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PUBLIC HEARING

before

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

ASSEMBLY BILL NO. 1726

(Increases criminal penalties for violation of
certain environmental laws. The Committee
focused its discussion on proposed
Committee Substitute to A-1726.)

October 2, 1990
Municipal Complex Building
Piscataway, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Robert G. Smith, Chairman
Assemblyman Neil M. Cohen, Vice Chairman
Assemblyman Arthur R. Albohn

ALSO PRESENT:

Spiros J. Caramalis
Office of Legislative Services
Aide, Assembly Energy and Environment Committee

Raymond E. Cantor
Office of Legislative Services
Aide, Assembly Energy and Environment Committee

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Hearing Recorded and Transcribed by
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State House Annex
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Trenton, New Jersey 08625

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PUBLIC HEARING

before

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

ASSEMBLY BILL NO. 1334

(Increases criminal penalties for violation of
certain environmental laws. The Committee
focused its discussion on proposed
Committee Substitute A-1334.)

October 2, 1980
Municipal Complex Building
Princeton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Robert G. Smith, Chairman
Assemblyman Neil M. Cohen, Vice Chairman
Assemblyman Arthur R. Alphon

ALSO PRESENT:

George J. Caranalis
Office of Legislative Services
Aide, Assembly Energy and Environment Committee

Raymond E. Carter
Office of Legislative Services
Aide, Assembly Energy and Environment Committee

Hearing Reported and Transcribed by
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Hearing Date
State House Annex
Princeton, New Jersey 08502



ROBERT G. SMITH
CHAIRMAN
NEIL M. COHEN
VICE-CHAIRMAN
THOMAS J. DUCH
ARTHUR R. ALBOHN
JACK COLLINS

New Jersey State Legislature
ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-7676

NOTICE OF A PUBLIC HEARING

The Assembly Energy and Environment Committee will hold a public hearing to discuss:

A-1726 Increases criminal penalties for violation of certain environmental laws.

The Committee will focus its discussion on the proposed committee substitute to A-1726.

The hearing will be held on Tuesday, October 2, 1990 at 10:00 a.m. in the Piscataway Municipal Complex Building, Piscataway, New Jersey

The public may address comments and questions to either Spiros Caramalis or Raymond Cantor, Aides to the Assembly Energy and Environment Committee. Persons wishing to testify should contact Deborah Del Vecchio, committee secretary, at (609) 292-7676.

Issued 9/18/90

(Directions: Garden State Parkway to exit for Interstate 287 North. Follow Interstate 287 for 10 miles to exit for Randolphville Road, bear right onto So. Randolphville Road. (Municipal Bldg. is approximately 2 1/2 miles from this point.) Follow this road to next light and make a left onto Old New Brunswick Road which becomes Hoes Lane. Continue on to the Municipal Complex #455 on the left hand side.)

ASSEMBLY COMMITTEE SUBSTITUTE FOR
ASSEMBLY, No. 1726

STATE OF NEW JERSEY

By Assembly R. Smith

AN ACT concerning certain environmental offenses,
amending , supplementing Title 13 of the
Revised Statutes, and amending and supplementing
N.J.S.2C:17-1 et seq.

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

1. (New section) This act shall be known and may be cited as
the "Comprehensive Pollution Control and Enforcement Act of
1990."

2. (New section) For purposes of this act:

"Business firm" or "firm" means any corporation, association,
partnership, sole proprietorship, trust or other commercial entity.

"Environmentally sensitive or wildlife areas" means any land or
water that is:

(1) designated as a wildlife sanctuary, as defined in section 1
of P.L.1982, c.167 (C.13:8-64), or a fish or wildlife refuge or
management area, which is held, managed or administered by the
State, a political subdivision of the State, or any instrumentality
thereof, or the United States government, or which is held and
administered in trust by a non-profit association;

(2) designated as a natural area pursuant to P.L.1975, c.363
(C.13:1B-15.12a et seq.);

(3) a reservoir area;

(4) held by the New Jersey Natural Lands Trust pursuant to
P.L.1968, c.425 (C.13:1B-15.119 et seq.), including the holding of
any property interest in such land or water;

(5) that has been classified in accordance with surface water
quality criteria adopted by the Department of Environmental
Protection pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.) or
P.L.1977, c.75 (C.58:11A-1 et seq.) as category I waters,
freshwater I waters, or pinelands waters; or

(6) within the boundaries of the pinelands preservation area as
defined in section 10 of P.L.1979, c.111 (C.13:18A-11).

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

Matter underlined thus is new matter.

"Pecuniary gain" means any saving or cost avoidance, or net profit realized, or expected or intended to be realized, by means or as a result of a failure of a person to comply with any applicable State or federal environmental statute, rule or regulation, or a compliance order issued by any court or administrative agency, including, but not limited to, any cost avoidance or net profit realized, or expected or intended to be realized, from the operations of any facility, enterprise or business which the defendant would have discontinued, or would have been required to discontinue but for the failure to comply with an applicable environmental statute, rule, regulation or compliance order, or absent concealment of a failure to comply therewith.

"Pecuniary loss" means any expenses which have been, or are anticipated to be incurred by the State, county, municipal or federal government agency or other instrumentality, or by any other person as a result of an unlawful release occurring within the State, or adversely affecting the air, land or waters of the State, including, but not limited to, reasonable remediation and restoration or replacement costs; any direct economic loss incurred by a person other than governmental agency, including loss from injury or death of persons, damage or loss of real or personal property, or loss, injury or damage to livestock, fish, or agricultural crops; economic loss from the closing of a facility or cancellation of previously received order occurring as a direct result of an unlawful release; or economic costs reasonably incurred to protect adjacent or nearby property, or to locate and procure an alternate source of potable water supply. "Pecuniary loss" does not include:

- (1) criminal investigation and prosecution costs incurred by a State, county, municipal, or federal government agency;
- (2) remediation costs voluntarily expended by the defendant as a result of an unlawful release or violative act for which he was charged, including those resulting from compliance with consent decrees voluntarily entered into, that were not the result of compliance with an administrative order or administrative consent order entered into as a result of the unlawful release or violative act; or
- (3) any costs associated with the criminal investigation or prosecution.

"Prosecuting attorney" means the Attorney General or the county prosecutor, whomever prosecutes the offense.

"Release" means the introduction into air, land or waters, whether by spilling, abandoning, discharging, emitting, disposing, leaking, dumping or by any other means, including, but not limited to, the abandonment or disposal of materials contained within a drum, tank or other container, regardless of whether the materials have escaped from the drum, tank, or other container, or the materials are contained within the limits of a landfill due to the use of a liner or other containment method utilized by the landfill which prevents the dispersal of such materials beyond the limits of the landfill.

"Remediation" means site investigation, preparation of a remediation strategy, cleanup or removal of a release, including mitigation, control or management, or any combination thereof, of an unlawful release, or the restoration or replacement for real or personal property, waters, or wildlife.

"Serious bodily injury" has the same meaning as that provided in subsection b. of N.J.S. 2C:11-1.

"Significant adverse environmental effect" means:

(1) serious harm or damage to wildlife, freshwater or saltwater fish, any aquatic or marine life or water fowl, or to their habitats, or to livestock, or agricultural crops; serious harm to, or degradation of, any ground or surface waters; or any other serious articulable harm or damage to, or degradation of, the lands or waters of the State, including marine waters; or

(2) pecuniary loss resulting from the acts of the defendant which exceeds \$150,000.

"Unlawful release" means a release, resulting from an act or omission, of a hazardous or nonhazardous substance, material or waste in violation of the provisions of P.L. 1977, c. 74 (C.58:10A-1 et seq.), P.L.1954, c.212 (C.26:2C-1 et seq.), P.L.1976, c.141 (C.58:10-23.1 et seq.), or P.L.1971, c.176 (C.13:1F-1 et seq.), or rule or regulation adopted in accordance therewith, or order issued pursuant thereto.

3. (New section) a. (1) Any person who purposely, knowingly or recklessly causes an unlawful release shall be guilty of a crime of the third degree, except that if the offense:

(a) occurs on, or adversely affects an environmentally sensitive or wildlife area, or results in a significant adverse environmental effect, the person shall be guilty of a crime of the second degree;

(b) creates a risk of serious bodily injury or death to any person, the person shall be guilty of a crime of the second degree;

(c) places another person in imminent danger of death or serious bodily injury, and the person knows at the time of the offense that he places a person in imminent

danger of serious bodily injury or death, or if the offense results in serious bodily injury or death the person shall be guilty of a crime of the first degree.

(2) Any person who negligently causes an unlawful release shall be guilty of a crime of the fourth degree, except that if the offense:

(a) occurs on, or adversely affects an environmentally sensitive or wildlife area, or results in a significant adverse environmental effect, the person shall be guilty of a crime of the third degree;

(b) creates a risk of, or causes death or serious bodily injury to any person, the person shall be guilty of a crime of the second degree.

If a person causing an unlawful release that occurs on, or adversely affects an environmentally sensitive or wildlife area, or results in a significant adverse environmental effect, prior to the issuance of an indictment for the unlawful release, undertakes and satisfactorily completes, or provides financial assurance for completion of a remediation of the unlawful release pursuant to a consent decree voluntarily entered into that was not the result of compliance with an administrative order or administrative consent order, and the release did not create a risk of, or present an imminent danger of, or result in death or serious bodily injury, that person shall be subject to a degree of crime that is one level below that which the person would otherwise have been subject pursuant to the provisions of this subsection.

b. Notwithstanding the provisions of N.J.S. 2C:43-3, and except in the case of negotiated or post-conviction agreement entered into pursuant to subsection c. of section 8 of P.L. .

c. (C.) (pending in the Legislature as this bill), a person convicted of :

(1) a crime of the first or second degree under subsection a. of this section shall be subject to a fine of not less than \$30,000.00, nor more than \$150,000.00, or in the case of a business firm, the firm shall be subject to a fine of not less than \$100,000.00, nor more than \$500,000.00, or imprisonment, or both;

(2) a crime of the third or fourth degree under this section shall be subject to a fine of not less than \$15,000.00, nor more than \$75,000.00, or, in the case of a business firm, the firm shall be subject to a fine of not less than \$50,000.00, nor more than \$250,000.00, or imprisonment, or both.

4. (New section) a. Any person who purposely or knowingly transports, offloads, dumps, or disposes of solid waste at any place in this State other than that for which authorized by the Department of Environmental Protection or the Board

of Public Utilities to accept solid waste, or causes or permits such conduct, whether for profit or otherwise, or who purposely or knowingly accepts or receives solid waste for disposal in this State without authorization for such disposal by the Department of Environmental Protection or the Board of Public Utilities, or causes or permits such conduct, whether for profit or otherwise, commits an offense.

b. An offense under subsection a. of this section is a crime of the fourth degree if the amount of solid waste involved is at least 10 cubic yards or 500 United States gallons; except that if the offense occurs on or adversely affects an environmentally sensitive or wildlife area, or results in a significant adverse environmental effect, the offense is a crime of the third degree.

c. An offense under subsection a. is a crime of the third degree if the amount of solid waste involved is at least 100 cubic yards or 5000 United States gallons; except that if the offense occurs on, or adversely affects an environmentally sensitive or wildlife area, or results in a significant adverse environmental effect, the offense is a crime of the second degree.

d. An offense under subsection a. is a crime of the second degree if the amount of solid waste involved is at least 1000 cubic yards or 50,000 United States gallons.

e. An offense under subsection a. is a crime of the second degree if it creates a risk of serious bodily injury or death to any person.

f. An offense under subsection a. is a crime of the first degree if the person committing the offense knows at that time that he thereby places another person in imminent danger of death or serious bodily injury or causes such death or injury.

g. Any person or purposely, knowingly, recklessly, or negligently stores, accumulates, or otherwise amasses in any manner solid waste in an amount greater than or equal to 1000 cubic yards, or in an amount greater than or equal to 50,000 United States gallons of liquids, whether for profit or otherwise, except as such storage, accumulation, or amassing is authorized or permitted by the Department of Environmental Protection or the Board of Public Utilities, commits a crime of the second degree; except that if the person committing the offense knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, or causes such serious bodily injury or death, that person shall be guilty of a crime of the first degree.

h. Where the degree of the offense for a violation of this section depends on the quantity of solid waste, the

quantity involved shall be determined by the trier of fact. Where the indictment or accusation so provides, the quantity of solid waste involved in individual unlawful acts constituting violations of this section may be aggregated in determining the grade of the offense, provided that each individual act constituting a violation of this section was committed within the applicable statute of limitations, or the indictment or accusation may provide that each day during which the violation continues constitutes an additional, separate and distinct offense.

i. For purposes of this section, "solid waste" has the same meaning as provided in section 3 of P.L.1970, c.39 (C. 13:1E-3).

j. Notwithstanding the provisions of N.J.S. 2C:43-3, where a person commits an offense pursuant to this section, the amount of the fine imposed, in addition to any term of imprisonment that may be imposed, shall be as follows:

(1) A person convicted of a crime of the fourth degree shall be subject to a fine of not less than \$10,000.00 nor more than \$50,000.00, or, in the case of a business firm, shall be subject to a fine of not less than \$25,000.00 nor more than \$125,000.00;

(2) A person convicted of a crime of the second or third degree shall be subject to a fine of not less than \$25,000.00 nor more than \$125,000.00, or, in the case of a business firm, shall be subject to a fine of not less than \$75,000.00 nor more than \$500,000.00.

