done in the past, because we did not have these kinds of liability. So, this Commission is going to have a very difficult balancing task to do, because we have to save the beneficial aspects of what liability and strict liability and several liability have done, in terms of the future health benefits to our society; and at the same time, deal with those serious problems that you and everyone else has mentioned.

MR. SACCO: We recognize your concern.

SENATOR LESNIAK: We thank you because we will look at the fuel oil problem as well.

Assemblyman Martin?

ASSEMBLYMAN MARTIN: No, I have no further questions.

SENATOR LESNIAK: Okay. Thank you very much for sticking it out, and we will see everyone else on the 15th.

(HEARING CONCLUDED)