(3) A person convicted of a crime of the first degree shall be subject to a fine of not less than \$50,000.00 nor more than \$250,000.00, or, in the case of a business firm, shall be subject to a fine of not less than \$150,000.00 nor more than \$1,000,000.00.

k. If a person who commits an offense under subsection a. of this act is not sentenced to a term of imprisonment, the court shall, in addition to any other penalty imposed under this or any other law, (1) require the person to perform not less than 90 nor more than 180 days of community service and (2) require the person to forfeit their privileges to operate a motor vehicle for a period of not less than one year, nor more than two years.

5. (New section) a. Any person who purposely or knowingly engages in a regulated activity in a freshwater wetland or a coastal wetland, as those terms are defined pursuant to P.L. 1987, c.156 (C. 13:9B-1 et seq.), and P.L.1970, c.272 (C. 13:9A-1 et seq.), in violation of P.L.1987, c.156 or P.L.1970, c.272, or any regulation, rule, or order adopted or issued pursuant thereto, which activity results in an adverse modification of 10 or more

acres of freshwater or coastal wetlands and which activity consists of (1) the removal, excavation, or dredging of soil, sand, gravel, or aggregate matter of any kind from the wetland, (2) the drainage or disturbance of the water level or water table of the wetland, or (3) the dumping, discharging, or filling of any material into the wetland, is guilty of a crime of the second degree.

If a person commits an offense subject to this subsection and that person prior to the issuance of an indictment for the offense, undertakes and satisfactorily completes, or provides financial assurance for, the satisfactory restoration of the freshwater or coastal wetland pursuant to a consent decree voluntarily entered into that was not the result of compliance with an administrative order or an administrative consent order, the person shall be subject to a crime of the third degree.

b. Any person who purposely or knowingly engages in a regulated activity in a freshwater wetland or a coastal wetland, as those terms are defined pursuant to P.L.1987, c.156 (C. 13:9B-1 et seq.), and P.L.1970, c.272 (C. 13:9A-1 et seq.), in violation of P.L.1987, c.156 or P.L.1970, c.272, or any regulation, rule, or order adopted or issued pursuant thereto, which activity results in an adverse modification of 10 or more acres of freshwater or coastal wetlands, the person shall be guilty of a crime of the third degree.

If a person commits an offense pursuant to this subsection, and prior to the issuance of an indictment for the offense, that person undertakes and satisfactorily completes, or provides financial assurance for, the satisfactory restoration of the freshwater or coastal wetland pursuant to a consent decree voluntarily entered into that was not the result of compliance with an administrative order or an administrative consent order, the person shall be subject to a crime of the fourth degree.

c. Any person who purposely or knowingly engages in a regulated activity in a freshwater wetland, freshwater wetland transition area, or a coastal wetland, as those terms are defined pursuant to P.L.1987, c.156 (C. 13:9B-1 et seq.), and P.L.1970, c.272 (C. 13:9A-1 et seq.), in violation of P.L.1987, c.156 or P.L.1970, c.272, or any regulation, rule, or order adopted or issued pursuant thereto, commits a crime of the fourth degree.

6. (New section) a. Any person who purposely or knowingly develops or uses land in any delineated floodway pursuant to P.L.1972, c.185 (C. 58:16A-50 et seq.), which development or use is in violation of the

provisions of P.L.1972, c.185, or any rule, regulation, or order adopted or issued pursuant thereto which violation places another person in imminent danger of serious bodily injury or death and the person knew at the time of the violative act that he so placed a person in imminent danger of serious bodily injury or death or the violative act resulted in serious bodily injury or death the person is guilty of a crime of the first degree.

b. Any person who purposely or knowingly develops or uses land in any delineated floodway pursuant to P.L.1972, c.185 (C. 58:16A-50 et seq.), which development or use is in violation of the provisions of P.L.1972, c.185, or any rule, regulation, or order adopted or issued pursuant thereto, is guilty of a crime of the third degree; except that if the violation causes a significant adverse environmental effect, or creates the risk of serious bodily injury or death, the person is guilty of a crime of the second degree.

c. Any person who recklessly or negligently develops or uses land in any delineated floodway pursuant to P.L.1972, c.185 (C. 58:16A-50 et seq.) which development or use is in violation of the provisions of P.L.1972, c.185, or any rule, regulation, or order adopted pursuant thereto, is guilty of a crime of the fourth degree; except that if the violation causes a significant adverse environmental effect, or creates the risk of serious bodily injury or death, the person is guilty of a crime of the third degree.

7. (New section) a. In a prosecution arising under section 3, 4, 5, or 6 of P.L. , c. (C.)(pending in the Legislature as this bill):

(1) all relevant evidence as to the nature and extent of any environmental damage or harm resulting from a person's conduct, including an opinion as to the expected scope of the extent or persistence of any future environmental damage or harm, shall be admissible; however, unless the indictment or accusation so alleges, the prosecution shall not be required to present any evidence of present or future environmental damage or harm:

(2) all relevant evidence as to the person's culpable mental state shall be admissible in accordance with the Rules of Evidence of the Court;

(3) it shall not be relevant that a person was unaware that the prohibited conduct occurred on an environmentally sensitive or wildlife area, or that the prohibited conduct would adversely affect an environmentally sensitive or wildlife area or have a significant adverse environmental effect; and with respect to this result element, the prosecution shall not

be required to establish that the person acted in accordance with any prescribed culpability requirement that may otherwise apply to any other material element of the offense.

b. Notwithstanding the provisions of N.J.S. 2C:1-6, a prosecution for a violation of section 3, 4, 5, or 6 of P.L. , c. (pending in the Legislature as this bill) shall be commenced within five years of the date of discovery of the violation.

8. (New section) a. Upon application of the prosecuting attorney, and except where a negotiated plea or post-conviction agreement has been entered into pursuant to subsection c. of this section, a person convicted of an offense designated a crime of the first or second degree pursuant to section 3, 4, 5, or 6 of P.L. , c. (C.) (pending in the Legislature as this bill) shall, in addition to any other disposition authorized or required to be imposed, be sentenced to a term of imprisonment, which shall include imposition of a minimum mandatory term of imprisonment for a duration of between one-third and one-half of the term of imprisonment imposed, if the prosecuting attorney establishes by a preponderance of the evidence at a hearing, which may occur at the time of sentencing, that one or more of the following conditions exist:

(1) the aggregate of the pecuniary losses resulting from the acts or omissions of the defendant, regardless of intent, exceed \$500,000;

(2) the pecuniary gain purposely or knowingly achieved or anticipated by the defendant as a result of his noncompliance with applicable environmental statutes, regulations, rules, or orders exceeds \$100,000.00; or

(3) the person, while in the course of committing the offense or in concealing or attempting to conceal the offense or its effects from any agency or department of the State or any political subdivision of the State, or any agency or instrumentality thereof, or any agency of the federal government, provided, filed, or offered for filing a record, document, article, object, or thing knowing or believing it to be false in any material respect, or who knowingly destroyed, concealed, removed or otherwise impaired the verity or availability thereof.

In making its findings, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or other court proceedings, and shall also consider any other relevant information.

b. A person convicted of a criminal offense under section 3, 4, 5, or 6 of P.L. , c. (C.) (pending in the Legislature as this bill), who previously had been convicted of a criminal offense

pursuant to any of these sections, section 10 of P.L.1977, c.74 (C.58:10A-10), section 19 of P.L.1954, c.212 (C.26:2C-19), section 9 of P.L.1970, c.39 (C.13:1E-9), section 13 of P.L. 1970, c. 30 (C. 48:13A-12), section 9 of P.L. 1970, c. 272 (C. 13:9A-9), section 21 of P.L. 1987, c. 156 (C. 13:9B-21), section 3 of P.L.1989, c.118 (C.13:1E-9.3), or section 22 of P.L.1976, c.141 (C.58:10-23.11u), or for a criminal violation occurring in the State of a similar environmental law of the United States, shall, upon application of the prosecuting attorney, be sentenced by the court to an extended mandatory term, notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except where a negotiated plea or post-conviction agreement has been entered into pursuant to subsection c. of this section, include the imposition of a mandatory minimum term of imprisonment of between one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or one year in the case of a fourth-degree crime, during which time the defendant shall not be eligible for parole.

c. Whenever there is mandated an extended term or enhanced sentence, or any other sanction or form of punishment, the court, upon making the required findings, shall impose the mandatory sentence unless the defendant has pleaded guilty pursuant to a negotiated agreement, or the defendant and the prosecuting attorney have entered into a post-conviction agreement, which provides for a lesser sentence or period of parole ineligibility, term of community service, fine or any other disposition. The negotiated plea or post-conviction agreement may provide for a specified term of imprisonment, period of parole ineligibility, community service, fine, or any other custodial or noncustodial disposition. In that event, the court at sentencing shall not impose a lesser term of imprisonment, parole ineligibility, community service, fine, order for the payment of taxed costs, or any other mandatory sanction or form of punishment than expressly provided for under the terms of the plea or post-conviction agreement.

9. (New section) a. When the court imposes a sentence upon a business firm convicted of an offense subject to the penalty provisions of section 3, 4, 5, or 6 of P.L. , c. (C.) (pending in the Legislature as this bill), it shall, in the case of a first or second degree crime, and may, in the case of third or fourth crime, place the business firm on probation for a term fixed by the court at not less than one year, nor more than five years, except that where the firm has been convicted of a crime of the fourth degree.

the term of probation shall not exceed eighteen months. In no event shall the term of probation be greater than the maximum term of imprisonment that could have been imposed on a natural person convicted of the same offense or offenses as the firm, taking into account any extended term imposed pursuant to section 8 of P.L. , c. (C.) (pending in the Legislature as this bill). The court shall impose such reasonable terms and conditions of probation as it deems necessary to prevent recurrence of the conduct that formed the basis for the conviction, and to ensure that the firm conducts its affairs affecting the lands, waters or ambient air within the jurisdiction of this State in accordance with all environmental laws and regulations; provided, however, that any such terms or conditions imposing remedial, corrective or control measures shall be subject to prior review and approval by the Department of Environmental Protection. The court shall also consider economic impact in determining the reasonableness of probation terms and conditions.

b. A business firm sentenced pursuant to subsection a. of this section, shall not have the right to refuse to be placed on probation pursuant to this section, or to reject any other terms or conditions imposed by the court in conjunction therewith, and it shall not be necessary for the firm to consent thereto. The firm shall be given a copy of the terms and conditions of probation, which shall be stated with sufficient specificity to enable the firm to guide its conduct accordingly. Imposition of the terms and conditions of probation authorized by this section shall be in addition to, and not in lieu of, any fines, penalties or other dispositions authorized or required to be imposed pursuant to section 3, 4, 5, 6, or 8 of P.L. , c. (C.) (pending in the Legislature as this bill), or any other law; provided, however, that when a business firm is ordered by the court to pay a fine, penalty, or restitution order for the payment of taxed costs, payment thereof shall be a condition of probation.

c. During a term of probation, and upon application of the prosecuting attorney, the Department of Environmental Protection, or the independent environmental monitor appointed by the court pursuant to subsection e. of this section, or upon the court's own motion, the court may modify the terms or conditions of probation, add further terms or conditions of probation as authorized under subsection a. of this section, or enter an order or take such other actions that are reasonably necessary to monitor the firm's

compliance with, or to enforce or clarify any term or condition of probation.

d. If a court is satisfied that a firm has failed to comply with a substantial requirement imposed as a condition of probation, or if a firm is convicted of any other criminal offense, the court may vacate the original order of probation and may enter a new order imposing a fine, penalty, order for restitution, or any other sentence or term or condition of probation, up to the limits authorized herein, that originally might have been imposed for the offense for which the firm was convicted. In addition, if the court vacates the original order and enters a new order pursuant to this subsection, the term of probation may be fixed by the court for a new term, which shall not be more than twice the maximum term of probation that could have originally been imposed.

Commencement of a proceeding to determine whether a business firm has failed to comply with a substantial requirement imposed as a condition of probation shall toll the probationary period until termination of such proceedings. In the event that the court does not find a violation of probation, this subsection shall not operate to toll the probationary period.

e. Upon application of the prosecuting attorney, the court shall, except for good cause shown, appoint an independent environmental monitor as a condition of probation, if the prosecuting attorney establishes by a preponderance of the evidence at a hearing, which may occur at the time of sentencing, that any of the following conditions exist:

(1) The business firm has been convicted of a crime of the first degree;

(2) The firm has been convicted of a crime involving purposeful or knowing conduct, and the crime either (a) was committed for the purpose, or in anticipation of achieving pecuniary gain, or b) resulted in significant adverse environmental effect;

(3) The firm concealed or attempted to conceal the crime or its effects from the State, or any political subdivision thereof, or any agency or other instrumentality of the State or political subdivision, or any agency of the federal government, including by providing, filing, or offering for filing any record, document or thing knowing or believing it to be false in any material respect, or by knowingly destroying, concealing, removing, or otherwise impairing the verity or availability of any object, document or thing;

(4) The firm has previously been convicted of a criminal offense pursuant to section 3, 4, 5, or 6 of

P.L. , c. (C.)(now before the Legislature as this bill), section 10 of P.L.1977, c.74 (C.58:10A-10), section 19 of P.L.1954, c.212 (C.26:2C-19), section 9 of P.L.1970, c.39 (C.13:1E-9), section 13 of P.L. 1970, c. 30 (C. 48:13A-12), section 9 of P.L. 1970, c. 272 (C. 13:9A-9), section 21 of P.L. 1987, c. 156 (C. 13:9B-21), section 3 of P.L.1989, c.118 (C.13:1E-9.3), or section 22 of P.L.1976, c.141 (C.58:10-23.11u), or for a criminal violation occurring in the State of a similar environmental law of the United States:

(5) There is a substantial likelihood that the firm is involved in organized criminal activity;

(6) The management policies or practices of the firm, including any inadequacies in its internal controls, encouraged, facilitated, condoned, or otherwise substantially contributed to the criminal conduct, delay in its detection, or failure to promptly report the conduct or its effects to appropriate government officials, and that the policies, practices or inadequacies in its internal controls have not yet been satisfactorily corrected;

(7) The firm has pleaded guilty pursuant to a negotiated plea agreement that expressly provides for the appointment by the court of an independent environmental monitor; or

(8) There is a likelihood that the firm will commit another environmental crime affecting the land, waters or ambient air within the jurisdiction of this State, whether due to recklessness, negligence or for any other reason.

In making its determination as to the existence of any of these conditions, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or other court proceeding, and shall also consider any other relevant information.

10. (New section) An independent environmental monitor appointed by the court pursuant to subsection e. of section 9 of P.L. , c. (C.) (pending in the Legislature as this bill), shall be a person or persons, partnership, professional corporation or association, or other entity duly qualified to serve in that capacity by reason of education, training, professional experience or expertise, considering the specific nature of the offense for which the business firm is convicted, the terms and conditions of probation, and the nature of the business firm's operations and activities that affect the land, waters or ambient air within the jurisdiction of this State. In no event shall the court appoint any person employed by any political

subdivision, department or agency of the State, or any agency of the federal government.

The independent environmental monitor shall serve for a term prescribed by the court which shall not be less than one year, nor more than five years, or the maximum term of the business firm's probation, whichever is lesser. The defendant firm shall be ordered as a condition of probation to pay the environmental monitor's reasonable fees and any costs reasonably expended in the performance of the environmental monitor's duties, which fees and expenditures shall be subject to review by the court. The court shall, however, be deemed to be the environmental monitor's client for the purposes of the monitor's professional, ethical and fiduciary obligations.

Throughout the term of an independent environmental monitor's service, the court shall have the continuing authority upon motion of the prosecuting attorney, the Department of Environmental Protection, or the environmental monitor, or upon its own motion, to issue any order or to impose any condition necessary to enforce any provision of this section or to achieve its remedial and rehabilitative objectives.

A person appointed an independent environmental monitor pursuant to this section, and any member of his or her immediate family, and any employees of an environmental monitor and their immediate families, shall not during the term of the environmental monitor's service, and for a period of one year thereafter, buy, sell or otherwise trade in any corporate securities, including options to buy or sell any such corporate security, or otherwise maintain or acquire any interest in the defendant business firm, or a parent or subsidiary thereof. Any transaction made in violation of this section shall subject the person to the penalties prescribed in section 17 of P.L.1963, c.192 (C.49:3-43).

11. (New section) a. An environmental monitor appointed by the court shall, within 30 days of appointment, file with the court a compliance and monitoring plan, detailing the specific objectives and responsibilities of the independent environmental monitor and its authority pursuant to this section to perform specific audits, tests, inspections, and any other compliance monitoring or information gathering procedures as may be necessary, which authority shall be limited in scope to those portions of the business firm's operations or management affecting the lands, waters or ambient air within the jurisdiction of this State that are related to the conduct constituting the criminal offense for which the business firm was convicted, or that are responsible for the prevention or detection of that or similar

conduct. The compliance and monitoring plan shall be specially adapted to the particular circumstances of the firm's conviction and its rehabilitative needs so as to ensure compliance with the terms and conditions of probation, reduce the likelihood of future violations affecting any land, waters or ambient air within the jurisdiction of this State that are similar or related to the conduct constituting the instant offense, increase the probability of the prompt detection of any such conduct or its effects, and correct any policies, practices or inadequacies in the business firm's internal controls that may have encouraged, facilitated, condoned or contributed to the criminal conduct, the delay in its detection, or the failure promptly to report such conduct or its effects to appropriate government officials. Compliance with, and implementation of a plan developed pursuant to this subsection shall be made a condition of a firm's probation.

b. A compliance and monitoring plan may include conditions or terms including, but not limited to, requiring a business firm to:

(1) provide the independent environmental monitor with monthly or quarterly reports, for a period of time to be fixed by the court, which shall detail the specific steps taken by the management of the firm to correct any inadequate policies, practices or internal controls, to prevent the recurrence of the conduct which formed the basis for its conviction, to increase the probability of the prompt detection of any such conduct or its effects and to ensure compliance with all of the terms and conditions of probation. The periodic reports shall be in a form developed by the environmental monitor, and the chief executive officer of the firm, and any and all other persons or officers as may be appropriate, may be required to sign all such periodic reports and attest under oath to the accuracy and completeness of the information contained in the report, and any supporting documents attached thereto;

(2) conduct a special audit, internal investigation, test, inspection or other monitoring or information gathering procedure by designated employees, which may be required periodically during the term of probation, and the results of which shall be provided to the environmental monitor;

(3) designate an employee to serve as a special compliance officer, who shall be responsible for providing information to the environmental monitor, and for supervising or monitoring the firm's operations and activities affecting any lands, waters or ambient air within the jurisdiction of this State that are related to

the conduct constituting the instant criminal offense, or the detection of such or similar conduct or its effects:

(4) revise or adopt formal policies or standard operating procedures, including notification protocols for the prompt reporting to appropriate government officials of accidents, releases or other events which may affect any land, waters or ambient air within the jurisdiction of this State; or

(5) conduct employee training and awareness programs designed to communicate to appropriate personnel any policies or standard operating procedures revised or adopted pursuant to the compliance and monitoring plan, and to ensure compliance with all applicable environmental laws and regulations, reduce the likelihood of future environmental violations, increase the probability of the prompt detection of, and appropriate response to any accidents, releases or other events affecting any land, waters or ambient air within the jurisdiction of this State, and to ensure prompt notification of any such events to appropriate government officials.

c. The prosecuting attorney, the Department of Environmental Protection, and the defendant organization shall be provided a copy of the proposed compliance and monitoring plan and shall be afforded an opportunity to comment thereon. The plan filed with the court may be modified by the court at any time upon the motion of the environmental monitor, the Department of Environmental Protection, the prosecuting attorney, or the defendant firm, or on the court's own motion, after giving notice to all of the foregoing parties.

12. (New section) a. The environmental monitor shall prepare quarterly progress reports in the form of certified statements summarizing:

(1) the extent of a business firm's cooperation with the environmental monitor, (2) the extent of a business firm's compliance with any statutory, regulatory or court ordered obligations relating to the firm's conviction, including but not limited to, the payment of any fine, penalty, fee, restitution, or order for the payment of taxed costs in accordance with section 15 of P.L. , c. (C.) (pending in the Legislature as this bill), or other required expenditures, (3) a business firm's compliance with the terms and conditions of the compliance and monitoring plan approved by the court, (4) the steps taken by a business firm to prevent the recurrence of the conduct which formed the basis for its conviction and to ensure that its affairs and operations affecting the land, waters and ambient air within the jurisdiction of this State are being conducted

in accordance with all environmental laws and regulations, (5) the results of any audits, tests, inspections or other compliance monitoring or information gathering procedures performed by the defendant firm or the environmental monitor, and (6) any additional recommendations of the environmental monitor. Copies of the quarterly certified progress reports shall be provided to the court, the defendant organization, the Department of Environmental Protection and to the prosecuting attorney. An annual summary of the certified progress reports shall be prepared by the environmental monitor, and shall, as a condition of probation be required, except as may otherwise be ordered by the court for good cause shown, to be reprinted in any annual report or prospectus prepared by the firm for distribution to its shareholders or potential investors.

b. The defendant business firm and its directors, officers, employees, accountants and other agents shall, as a condition of probation, be required to cooperate with the environmental monitor and to make available for immediate inspection facilities, properties and operations of the organization that affect any lands, waters or ambient air within the jurisdiction of this State, and promptly submit for examination by the environmental monitor any books, paper, minutes, records and any other information, whether in writing or otherwise, concerning those portions of the firm's operations or management affecting the land, waters or ambient air within the jurisdiction of this State that are related to the conduct constituting the criminal offense for which the firm was convicted, or responsible for the prevention or detection of such a similar conduct. No natural person shall, however, be required to sacrifice his or her privilege against self-incrimination, nor shall the firm or any natural person be required to produce or provide access to materials that are legitimately protected by an attorney client privilege. The firm may further apply to the court, on notice to the environmental monitor and the prosecuting attorney, for permission to refuse to turn over or provide access to proprietary information or trade secrets that are completely unrelated to the organization's satisfactory compliance with the terms and conditions of probation, and the compliance and monitoring plan developed in accordance with section 11 of P.L. , c. (C.) (pending in the Legislature as this bill). Upon application to preclude disclosure or access, the court shall review the relevant information, documents or records in camera. In the event that the court orders disclosure of or access to

any proprietary information or trade secret, the court may issue such protective orders as are appropriate and necessary to prevent disclosure of the information or secret to the public, or to any person whose access to, or review of the information or trade secret is not necessary to monitor the organization's compliance with the terms and conditions of probation, or otherwise to effectuate the remedial or rehabilitative objectives of this section.

13. (New section) a. Nothing in sections 9 through 12 of P.L. , c. (C.) (pending in the Legislature as this bill) shall be construed in any way to limit the authority of the court to impose any sentence or reasonable condition of probation, or to issue any order pursuant to any other provision of that act or any other law. Nor shall the provisions of this section be construed in any way to preempt, preclude or limit the authority of the Department of Environmental Protection or any other agency to require the filing of any report or the disclosure of any records or information, to conduct any inspection or investigation, to take any other action authorized by law or regulation, or to pursue any cause of action, judicial or administrative remedy or relief available at law.

b. No condition or term of probation imposed by the court shall be terminated or abridged by reason of the sale, merger, consolidation, reorganization or dissolution of a business firm, and any such conditions or terms of probation shall remain in force and be binding upon the firm or its actual successors in interest, except as may be specifically provided by the court. Actual successors in interest shall be jointly and severally liable for any fines, penalties, orders for restitution, or other court-imposed obligations assessed pursuant to section 3, 4, 5 or 6, and, as applicable, sections 8 through 12 of P.L. , c. (C.) (pending in the Legislature as this bill). The court upon the motion of any interested party or upon its own motion may at any time convene an evidentiary hearing to determine the true status of a business firm, or to ascertain the existence or identity of its actual successors in interest.

The court shall have the continuing authority, upon notice to the prosecuting attorney, the Department of Environmental Protection and any independent environmental monitor appointed by the court, to modify or clarify the terms and conditions of probation, in the court's discretion, where appropriate to take into account any sale, merger, consolidation, reorganization

or dissolution of the organization. The court, in its discretion, may modify or eliminate any previously imposed requirement that is no longer needed to prevent the recurrence of conduct that formed the basis for the conviction, and that imposes an unreasonable burden on the firm's actual successors in interest.

14. (New section) Any natural person who knowingly or purposely violates or disobeys any condition or term of probation imposed pursuant to this section, or who knowingly or purposely aids, promotes or facilitates a business firm, or its actual successors in interest, in doing so, shall be, in addition to any extended or mandatory penalties to which the person may be subject pursuant to section 8 of P.L. , c. (C.), liable for criminal contempt as defined at section 34 of P.L.1981, c.290 (C.2C:29-9). Nothing in this section shall be construed as limiting the liability of the firm itself or its actual successors in interest for criminal contempt.

15. (New section) Whenever a person is convicted of an offense pursuant to section 3, 4, 5, or 6 of P.L. , c. (C.) (pending in the Legislature as this bill), or for violations of the terms or conditions of a business firm's probation, and upon application of the prosecuting attorney, the court shall, in addition to any other disposition authorized by the provisions of that act or any other law, order the defendant to reimburse the prosecuting authority for all reasonable counsel fees and all other costs reasonably incurred by any State, county or municipal law enforcement agency which participated in the surveillance, investigation, arrest or prosecution resulting in the conviction. The amount of taxed costs authorized by this section shall be determined by the court in the manner provided for under the Rules Governing the Court of the State of New Jersey for the recovery of costs and counsel fees by a prevailing party in a civil action. The order for payment of taxed costs authorized by this section shall be part of the judgment of conviction, and shall be payable forthwith, unless the court grants permission for the payment to be made within a specified period of time or in specified installments. Upon a default in the payment of taxed costs or an installment payment, execution may be levied, and such other measures may be taken for collection of the amount in default, as authorized for the collection of an unpaid civil judgment entered against the defendant in an action on a debt. Notwithstanding any other provision of law, all monies collected pursuant to this section shall be disposed of, distributed, appropriated and used in accordance with the

provisions of section 1 of P.L. 1936, c. 135 (N.J.S.2C:64-6) as if the collected monies were the proceeds of property forfeited pursuant to chapter 64 of Title 2C of the New Jersey Statutes.

16. (New section) a. The provisions of sections 2 through 15 of P.L. , c. (C.) (pending in the Legislature as this bill), shall be liberally construed to effectuate the remedial and rehabilitative objectives of these sections.

b. The provisions of sections 2 through 6 of P.L. , c. (C.) (pending in the Legislature as this bill) shall not be construed in any way to preclude a prosecution or conviction for a violation of any other provision of Title 2C of the New Jersey Statutes, or for a criminal violation of any environmental statute. Nor shall the provisions of those sections be construed in any way to preclude the imposition of civil or civil administrative penalties, criminal penalties, or both criminal and civil or civil administrative penalties, by any court or administrative agency of this State under a provision of any other law.

17. N.J.S. 2C:17-2 is amended to read as follows:

2C:17-2 a. [(1)] A person who, purposely or knowingly, unlawfully causes an explosion, flood, avalanche, or collapse of a building [, release or abandonment of poison gas, radioactive material or any other harmful or destructive substance] commits a crime of the second degree. A person who, purposely or knowingly, unlawfully causes widespread injury or damage in any manner commits a crime of the second degree.

[(2) A person who, purposely or knowingly, unlawfully causes a hazardous discharge required to be reported pursuant to the "Spill Compensation and Control Act," P.L. 1976, c. 141 (C. 58:10-23.11 et seq.) or any rules and regulations adopted pursuant thereto, or who, purposely or knowingly, unlawfully causes a release or abandonment of hazardous waste as defined in section 1 of P.L. 1976, c. 99 (C. 13:1E-38) or a toxic pollutant as defined in section 3 of P.L. 1977, c. 74 (C. 58:10A-3) commits a crime of the second degree. Any person who recklessly violates the provisions of this paragraph is guilty of a crime of the third degree. The provisions of N.J.S. 2C:1-6 to the contrary notwithstanding, a prosecution for a violation of the provisions of this paragraph shall be commenced within five years of the date of the discovery of the violation.]

b. A person who recklessly causes widespread injury or damage is guilty of a crime of the third degree.

c. A person who recklessly creates a risk of widespread injury or damage commits a crime of the fourth degree, even if no such injury or damage occurs.

d. A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate widespread injury or damage commits a crime of the fourth degree, if:

(1) He knows that he is under an official, contractual or other legal duty to take such measures; or

(2) He did or assented to the act causing or threatening the injury or damage.

e. For purposes of this section, widespread injury or damage means serious bodily injury to 10 or more people or damage to 10 or more habitations or to a building which would normally have contained at the time of the offense.

(cf: P.L. 1985, c.348, s.1)

18. Section 9 of P.L.1970, c.39 (C.13:1E-9) is amended to read as follows:

9. a. All codes, rules and regulations adopted by the department related to solid waste collection and disposal shall have the force and effect of law. Such codes, rules and regulations shall be observed throughout the State and shall be enforced by the department and by every local board of health, or county health department, as the case may be.

The department and the local board of health, or the county health department, as the case may be, shall have the right to enter a solid waste facility at any time in order to determine compliance with the registration statement and engineering design, and with the provisions of all applicable laws or rules and regulations adopted pursuant thereto.

The municipal attorney or an attorney retained by a municipality in which a violation of such laws or rules and regulations adopted pursuant thereto is alleged to have occurred shall act as counsel to a local board of health.

The county counsel or an attorney retained by a county in which a violation of such laws or rules and regulations adopted pursuant thereto is alleged to have occurred shall act as counsel to the county health department.

Any county health department may charge and collect from the owner or operator of any sanitary landfill facility within its jurisdiction such fees for enforcement activities as may be established by ordinance or resolution adopted by the governing body of any such county. Such fees shall be established in accordance with a fee schedule regulation to be adopted by the

department, pursuant to law, within 60 days of the effective date of this amendatory act and shall be utilized exclusively to fund such enforcement activities.

All enforcement activities undertaken by county health departments pursuant to this subsection shall conform to all applicable performance and administrative standards adopted pursuant to section 10 of the "County Environmental Health Act," P.L. 1977, c. 443 (C. 26:3A2-28).

b. Whenever the commissioner finds that a person has violated any provision of P.L. 1970, c. 39 (C. 13:1E-1 et seq.), or any rule or regulation adopted, permit issued, or solid waste management plan adopted pursuant to P.L. 1970, c. 39, he shall:

(1) Issue an order requiring the person found to be in violation to comply in accordance with subsection c. of this section;

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

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

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

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

Pursuit of any of the remedies specified under this section shall not preclude the seeking of any other remedy specified.

c. Whenever the commissioner finds that a person has violated any provision of P.L. 1970, c. 39, or any rule or regulation adopted, permit issued, or solid waste management plan adopted pursuant to [P.L. 1970, c. 39], that act he may issue an order specifying the provision or provisions of [P.L. 1970, c. 39] the act, or the rule, regulation, permit or solid waste management plan of which the person is in violation, citing the action which constituted the violation, ordering abatement of the violation, and giving notice to the person of his right to a hearing on the matters contained in the order. The ordered party shall have 20 days from receipt of the order within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the

commissioner may issue a final order. If no hearing is requested, then the order shall become final after the expiration of the 20-day period. A request for hearing shall not automatically stay the effect of the order.

d. The commissioner, a local board of health or county health department may institute an action or proceeding in the Superior Court for injunctive and other relief, including the appointment of a receiver for any violation of this act, or of any code, rule or regulation promulgated, permit issued or solid waste management plan adopted pursuant to this act and said court may proceed in the action in a summary manner. In any such proceeding the court may grant temporary or interlocutory relief, notwithstanding the provisions of R.S. 48:2-24.

Such relief may include, singly or in combination:

- (1) A temporary or permanent injunction;
- (2) Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and litigating the case under this subsection;
- (3) Assessment of the violator for any cost incurred by the State in removing, correcting or terminating the adverse effects upon water and air quality resulting from any violation of any provision of this act or any rule, regulation or condition of approval for which the action under this subsection may have been brought;
- (4) Assessment against the violator of compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by any violation of this act or any rule, regulation or condition of approval established pursuant to this act for which the action under this subsection may have been brought. Assessments under this subsection shall be paid to the State Treasurer, or to the local board of health, or to the county health department, as the case may be, except that compensatory damages may be paid by specific order of the court to any persons who have been aggrieved by the violation.

If a proceeding is instituted by a local board of health or county health department, notice thereof shall be served upon the commissioner in the same manner as if

the commissioner were a named party to the action or proceeding. The department may intervene as a matter of right in any proceeding brought by a local board of health or county health department.

e. The commissioner is authorized to assess a civil administrative penalty of not more than \$50,000.00 for each violation provided that each day during which the violation continues shall constitute an additional, separate and distinct offense. The commission shall not assess a civil administrative penalty in excess of \$25,000.00 for a single violation, or in excess of \$2,500.00 for each day during which a violation continues, until the department has adopted, pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), regulations requiring the commissioner, in assessing a civil administrative penalty, to consider the operational history of the facility at which the violation occurred, the severity of the violation, the measures taken to mitigate or prevent further violations, and whether the penalty will maintain an appropriate deterrent. No assessment shall be levied pursuant to this section until after the violator has been notified by certified mail or personal service. The notice shall include a reference to the section of the statute, rule, regulation, order, permit condition or solid waste management plan violated, a concise statement of the facts alleged to constitute a violation, a statement of the amount of the civil administrative penalties to be imposed, and a statement of the party's right to a hearing. The ordered party shall have 20 calendar days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, the notice shall become a final order after the expiration of the 20-day period. Payment of the assessment is due when a final order is issued or the notice becomes a final order. The authority to levy a civil administrative penalty is in addition to all other enforcement provisions in P.L. 1970, c. 39, and the payment of any

assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. The department may compromise any civil administrative penalty assessed under this section in an amount the department determines appropriate.

f. Any person who violates the provisions of this act or any code, rule or regulation promulgated pursuant to this act shall be liable to a penalty of not more than \$50,000.00 per day, to be collected in a civil action commenced by a local board of health, a county health department, or the commissioner.

Any person who violates an administrative order issued pursuant to subsection c. of this section, or a court order issued pursuant to subsection d. of this section, or who fails to pay an administrative assessment in full pursuant to subsection e. of this section is subject upon order of a court to a civil penalty not to exceed \$100,000.00 per day of such violations.

Of the penalty imposed pursuant to this subsection, 10% or \$250.00, whichever is greater, shall be paid to the department from the General Fund if the Attorney General determines that a person is entitled to a reward pursuant to section 2 of P.L. 1987, c. 158 (C. 13:1E-9.2).

Any penalty imposed pursuant to this subsection may be collected with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). The Superior Court and the municipal court shall have jurisdiction to enforce the provisions of "the penalty enforcement law" in connection with this act.

g. Any person who purposely or knowingly:

(1) Transports any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(2) Generates and causes or permits to be transported any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(3) Disposes, treats, stores or transports hazardous waste without authorization from the department;

(4) Makes any false or misleading statement to any person who prepares any hazardous waste application.

label, manifest, record, report, design or other document required to be submitted or otherwise filed with or, provided to the department; or

(5) Makes any false or misleading statement on any hazardous waste application, label, manifest, record, report, design or other document required to be submitted or otherwise filed with or provided to the department shall, upon conviction, be guilty of a crime of the third degree and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than [\$50,000.00] \$250,000.00 for the first offense and not more than [\$100,000.00] \$500,000.00 for the second and each subsequent offense and restitution, in addition to any other appropriate disposition authorized by subsection b. of N.J.S. 2C:43-2.

h. Any person who recklessly or negligently:

(1) Transports any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(2) Generates and causes or permits to be transported any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(3) Disposes, treats, stores or transports hazardous waste without authorization from the department;

(4) Makes any false or misleading statement to any person who prepares any hazardous waste application, label, manifest, record, report, design or other document required to be submitted to, or otherwise filed with, or provided to the department; or

(5) Makes any false or misleading statement on any hazardous waste application, label, manifest, record, report, design or other document required to be submitted to, or otherwise filed with, or provided to the department, shall, upon conviction, be guilty of a crime of the fourth degree and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than \$100,000.00 for the first offense and not more than \$200,000.00 for the second and each subsequent offense and restitution, and to any other appropriate disposition authorized by subsection b. of N.J.S. 2C:43-2.

i. Any person who, regardless of intent, generates and causes or permits any hazardous waste to be transported, transports, or receives transported hazardous waste without completing and submitting to the department a hazardous waste manifest in accordance with the provisions of this act or any rule or regulation adopted pursuant hereto shall, upon conviction, be guilty of a crime of the fourth degree, and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than \$50,000.00 for the first offense and not more than \$100,000.00 for the second and each subsequent offense and restitution, in addition to any other appropriate disposition authorized by subsection b. of N.J.S. 2C:43-2.

j. All conveyances used or intended for use in the willful discharge, in violation of the provisions of P.L. 1970, c. 39 (C. 13:1E-1 et seq.), of any solid waste, or hazardous waste as defined in P.L. 1976, c. 99 (C. 13:1E-38 et seq.) are subject to forfeiture to the State pursuant to the provisions of P.L. 1981, c. 387 (C. 13:1K-1 et seq.).

k. [The] Notwithstanding the provisions of N.J.S. 2C:1-6 [to the contrary notwithstanding], a prosecution for a violation of the provisions of subsection g., subsection h. or subsection i. of this section shall be commenced within five years of the date of discovery of the violation. For the purposes of subsections g., h., i. and j. of this section, "hazardous waste" means any solid waste or combination of solid wastes, including toxic, corrosive, irritating, sensitizing, radioactive, biologically infectious, explosive or flammable solid waste, which poses a present or potential threat to human health, living organisms or the environment, provided that the solid waste is hazardous in accordance with the standards and procedures established therefor by the Department of Environmental Protection.

l. Any person who knowingly or purposely violates a solid waste interdistrict waste flow order commits an offense. An offense under this subsection is a crime of the fourth degree if the amount of solid waste involved is at least 10 cubic yards or 500 United States gallons. An offense under this subsection is a
crime of the third

degree if the amount of solid waste involved is at least 1000 cubic yards or 50,000 United States gallons. The quantity of solid waste involved for determining the degree of offense pursuant to this subsection shall be determined by the trier of fact. Where the indictment or accusation so provides, the quantity of solid waste involved in individual unlawful acts constituting violations of this subsection may be aggregated in determining the grade of the offense, provided that each individual act constituting a violation of this subsection was committed within the applicable statute of limitations, or the indictment or accusation may provide that each day during which the violation continues constitutes an additional, separate, and distinct offense.

(cf: P.L. 1987, c.158, s.1)

19. Section 2 of P.L.1989, c.118 (C.13:1E-9.3) is amended to read as follows:

2. a. No person shall, regardless of intent, engage, or be permitted to engage, in the collection or disposal of solid waste in excess of 0.148 cubic yards of solids or 30 United States gallons of liquids, whether for profit or otherwise, except at a disposal site or any other place which has authorization from the Department of Environmental Protection or the Board of Public Utilities to accept solid waste.

b. No person shall, regardless of intent, transport or cause or permit to be transported any solid waste in excess of 0.148 cubic yards of solids or 30 United States gallons of liquids, whether for profit or otherwise, to a disposal site or any other place which does not have authorization from the Department of Environmental Protection or the Board of Public Utilities to accept solid waste.

c. The provisions of this section shall be enforced by the Attorney General, any county prosecutor, or by the Department of Environmental Protection or the Board of Public Utilities and by every municipality, local board of health, or county health department, as the case may be.

(cf: P.L.1989, c.118, s.2)

20. Section 13 of P.L.1970, c. 30 (C. 48:13A-12) is amended to read as follows:

13. a. Any person or any officer or agent thereof who shall knowingly violate any of the provisions of this act or aid or advise in such violation, or who, as principal, manager, director, agent, servant or employee knowingly does any act comprising a part of such violation, is guilty of a [misdemeanor] crime of the fourth degree and shall be punished by imprisonment [or not more than three years] or notwithstanding the provisions of N.J.S. 2C:43-3, by a fine of not more than \$50,000.00, or by both; and if a corporation by a fine of not more than \$100,000.00. Each day during which the violation continues constitutes an additional, separate and distinct offense.

b. Any person who shall violate any provision of this act or any rule, regulation or administrative order adopted or issued hereunder, including an interdistrict waste flow order issued in conjunction with the Department of Environmental Protection, or under any applicable provision of Title 48 of the Revised Statutes, or who shall engage in the solid waste collection business or solid waste disposal business without having been issued a certificate of public convenience and necessity, shall be liable to a penalty of not more than \$10,000.00 for a first offense, not more than \$25,000.00 for a second offense and not more than \$50,000.00 for a third and every subsequent offense. Each day during which the violation continues constitutes an additional, separate and distinct offense. The penalties herein provided shall be enforced by summary proceedings instituted by the board under "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). The Superior Court and the municipal courts shall all have jurisdiction to enforce "the penalty enforcement law" in connection with this act.

c. Whenever it shall appear to the Board, a municipality, local board of health, or county health department, as the case may be, that any person has violated, intends to violate, or will violate any provision of this act or any rule, regulation or administrative order duly promulgated hereunder, or under any applicable provision of Title 48 of the Revised Statutes, the Board, the municipality, local board of health or county health department may
institute a civil

action in the Superior Court for injunctive relief and for such other relief as may be appropriate in the circumstances, and the said court may proceed in any such action in a summary manner.

d. Any person who knowingly or purposely violates an interdistrict waste flow order commits an offense. An offense under this subsection is a crime of the fourth degree if the amount of solid waste involved is at least 10 cubic yards or 500 United States gallons. An offense under this subsection is a crime of the third degree if the amount of solid waste involved is at least 1000 cubic yards or 50,000 United States gallons. The quantity of solid waste involved for determining the degree of offense pursuant to this subsection shall be determined by the trier of fact. Where the indictment or accusation so provides, the quantity of solid waste involved in individual unlawful acts constituting violations of this subsection may be aggregated in determining the grade of the offense, provided that each individual act constituting a violation of this subsection was committed within the applicable statute of limitations, or the indictment or accusation may provide that each day during which the violation continues constitutes an additional, separate, and distinct offense.

(cf: P.L. 1989, c.118, s.1)

21. Section 9 of P.L. 1970, c. 272 (C. 13:9A-9) is amended to read as follows:

9. a. Any person who violates any order by the commissioner, or violates any of the provisions of this act, shall be liable to the State for the cost of restoration of the affected wetland to its condition prior to such violation insofar as that is possible, and shall be punished by a fine of not more than \$1,000.00, to be collected in accordance with the provisions of the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.).

b. A person who purposely, knowingly, recklessly, or negligently violates this act shall be guilty, upon conviction, of a disorderly persons offense and shall notwithstanding the provisions of N.J.S. 2C:43-3, be subject to a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation for the first offense and a fine of not less than \$5,000.00 nor more

than \$50,000.00 per day of violation for the second offense, or by imprisonment, or by both. A person who purposely or knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to this act, shall, upon conviction, be guilty of a crime of the fourth degree and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than \$10,000.00 or by imprisonment, or by both.

(cf: P.L.1970, c.272, s.9)

22. Section 21 of P.L. 1987, c. 156 (C. 13:9B-21) is amended to read as follows:

21. a. Whenever, on the basis of available information, the commissioner finds that a person is in violation of any provision of this act, or any rule or regulation adopted, or permit or order issued, pursuant to this act, the commissioner may:

- (1) Issue an order requiring any such person to comply in accordance with subsection b. of this section; or
- (2) Bring a civil action in accordance with subsection c. of this section; or
- (3) Levy a civil administrative penalty in accordance with subsection d. of this section; or
- (4) Bring an action for a civil penalty in accordance with subsection e. of this section; or
- (5) Petition the Attorney General to bring a criminal action in accordance with subsection f. of this section.

Recourse to any of the remedies available under this section shall not preclude recourse to any of the other remedies.

b. Whenever, on the basis of available information, the commissioner finds a person in violation of any provision of this act, or of any rule or regulation adopted, or permit or order issued, pursuant to this act, the commissioner may issue an order: (1) specifying the provision or provisions of this act, or the rule, regulation, permit or order of which he is in violation; (2) citing the action which constituted the violation; (3) requiring compliance with the provision or provisions

violated; (4) requiring the restoration of the freshwater wetland or transition area which is the site of the violation; and (5) providing notice to the person of his right to a hearing on the matters contained in the order.

c. The commissioner is authorized to institute a civil action in Superior Court for appropriate relief from any violation of any provisions of this act, or any rule or regulation adopted, or permit or order issued, pursuant to this act. Such relief may include, singly or in combination:

- (1) A temporary or permanent injunction;
- (2) Assessment of the violator for the costs of any investigation, inspection, or monitoring survey which led to the establishment of the violation, and for the reasonable costs of preparing and bringing legal action under this subsection;
- (3) Assessment of the violator for any costs incurred by the State in removing, correcting, or terminating the adverse effects upon the freshwater wetland resulting from any unauthorized regulated activity for which legal action under this subsection may have been brought;
- (4) Assessment against the violator for compensatory damages for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized regulated activity. Assessments under this subsection shall be paid to the State Treasurer, except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized regulated activity;
- (5) A requirement that the violator restore the site of the violation to the maximum extent practicable and feasible.

d. The commissioner is authorized to assess a civil administrative penalty of not more than \$10,000.00 for each violation, and each day during which each violation continues shall constitute an additional, separate, and distinct offense. Any amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, and duration. No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service. The

notice shall identify the section of the statute, regulation, or order or permit condition violated; recite the facts alleged to constitute a violation; state the amount of the civil penalties to be imposed; and affirm the rights of the alleged violator to a hearing. The ordered party shall have 20 days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, the notice shall become a final order after the expiration of the 20-day period. Payment of the assessment is due when a final order is issued or the notice becomes a final order. The authority to levy an administrative order is in addition to all other enforcement provisions in this act, and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. Any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation.

e. A person who violates this act, an administrative order issued pursuant to subsection b., or a court order issued pursuant to subsection c., who fails to pay a civil administrative assessment in full pursuant to subsection d., shall be subject, upon order of a court, to a civil penalty not to exceed \$10,000.00 per day of such violation, and each day during which the violation continues shall constitute an additional, separate, and distinct offense. Any civil penalty imposed pursuant to this subsection may be collected with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.). The Superior Court shall have jurisdiction to enforce "the penalty enforcement law" in conjunction with this act.

f. A person who [willfully] purposely, knowingly, recklessly, or negligently violates this act shall be guilty, upon conviction, of a [crime of the fourth

degree] disorderly persons offense and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation [. A second offense under this subsection shall subject the violator to] for the first offense and a fine of not less than \$5,000.00 nor more than \$50,000.00 per day of violation for the second offense, or by imprisonment, or by both. A person who purposely or knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to this act, shall, upon conviction, be guilty of a crime of the fourth degree and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than \$10,000.00 or by imprisonment, or by both.

g. In addition to the penalties prescribed in this section, a notice of violation of this act shall be recorded on the deed of the property wherein the violation occurred, on order of the commissioner, by the clerk or register of deeds and mortgages of the county wherein the affected property is located and with the clerk of the Superior Court and shall remain attached thereto until such time as the violation has been remedied and the commissioner orders the notice of violation removed.

h. If the violation is one in which the department has determined that the restoration of the site to its previolation condition would increase the harm to the freshwater wetland or its ecology, the department may issue an "after the fact" permit for the regulated activity that has already occurred; provided that assessment against the violator for costs or damages enumerated in subsection c. of this section has been made, the creation or restoration of freshwater wetlands resources at another site has been required of the violator, an opportunity has been afforded for public hearing and comment, and the reasons for the issuance of the "after the fact" permit are published in the New Jersey Register and in a newspaper of general circulation

in the geographical area of the violation. Any person violating an "after the fact" permit issued pursuant to this subsection shall be subject to the provisions of this section.

i. The burden of proof and degree of knowledge or intent required to establish a violation of this act shall be no greater than the burden of proof or degree of knowledge or intent which the United States Environmental Protection Agency must meet in establishing a violation of the Federal Act or implementing regulations.

j. The department shall establish and implement a program designed to facilitate public participation in the enforcement of this act which complies with the requirements of the Federal Act and implementing regulations.

k. The department shall make available without restriction any information obtained or used in the implementation of this act to the United States Environmental Protection Agency upon a request therefor.

l. The department may require an applicant or permittee to provide any information the department requires to determine compliance with the provisions of this act.

m. The department shall have the authority to enter any property, facility, premises or site for the purpose of conducting inspections, sampling of soil or water, copying or photocopying documents or records, and for otherwise determining compliance with the provisions of this act.

(cf: P.L.1987, c.156, s.21)

23. N.J.S. 26:2C-19 is amended to read as follows:

26:2C-19. a. If any person violates any of the provisions of this act or any code, rule, regulation or order promulgated or issued pursuant to the provisions of this act, the department may institute a civil action in a court of competent jurisdiction for injunctive or any other appropriate relief to prohibit and prevent such violation or violations and the said court may proceed in the action in a summary manner.

b. Any person who violates the provisions of this act or any code, rule, regulation or order promulgated or issued pursuant to this act shall be liable to a civil

administrative penalty of not more than \$10,000.00 for the first offense, not more than \$25,000.00 for the second offense, and not more than \$50,000.00 for the third and each subsequent offense. If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense. No civil administrative penalty shall be levied except upon an administrative order issued pursuant to section 14 of P.L.1954, c.212 (C.26:2C-14).

c. The department is hereby authorized and empowered to compromise and settle any claim for a penalty under this section in such amount in the discretion of the department as may appear appropriate and equitable under all of the circumstances.

d. Any person who violates the provisions of P.L.1954, c.212 (C.26:2C-1 et seq.) or any code, rule, regulation, or order promulgated or issued pursuant to that act, or a court order issued pursuant to subsection a. of this section, or who fails to pay a civil administrative penalty in full pursuant to section 9 of P.L.1962, c.215 (C.26:2C-14.1), is subject, upon order of the court, to a civil penalty of not more than \$10,000.00 for the first offense, not more than \$25,000.00 for the second offense, and not more than \$50,000.00 for the third and each subsequent offense. If the violation is of a continuing nature, each day during which the violation continues, or each day in which the civil administrative penalty is not paid in full, constitutes an additional, separate and distinct offense. Any penalty imposed under this subsection may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). The Law Division of the Superior Court has jurisdiction to enforce "the penalty enforcement law."

e. A person who causes a release of air contaminants in a quantity or concentration which poses a potential threat to public health, welfare or the environment or which might reasonably result in citizen complaints shall immediately notify the department. A person who fails to so notify the department is liable to the penalties and procedures prescribed in this section.

f. Any person who:

(1) purposely [or], knowingly, or recklessly violates the provisions of P.L.1954, c.212 (C.26:2C-1 et seq.), or any code, rule, regulation, administrative order, or court order promulgated or issued pursuant thereto, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under P.L.1954, c.212, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a monitoring report, or any portion thereof, required pursuant to P.L.1954, c.212, is guilty of a crime of the third degree, and shall, notwithstanding the provisions of subsection b. of N.J.S. 2C:43-3, be subject to a fine of not less than \$5,000 nor more than \$75,000 per day of violation, or by imprisonment, or by both;

(2) [recklessly] negligently violates the provisions of P.L.1954, c.212 (C.26:2C-1 et seq.), or any code, rule, regulation, administrative order, or court order promulgated or issued pursuant thereto, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under P.L.1954, c.212, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a monitoring report, or any portion thereof, required pursuant to P.L.1954, c.212, is guilty of a crime of the fourth degree.

(cf: P.L. 1989, c.333, s.1)

24. Section 22 of P.L. 1976, c. 141 (C. 58:10-23.11u) is amended to read as follows:

22. a. Whenever, on the basis of available information, the department determines that a person is in violation of a provision of P.L.1976, c.141 (C.58:10-23.11 et seq.), including any rule, regulation, plan, information request, access request, order or directive promulgated or issued pursuant thereto, or that a person knowingly has given false testimony, documents or information to the department, the department may:

(1) bring a civil action in accordance with subsection b. of this section;

(2) levy a civil administrative penalty in accordance with subsection c. of this section; or

(3) bring an action for a civil penalty in accordance with subsection d. of this section.

Use of any remedy specified in this section shall not preclude use of any other remedy. The department may simultaneously pursue administrative and judicial remedies provided in this section.

b. The department may commence a civil action in Superior Court for, singly or in combination:

(1) a temporary or permanent injunction;

(2) the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating an action under this subsection;

(3) the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, any income lost from the time the property is damaged to the time it is restored, repaired or replaced, and any reduction in value of the property caused by the discharge by comparison with its value prior thereto;

(4) the cost of restoration and replacement, where practicable, of any natural resource damaged or destroyed by a discharge; and

(5) any other costs incurred by the department pursuant to P.L.1976, c.141.

Compensatory damages for damages awarded to a person other than the State shall be paid to the person injured by the discharge.

c. (1) The department may assess a civil administrative penalty of not more than \$50,000 for each violation, and each day of violation shall constitute an additional, separate and distinct violation. A civil administrative penalty shall not be levied until a violator has been notified by certified mail or personal service of:

(a) the statutory or regulatory basis of the violation;

(b) the specific citation of the act or omission constituting the violation;

(c) the amount of the civil administrative penalty to be imposed;

(d) the right of the violator to a hearing on any matter contained in the notice and the procedures for requesting a hearing.

(2) (a) A violator shall have 20 calendar days following receipt of notice within which to request a hearing on any matter contained in the notice, and shall comply with all procedures for requesting a hearing. Failure to submit a timely request or to comply with all departmental procedures shall constitute grounds for denial of a hearing request. After a hearing and upon a finding that a violation has occurred, the department shall issue a final order assessing the amount of the civil administrative penalty specified in the notice. If a violator does not request a hearing or fails to satisfy the statutory and administrative requirements for requesting a hearing, the notice of assessment of an civil administrative penalty shall become a final order on the 21st calendar day following receipt of the notice by the violator. If the department denies a hearing request, the notice of denial shall become a final order upon receipt of the notice by the violator.

(b) A civil administrative penalty may be settled by the department on such terms and conditions as the department may determine.

(c) Payment of a civil administrative penalty shall not be deemed to affect the availability of any other enforcement remedy in connection with the violation for which the penalty was levied.

(3) If a civil administrative penalty imposed pursuant to this section is not paid within 30 days of the date that the penalty is due and owing, and the penalty is not contested by the person against whom the penalty has been assessed, or the person fails to make a payment pursuant to a payment schedule entered into with the department, an interest charge shall accrue on the amount of the penalty from the 30th day that amount was due and owing. In the case of an appeal of a civil administrative penalty, if the amount of the penalty is upheld, in whole or in part, the rate of interest shall be calculated on that amount as of the 30th day from the date the amount was due and owing under the administrative order. The rate of interest shall be that established by the New

Jersey Supreme Court for interest rates on judgments, as set forth in the Rules Governing the Courts of the State of New Jersey.

(4) The department may assess and recover, by civil administrative order, the costs of any investigation, cleanup or removal, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty pursuant to this subsection. The assessment may be recovered at the same time as a civil administrative penalty, and shall be in addition to the penalty assessment.

d. Any person who violates a provision of P.L.1976, c.141 (C.58:10-23.11 et seq.), or a court order issued pursuant thereto, or who fails to pay a civil administrative penalty in full or to agree to a schedule of payments therefor, shall be subject to a civil penalty not to exceed \$50,000.00 per day for each violation, and each day's continuance of the violation shall constitute a separate violation. Any penalty incurred under this subsection may be recovered with costs in a summary proceeding pursuant to "the penalty enforcement law" (N.J.S.2A:58-1 et seq.) in the Superior Court or a municipal court.

e. All conveyances used or intended for use in the willful discharge of any hazardous substance are subject to forfeiture to the State pursuant to the provisions of P.L.1981, c.387 (C.13:1K-1 et seq.).

f. Any person who:

(1) purposely, knowingly, or recklessly violates the provisions of P.L. 1976, c.141 (C.58:10-23.11 et seq.), or any code, rule, regulation, administrative order, directive, access request, or court order promulgated or issued pursuant thereto, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under P.L.1976, c.141, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, is guilty of a crime of the third degree, and shall, notwithstanding the provisions of subsection b. of N.J.S. 2C:43-3, be subject to a fine of not less than

\$5,000 nor more than \$75,000 per day of violation, or by imprisonment, or by both;

(2) negligently violates the provisions of P.L.1976, c.141 (C.58:10-23.11 et seq.), or any code, rule, regulation, administrative order, directive, access request, or court order promulgated or issued pursuant thereto, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under P.L.1976, c.141, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to that act, is guilty of a crime of the fourth degree.

The criminal penalties provided for in this subsection do not apply to violations of section 3 of P.L.1976, c.141 (C. 58:10-23.11k).

(cf: P.L.1990, c.xxx, s.1)

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

10. a. Whenever the commissioner finds that any person is in violation of any provision of this act, he shall:

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

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

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

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

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

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

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

b. Whenever the commissioner finds that any person is in violation of any provision of this act, he may issue an order (1) specifying the provision or provisions of

this act, or the rule, regulation, water quality standard, effluent limitation, or permit of which he is in violation, (2) citing the action which caused such violation, (3) requiring compliance with such provision or provisions, and (4) giving notice to the person of his right to a hearing on the matters contained in the order.

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

(1) A temporary or permanent injunction;

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

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

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

(5) Assessment against a violator of the actual amount of any economic benefits accruing to the violator from a violation. Economic benefits may include the amount of any savings realized from avoided capital or noncapital costs resulting from the violation; the return earned or that may be earned on the amount of avoided costs; any benefits accruing to the violator as a result of a competitive market advantage enjoyed by reason of the violation; or any other benefits resulting from the violation.

Assessments under paragraph (4) of this subsection shall be paid to the State Treasurer, except that compensatory damages shall be paid by specific order of the court to any persons who have been aggrieved by the unauthorized discharge. Assessments pursuant to actions brought by the commissioner under paragraphs (2), (3) and

(5) of this subsection shall be paid to the "Clean Water Enforcement Fund," established pursuant to section 12 of P.L.1990, c.28 (C.58:10A-14.4).

d. (1) (a) The commissioner is authorized to assess, in accordance with a uniform policy adopted therefor, a civil administrative penalty of not more than \$50,000.00 for each violation and each day during which such violation continues shall constitute an additional, separate, and distinct offense. Any amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, and duration. The commissioner shall adopt, by regulation, a uniform assessment of civil penalties policy by January 1, 1992.

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

(c) In addition to the assessment of a civil administrative penalty, the commissioner may, by administrative order and upon an appropriate finding, assess a violator for costs authorized pursuant to paragraphs (2) and (3) of subsection c. of this section.

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

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

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

(4) The authority to levy a civil administrative penalty is in addition to all other enforcement provisions in this act, and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. Any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation, except that the amount compromised shall not be more than 50% of the assessed penalty, and in no instance shall the amount of that compromised penalty be less than the statutory minimum amount, if applicable, prescribed in section 6 of P.L.1990, c.28 (C.58:10A-10.1). In the case of a violator who is a local agency that enters into an administrative consent

order, the terms of which require the local agency to take prescribed measures to comply with its permit, the commissioner shall have full discretion to compromise the amount of penalties assessed or due for violations occurring during a period up to 24 months preceding the entering into the administrative consent order; except that the amount of the compromised penalty may not be less than the statutory minimum amount, if applicable, prescribed in section 6 of P.L.1990, c.28 (C.58:10A-10.1). A civil administrative penalty assessed against a local agency for a violation of an administrative consent order may not be compromised by more than 50% of the assessed penalty. In no instance shall the amount of a compromised penalty assessed against a local agency be less than the statutory minimum amount, if applicable, prescribed in section 6 of P.L.1990, c.28 (C.58:10A-10.1). The commissioner shall not compromise the amount of any component of a civil administrative penalty which represents the economic benefit gained by the violator from the violation.

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

incurred by the department in preparing and litigating the imposition of the assessment, except that no litigation costs shall be imposed where the appeal ultimately results in a reduction or elimination of the assessed penalty.

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

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

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

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

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

accruing to the violator from the violation. The Superior Court shall have jurisdiction to enforce "the penalty enforcement law in conjunction with this act.

f. (1)(a) Any person who purposely, knowingly, or recklessly violates this act, and the violation causes a significant adverse environmental effect, shall, upon conviction, be guilty of a crime of the second degree, and shall, notwithstanding the provisions of subsection a. of N.J.S.2C:43-3, be subject to a fine of not less than \$25,000 nor more than \$250,000 per day of violation, or by imprisonment, or by both.

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

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

(3) Any person who negligently violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this

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

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

(5) As used in this subsection, "purposely," "knowingly," "recklessly," and "negligently" shall have the same meaning as defined in N.J.S.2C:2-2.

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

h. The amendatory portions of this section, as set forth in P.L.1990, c.28 (C.58:10A-10.1 et al.), except for subsection f. of this section, shall not apply to violations occurring prior to July 1, 1991.

(cf: P.L.1990, c.28, s.5)

26. Section 12 of P.L. 1972, c. 185 (C. 58:16A-63) is amended to read as follows:

12. [(a)] a. Any person who knowingly violates a provision of this act or a rule, regulation or order adopted pursuant to this act shall be subject to a penalty of not more than \$2,500.00 for each

offense and any person who otherwise violates a provision of this act shall be subject to a penalty of not more than \$1,500.00 for each offense both, to be collected by the department in a summary proceeding under the Penalty Enforcement Law (N.J.S. 2A:58-1 et seq.), and in any court of competent jurisdiction wherein injunctive relief has been requested. The Superior Court and county district court shall have jurisdiction to enforce said Penalty Enforcement Law. If the violation is of a continuing nature each day which it continues shall constitute an additional, separate and distinct offense. The department is hereby authorized and empowered to compromise and settle any claim for a penalty under this section in such amount in the discretion of the department as may appear appropriate and equitable under all of the circumstances. All moneys recovered in any such action, together with the costs recovered therein, shall be paid to the Environmental Services Fund.

[(b)] b. If any person violates any of the provisions of this act or any rule or regulation promulgated pursuant to the provisions of this act, the department may institute an action in a court of competent jurisdiction for injunctive relief to prohibit and prevent such violation or violations and the said court may proceed in the action in a summary manner.

c. A person who purposely, knowingly, recklessly, or negligently violates this act shall be guilty, upon conviction, of a disorderly persons offense and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation for the first offense and a fine of not less than \$5,000.00 nor more than \$50,000.00 per day of violation for the second offense, or by imprisonment, or by both. A person who purposely or knowingly makes a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or who falsifies, tampers with or knowingly renders inaccurate, any monitoring device or method required to be maintained pursuant to this act, shall, upon conviction, be guilty of a crime of the fourth degree and shall, notwithstanding

N.J.S. 2C.43-3, be subject to a fine of not more than \$10,000.00,
or by imprisonment, or by both.

(cf: P.L..1979, c.59, s.7)

27. This act shall take effect immediately.

SYNOPSIS

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ASSEMBLYMAN ROBERT G. SMITH (Chairman): My name is Bob Smith. I represent the 17th Legislative District. Welcome to Piscataway Township, which is a beautiful central New Jersey town in the 17th Legislative District. This is the Assembly Energy and Environment Committee. We are here today to review A-1726, the Comprehensive Environmental Criminal Penalties Act of 1990. Let me first introduce to you the members of our panel who are present at this time. To my right is Assemblyman Neil Cohen who represents Union County, and to my left two places over is Assemblyman Arthur Albohn. Assemblyman Albohn represents Morris County. And we will shortly be joined by Assemblyman Tom Duch who represents Passaic County.

Let me, on behalf of Mayor Ted Light and the Township Council of Piscataway, welcome you here to Piscataway. They've been kind enough to allow us to utilize the municipal building and have certainly made us feel at home.

As an introductory comment to A-1726, the Comprehensive Environmental Penalties Act, which I am the sponsor of with Assemblywoman Marlene Lynch Ford, let me lay a little foundation for this legislation. You should be aware of the fact that in the 1980s New Jersey's record in environmental criminal prosecutions was really not exemplary. In fact, the word "appalling" might be used as a better description.

On the average, in the 1980s, less than two environmental criminals per year were incarcerated during the entire decade. Approximately half-a-million dollars per year was collected during the 1980s in criminal penalties. The Federal government's record is, quite frankly, no better. And I would cite for you a Wall Street Journal article of three weeks ago, and I'll just take a little quote out of that which says as follows, "Judges and juries are beginning to agree" -- that is, that environmental criminal law enforcement should occur at a greater level. "In Fiscal Year 1989, Federal courts handed out prison terms totaling about 37 years and \$11.1

million in fines for environmental crimes, compared with less than two years of sentences and \$198,000 in fines five years earlier, EPA figures show." And that, by the way, is for the entire United States of America, which appears to me to be shameful.

I think as a basic statement or basic principle we should consider the fact that environmental criminals and environmental crimes are as heinous as murder or mugging or any violent crime. Environmental crimes kill our citizens; they affect our health. Exposures to carcinogens can initiate cancers. Our respiratory systems are attacked by air pollutants. Our life spans are shortened. Our rates of illness increase, and consequently, I think the premise that environmental criminals are as violent and as dangerous as people that we normally consider to be criminals or violent criminals, is a true statement; thus, the need for this legislation.

With that preliminary statement, we have a number of individuals, agencies, and organizations that have indicated the desire to testify at this public hearing. Your comments are being recorded for the public record. There will be a transcript of this hearing available shortly. Let us start with our first witness. We have Mr. James J. Lyko from the New Jersey Division of Criminal Justice. Mr. Lyko, if you would come over to the witness table, we'd be happy to hear your comments.

J A M E S J. L Y K O, ESQ.: Thank you.

ASSEMBLYMAN SMITH: And if I might suggest, the one microphone is for the hearing record. I believe the other microphone-- You want to put both microphones together? That's it.

MR. LYKO: Mr. Chairman and members of the Committee, I thank you for the opportunity to speak briefly on this bill. I'm James Lyko. I'm Chief of the Environmental Prosecutors

Bureau within the New Jersey Division of Criminal Justice. And to my left is Ms. Toni Hendricksen who is the Assistant State Environmental Prosecutor, with the Office of State Environmental Prosecutor, Steven Madonna.

Mr. Chairman, let me begin by noting that from a prosecutorial perspective, this is an important bill and it is basically a good bill. It toughens the environmental provisions that currently exist in New Jersey's environmental laws. It gives new tools to law enforcement in the fight that law enforcement has against the pollution that you just referred to, Mr. Chairman. And I think most importantly, it sends out the message that a good environment means good business in the State of New Jersey. And for that reason, the Department of Law and Public Safety can support this bill -- can support most of the main features of this bill.

Mr. Chairman, what I would like to do for a moment is to highlight a couple of those features that we think are among the most significant features of the bill. Firstly, this bill creates for the first time in the State of New Jersey, criminal penalties for significant violations of the State's solid waste laws. Now as we all know, solid waste in this State has been a serious problem in recent years and yet we have not had criminal provisions to address the more egregious types of solid waste violations.

We have criminal provisions for hazardous waste violations, for medical waste, for water pollution, for air pollution, but we've had no criminal provisions for significant solid waste offenses. This bill would create those offenses and that is a significant addition both in terms of solid waste dumping and also with regard to violations of the State's waste-haul requirements that in many ways are both economic and environmental crimes.

Secondly -- a second highlight that I would note, is that the bill enhances the power of the courts to promote

corrective and remedial action in the context of corporate crime. And it does that in two significant ways: One, it articulates the concept of corporate probation in section 9 of the bill; and secondly, it establishes the authority of the courts to appoint what is called in the bill an Environmental Monitor, as a condition of probation when certain predicate facts are established by a preponderance of the evidence. In other words, when it is shown that there is a substantial factual basis for the appointment of the Environmental Monitor, a court would have the authority as a condition of probation to appoint such a monitor to oversee those aspects of the corporation's activities that were involved with the criminal conduct for which the corporation was convicted.

This is an important enhancement of the power of the courts, not only to punish crime but also to make sure that the underlining corrective problems that have to be taken care of are, in fact, corrected. Thirdly, the bill -- again just highlighting some of the significant features -- broadens the types of unlawful releases that are subject to criminal prosecution in section 3 of the bill. And the final point I would note among many significant strengths in this bill, is that it contains enhancement provisions. In other words, it says, "If certain conditions are met, then the grade of the crime can be increased by one grade."

Now, Mr. Chairman, as you well know, the Clean Water Enforcement Act contained this very same type of enhancement provision -- the bill that was signed by the Governor this year. And basically what it says is, "If an environmental crime impacts adversely on an environmentally sensitive or wildlife area, or if it causes a significant adverse environmental effect, then the degree of the crime can be enhanced." We think not only is this a good provision, but it is certainly in keeping with the direction in which the Legislature has already been moving in the Clean Water Enforcement Act.

Now, Mr. Chairman, having said that, I must note that there are some areas -- and I'm not going to detail them here -- but there are some areas, which we think are fairly significant in which the bill does have some problems as to which we'd have some reservations. And certainly we are prepared to willing work with you and with the Committee and with the staff of the Committee to deal and address these problems. A couple of the ones I want to mention right now are:

Firstly, I think, I can only assume that inadvertently the bill does weaken the criminal provisions that currently exist in some significant respects. For example: In section 3 of the bill, the basic criminal provision that is created in section 3 for the unlawful releases absent the enhancement provision, is listed as a third degree crime. Now under current law, an unlawful release of hazardous waste or toxic pollutants absent any enhancement provision is a second degree crime. This bill would, in section 17, delete the existing language in the law that makes such a release a second degree crime and would replace it with the new language in section 3 that would make the basic unlawful release a third degree crime. We think this is an obvious weakening of current law. I can only assume that there was some inadvertence in the drafting of the bill, but certainly this is an aspect that we would wish to have the Committee address.

Likewise, in section 22 of the bill, it weakens the existing criminal provision for violation of the freshwater wetlands statute, reducing the current law from fourth degree to a disorderly person's offense. And I might note that, that is even inconsistent with section 5 of the bill that otherwise creates an upgraded criminal provision for freshwater wetlands.

Secondly, the bill in section 3 and section 5 contains what I would refer to as a downgrade of provision. And essentially what that says is that, "A violator can only be prosecuted for a crime that is one degree less than would

otherwise be warranted if the violator provides remediation of the unlawful release which the violator had caused." Now obviously we want-- All of us in government want, as a matter of policy, to provide incentives to violators, whether they be corporate violators or individuals, to clean up their act. But I suggest that the way to do this is to remove the disincentives to that, rather than to enact this type of provision. Because under this type of provision, a violator, in effect, gets rewarded through a lesser criminal prosecution from doing something that the violator is already required to do under the civil law; namely to clean up the mess that the violator may have made. So I suggest that this type of downgrade provision is not a warranted provision in the criminal law.

And finally, the final point I would note, Mr. Chairman, is that the bill does have a number of drafting problems that again I think we can deal with, with the staff. For example, just to give one example: There are several places in the bill where there are gradations of offenses based on the amount of waste involved, such as the amounts of solid waste -- section 4 of the bill, for example. But the categories are not mutually exclusive, and so the result is that if someone disposed of unlawfully, let's say a thousand cubic yards of solid waste, even though that might otherwise be a third degree offense, it can also technically be a fourth degree offense.

And these are the types of drafting problems that I suggest must be taken care of; not because there is a deficiency in the environmental law, but because the courts in a criminal prosecution will construe these statutes strictly against the State. Therefore, I suggest there has to be a little more precision.

Having said all of that, Mr. Chairman, I'm going to conclude my remarks by going back to where I began. That from

the Department's perspective -- certainly from the perspective of the Prosecutor -- this is a positive bill. It's a good bill. It's a bill that certainly we can support and to which we will work with you and the Committee in dealing with some of these problems that I have noted. Thank you very much.

T O N I A. H E N D R I C K S E N, ESQ.: Mr. Chairman, members of the Committee, I would just like to express Mr. Madonna's regrets for not being able to be here this morning. He had a long planned commitment out of town and was unable to address this Committee on a bill with which he has been so personally involved. I express those regrets to this Committee.

As a member of the Department of Law and Public Safety, the Environmental Prosecutors Office, of course, joins in all of the comments that were made by my colleague, Mr. Lyko. And we thank the Committee for giving us this opportunity to come in and be heard on one of the most important, if not the most important, environmental bills to be addressed in recent time. Thank you.

ASSEMBLYMAN SMITH: Let me express the appreciation of the Committee to the Division of Criminal Justice for sending both of you here today. Let me make a request, and that is that next week, that we schedule some time with our Committee staff and the Division of Criminal Justice so that the technical corrections and imperfections that we may see in the bill can be properly addressed. We'd like to see this bill move ahead in the month of October, and I think the way we can expedite this is by getting the Division of Criminal Justice and our Committee staff together.

Let me also say for the record how pleased I am and how pleased the Committee is with Mr. Madonna's performance as Environmental Prosecutor. I think Governor Florio, in appointing the first Environmental Prosecutor to my knowledge in the United States, has done a real service for the people of the State of New Jersey. And as we watch Mr. Madonna's efforts

on behalf of the citizens of the State in prosecuting environmental criminals, we're very much impressed with the diligence of not only him, but his office, in trying to correct many of the problems that have unfortunately not been addressed as aggressively as they should have been in the past. So please pass back to Mr. Madonna our appreciation and admiration.

And with that, let me ask that the Division of Criminal Justice stay for the entirety of the hearing, and also, we may need to call you back if we run into some questions that require your input. So thank you for appearing today. So that we can get a balanced presentation, let me ask that Mr. Bozarth, who is the head of the Chemical Industry Council of New Jersey, come forward and let's hear some opposing points of view.

H A L B O Z A R T H: Thank you, Mr. Chairman.

ASSEMBLYMAN SMITH: Good morning.

MR. BOZARTH: Good morning. It's a pleasure to be here in Piscataway.

ASSEMBLYMAN SMITH: Right, and by the way, is that microphone turned on okay?

MR. BOZARTH: Seems to be.

ASSEMBLYMAN SMITH: Good. And move it as close as you can so that we can hear what you are saying.

MR. BOZARTH: How's that?

ASSEMBLYMAN SMITH: Thank you.

MR. BOZARTH: Mr. Chairman, I do appreciate the opportunity to testify here today on something which causes the folks in the business community that I represent an immense amount of worry. I think that the testimony you'll hear today following me, especially from some of the legal scholars who have looked at this issue, will be quite informative from your point of view.

I want to take a second to give you an overview of the position that the industry that I represent has on this bill,

number one, and also to read excerpts of material that has been presented to me by some of the finest environmental attorneys in the State.

I would say, however, first of all, that the folks that I represent comprise about 105 member companies in the chemical and allied products industry throughout the State of New Jersey. We represent approximately 117,000 jobs in the State, \$17 billion in sales, and a major financial presence in the State. And that's one of the reasons, frankly, Mr. Chairman, that we're dismayed at the draconian measures this bill takes with regard to "crimes which have no harm to the environment" which are dealt with, and the responsibility of acts which are basically negligent. To have those accidents and those things that people do not try to do, are mandated to have criminal penalties and mandatory minimal and maximum sentences, to me goes a bit far. I think draconian is probably a mild way of looking at things from my point of view.

The matter in which the bill deals with "those who dare violate" -- and I use those words in quotes -- the strictures of environmental law and regulations is reminiscent -- in one lawyer's opinion -- of the manner in which the Spanish church dealt with heretics in the days of Torquemada.

If passed, the statute would provide a Constitutional field day for lawyers, particularly those versed in the prohibition against cruel and unusual punishment. It is, on balance, an ugly and mean-spirited statute which presumes that behaviors violative of the rules and regs of DEP are suitable for harsh punishment regardless of whether the person knew the activities were in violation of law, regardless of whether any harm whatsoever befell the environment. I don't use those terms lightly. There are major flaws from our point of view with what the bill does in that specific instance.

The theme of this bill is an old theme historically. It deals with crime and punishment as things throughout history

have done for so long, so often. One of the things that our society is built on is the fact that the punishment must fit the crime. This bill takes that concept of legal jurisprudence and throws it out the window, after 200-and-some-odd years of refining what that means. It creates whole new classes of criminal behavior, again without regard to actual negligence on the part of the person with knowledge beforehand, and then provides maximum obscenities, maximum penalties for those activities which, in effect, have caused no environmental harm.

I want to say for the record, Mr. Chairman, that in no way do the folks that I represent think that people who despoil the environment in a willful and knowing fashion should go free. I'm not here saying that in any form or shape that the statutes of the State of New Jersey ought to be most stringent to make sure that the kind of behavior that you're obviously trying to attempt to stop, can be stopped.

However, I think you've gone extraordinarily far in this area. Let me give you one example: "Release" -- in the bill, is defined as, "including the placement of material into a fully lined landfill from which there is no release of the material." In other words, a release for criminal purposes need not be a release into the environment. This creates a strange type of victimless and harmless crime. An unlawful release is a release in violation of any of the numerous rules and regs under the Clean Water Act, air acts, spill acts, etc.

One of the things here that I think you're missing, is that over the last four years or more, many times, with your help specifically, Mr. Chairman, this State has put in place some of the most stringent penalty regulations and laws ever seen in America, and I think one of the things that we have to do is see whether or not the behavior which you so rightly wish to avoid in the future is stopped because of those laws. An example, and I'll only use this one, is the Clean Water Enforcement Act, signed a few scant months ago. Its penalty provisions have yet to go into place.

As you know, my organization disagreed wholeheartedly in the way those penalties were put in place. However, we don't know the impact of that law yet. We don't know the impact, for a second instance, of the new regulations under the Spill Control Act. We don't know the long-range impact of the millions of dollars of fines that have been applied to specific folks throughout the State that are ongoing. We don't know the effect of the increase prosecutorial activities on the part of Mr. Madonna with the existing tools that he has. We don't know where we stand. And until we have a few years worth of experience, we won't know whether or not we need this kind of legislation, which takes crimes, redefines crimes, and takes activities now defined as crimes under this bill, and forces people and judges to look at mandatory sentencing.

The fines in this bill have risen expendientially: Others will testify today, five, 10, sometimes 30 times the amount of the fines today. And yet under only one specific statute on the books now in New Jersey, is a release punishable by \$50,000 per day, per event.

I'm here to tell you, as I have in the past, Mr. Chairman, that that is more than significant to the corporations that I represent. It is not a minor fine. The penalties for violation of rules and regulations existing in the State of New Jersey now are not minor. They do have the attention of the corporate community, as does this bill. This bill has the attention of the corporate community, part of which I represent, for a simple reason: If the State of New Jersey presumes criminality on the part of relatively small transgressions; mistakes made on manifest forces, manifest forms, and forces people to jail for a maximum time -- and parenthetically I might say that mandatory sentences, Mr. Chairman, are applied in the criminal field only during a robbery committed with a gun. With the exception of one environmental statute, that's the only place.

So, in effect, you could run into a situation where a vehicular manslaughter, where a person dies, is treated less strongly than this bill treats a relatively minor transgression of the regulations which has no impact on the environment. I submit to the Committee, that's a bit much. Let me read some more.

Back to releases: This new crime created by this bill is a substitute for the amendment and pardon repeal of N.J.S.A. 2C:17-2, formerly the main criminal code of the environmental crime section. The crime of unlawful release is troublesome precisely because of the loose definition of release and unlawful release. Pure regulatory violations which have nothing to do with actual environmental injury become crimes. As an example: One negligently caught causing an unlawful release is guilty of a crime of the fourth degree, which becomes a third degree just because it occurs in an environmentally sensitive area. Again, this specific section deals more harshly with a negligent spill which no one wanted to occur, which no one could do anything to stop -- more harshly than a negligent vehicle death. Does this make sense? I submit that it doesn't.

Section 3(a) contains a provision that repeats itself several times in the course of the bill; a step-down in the offense by one degree if the person takes remedial steps and provides financial assurance before indictment, pursuant to a consent decree. This places the potential defendant in the position of having to negotiate a consent decree, thereby, perhaps making significant admissions to effect remediation in order to be indicted later for a lesser degree crime. If the purpose is to encourage remedial behavior, this hardly is the way to go. It creates an immediate dilemma between doing the right thing and trying to protect oneself against criminal penalties.

In section 4, dealing with unlawful transportation, disposal of solid waste-- This offense poises a whole series of criminal consequences for merely placing solid waste in other than an authorized facility. It can mean simply going to the wrong landfill with a load of solid waste which causes absolutely no environmental injury to anyone. If the waste involves more than 100 cubic yards or 500,000 gallons, it's a third degree crime.

Under section g., it is a crime to negligently store waste of more than 1000 cubic yards. Neither of these crimes involves necessarily any environmental harm whatsoever. Perhaps strangest of all about this crime, is that under section 4k., if the court refuses to imprison someone, it must sentence that person to community service and revoke driving privileges for one or two years.

Section 5, the wetlands area -- which I'm tangentially interested in -- applies so broadly that any regulated activity in a wetlands in violation of a DEP rural order which results in adverse modification of 10 more acres, can be a third to second degree crime depending upon whether excavation or dredging is involved. It has a step-down provision that if one takes voluntarily remedial action pursuant to a consent decree, the crime can be stepped down to a fourth degree crime. But it is also a fourth degree crime to do absolutely anything in a wetlands or transition area in violation of any rule, reg, or order. Thus, for example, having an inadequate soil and sediment control plan or forgetting to put the flags the right distance into the ground, or other -- some trivial -- purely regulatory, non-environmental affront, can be a fourth degree crime.

Section 6 does for flood plains what section 5 did for wetlands. The developer goes to jail if he makes a mistake; purely an accidental mistake, not with malice or forethought, not with a feeling of making money from his violative activity -- a mistake.

Section 7 underscores the bill's intention that violators of DEP regs go to jail regardless of whether they have caused any harm to anyone except the sensitivities of the offended bureaucrat. Again, the crime must fit the punishment. In this case, a violation of the rules, in an insignificant example, should not accrue to the violator's detriment of spending years in jail on a mandatory sentence given by the judge. It provides that prosecution is not required to have or present any evidence of present or future environmental damage or harm. Indeed, it makes the mere opinion of the agency as to the future of expected consequences of conduct admissible. It makes it clear that it is not an offense if the person was unaware that the conduct was occurring in an environmentally sensitive area, or that it would have an adverse effect.

Section 8 is part of the sentencing provision by which these violators will go to jail. Under 8a. they will stay in jail a minimum mandatory term of one-third to one-half of the term imposed if there has been certain pecuniary losses or false filings, or other aggravating circumstances. Under 8b., there are enhanced penalties for prior offenders. Under 8c., it is intended to prevent people from ever going to trial on their cases. It provides that the courts shall impose the mandatory sentence unless the defendant has pleaded guilty under a plea arrangement.

Section 9 is to insure that after the violator has paid an exorbitant fine criminally, -- not to mention the civil fines -- has remediated any harm, or where no harm is caused, and has served time in jail, he will also lose the business. This section imposes a sentence upon business firms which in effect puts the business in a probationary period under whatever terms the courts wish. And the business firm cannot refuse probation. During the term of probation, DEP

essentially runs the business through an independent Environmental Monitor who serves, not the business interest, but runs the business for the "benefit of the environment."

Sections 10 to 13 flush out the role of the Environmental Monitor, making clear that the business has essentially been forfeited to the Environmental Monitor to do anything and everything the DEP may wish it to do. Of course, the individuals involved have no choice under section 12b. They're required to cooperate with the Environmental Monitor or else risk being thrown back in jail. As if the problem of trying to run a business after having "violated the law" is not enough, under section 13(b) one is prohibited from terminating the business. And one cannot sell the business anyway because successors become jointly and severally liable for all court-imposed obligations.

Now that the person has paid the fines, gone to jail, lost his business to the Environmental Monitor, he has the privilege under section 15 of reimbursing the government for all of its counsel fees and other costs involved in stripping the person of any rights, dignity, or privileges.

Now having said that as a quick background for some of the comments that some of the best legal minds in New Jersey and the environmental area have made, let me recap and sum-up by again telling the Committee what I believe the bill should really deal with, and I believe that the bill must be refashioned to make the punishment fit the crime. I don't think we need to define new crimes, necessarily. I don't see any example save one in the last four or five years when the existing statutory authority was not enough for either the DEP or the Attorney General's Office to go in and to stop the transgression. In fact there has been evidence over the last five years where businesses have, in effect, been shut down at the request of the authorities.

To me, that's the real incident. If one finds a significantly bad actor in terms of an old debate, Mr. Chairman, that bad actor ought to be dealt with in the harshest penalties appropriately fitting the crime. I don't believe for regulatory transgressions and minor acts made with only negligence, that people -- businessmen in the State of New Jersey -- ought to go to jail for any time, for any purpose. I believe one of the major areas that this bill deals with can be dealt with in a civil manner and can be dealt with in a way that the behavior will be proscribed in the future for those other people, and will set an example that that kind of behavior is, and rightly so, not to be tolerated in the State. But to do this kind of activity, to give the prosecutorial arm of the government such unwanted power is to send a chilling signal to the business community that they have no rights.

Thank you, Mr. Chairman. We, too, will continue to provide you and staff with comments, but I must tell you that at this point, there is very little positive that the members that I represent in the chemical and allied product industry can see with this bill.

We urge the Committee to reconsider where this bill is headed and where it's going. We urge the Chairman that should this bill be released from this Committee, that he request the Speaker send this to the Judiciary or the Law and Public Safety Committee so that the people who deal with the criminality of behavior on a daily basis can take a look at this and see whether or not vehicular manslaughter is "less of a crime" than regulatory noncompliance through pure negligence.

Thank you, Mr. Chairman. I appreciate the time.

ASSEMBLYMAN SMITH: Mr. Bozarth, except for those few objections, shall we mark you down in favor of the bill?
(laughter)

MR. BOZARTH: You certainly can't, Mr. Chairman.

ASSEMBLYMAN SMITH: Our next witness will be Ed Lloyd, the General Counsel for the New Jersey Public Interest Research Group. Mr. Lloyd?

E D W A R D L. L L O Y D, ESQ.: Thank you, Mr. Chairman and members of the Committee. Good morning. My name is Edward Lloyd. I'm General Counsel of the New Jersey Public Interest Research Group. New Jersey PIRG is a nonprofit, nonpartisan research organization which advocates on behalf of its members for greater environmental and consumer protection. I'd like to thank the Committee for giving us the opportunity this morning to present our views on the Comprehensive Pollution Control and Enforcement Act of 1990.

NJPIRG strongly supports the immediate passage of this bill. This legislation sends a message to anyone who dares to violate or ignore this State's environmental standards. The strongest statement that a society can make about actions which are abhorrent to its values is to criminalize those activities. Among the values that New Jerseyans consistently and strongly support is the desire for a clean environment -- in the air, on the land, and on the water. New Jerseyans will no longer tolerate the negligence of those values. In this bill, they proclaim the preeminence of those values: "Desecration of our environment is a criminal act which will be prosecuted to the fullest extent of the law."

This legislation criminalizes negligent as well as purposeful violations of the State's environmental laws, and so it should. The message that the people are sending through their legislators is that if anyone's activities impinge upon the State's environment, then they must act with utmost care or be faced with criminal prosecution. Careless disregard for the laws designed to protect the environment should not, and will not, be tolerated. It is important to recognize that the negligence criminalized in this legislation is the equivalent of gross negligence in the civil context. And gross negligence

-- that is the utter disregard of the human victims or the environmental consequences of reckless spills, discharges, dumping, and emissions -- should be a crime. In this regard, this legislation is not breaking any new ground. Such negligence has been made a crime in both clean air legislation and in the Clean Water Enforcement Act signed early this year by Governor Florio. The word "negligence" commonly means accident. But gross negligence that is criminalized in this bill means acting or failing to act in the face of grave known risk that an accident may occur. It is our job to see that these kinds of "reckless disregard" accidents do not occur.

While this legislation sends a clear message as to what conduct will result in criminal prosecution, it also takes a novel and balanced approach to ensure that the conduct will not be repeated. The centerpiece of this legislation is the provision for the court to appoint an independent Environmental Monitor, what I call an Environmental Probation Officer. The Environmental Probation Officer will ensure that future violations of the law do not occur and that full compliance with the law is achieved.

The use of an Environmental Monitor is a unique and creative mechanism to ensure continuing compliance with environmental laws and an appropriate balance to the serious criminal penalties which may be imposed for criminal violations. The Environmental Monitor is a perfect solution to the dilemma of fostering compliance with detailed environmental laws without involving the judiciary in the day-to-day management of the violator. NJPIRG has successfully employed the requirement of ongoing monitoring and compliance in citizen suits under the Federal Clean Water Act. And I might add with the consent and agreement of the defendant in those cases, their use in criminal enforcement will enhance the ability of prosecutors to ensure continued compliance with all of the State's environmental laws.

A second unique provision of this legislation is the requirement of probation for firms convicted of environmental crimes. This requirement also balances the need for stiff penalties for past violations of the law with the necessity for strict compliance with those laws in the future. Indeed, the requirement for mandatory probation should not be limited to merely those firms convicted of first and second degree crimes, as it is now in the bill, but should be extended to include all environmental convictions.

It is also significant that the criminal penalties in the legislation are made even more severe when environmentally sensitive resources are harmed or when a significant environmental effect has occurred as a result of the criminal activity. These triggers for enhanced penalties are employed only in sections 3 and 4 of the legislation, and PIRG believes that they should be included for any and all environmental crimes created by the legislation. In order to accomplish this expansion of the use of the triggers, the definition of "unlawful release" should be expanded to include violations of all environmental laws addressed in the legislation, including the Solid Waste Management Act, the Coastal and Freshwater Wetlands Acts, and any other law enacted for the protection of the environment.

The definition of "environmentally sensitive resources" which trigger the more severe penalties should also be expanded to include coastal and freshwater wetlands, marine water, and local, State, and national parks. The Committee should also provide a mechanism in the legislation for the DEP to add other environmentally sensitive resources to this list through rule making, after opportunity for public notice and comment. Any resource recognized as environmentally valuable in existing legislation or set aside for public recreational or other use should be protected from misuse through the criminal law imposed in this legislation.

The legislation also establishes criminal penalties for violations of the State's solid waste laws including the violation of waste flow orders. It is extremely important that these provisions have been included in the legislation because recent significant increases in the cost of solid waste disposal have created significant and substantial economic incentives for the violation of solid waste laws and waste flow orders. These incentives to violate the law must be counteracted by increased penalties authorized in this legislation.

NJPIRG also applauds the inclusion of the provision to allow the court to order a convicted violator to reimburse the prosecutor for reasonable costs of bringing the action, including reasonable attorneys' fees. A similar provision is included in the citizen suit provision of over a dozen Federal laws and in New Jersey's Environmental Rights Act. NJPIRG and others have successfully used such provisions in civil litigation, and the extension of this remedy to criminal prosecutions should enhance the ability of the State and local prosecutors to enforce environmental laws.

As indicated above, the enhanced criminal penalties contained in this legislation are critically needed to promote increased compliance with the State's environmental laws. There are, however, several instances in the legislation where the penalties for violations of these laws are actually reduced. The relaxation of penalties in these sections should be eliminated from the legislation. Specifically, under current law, causing an unlawful release is a crime of the second degree, but the legislation makes it a third degree crime in section 3 -- subject to upgrades in certain instances. In addition, section 22 of the legislation decriminalizes a violation of the Freshwater Wetlands Act by downgrading the violation from a fourth degree crime to a disorderly person. Finally, sections 3 and 5 of the

legislation permit downgrading of crimes as a result of remediation undertaken by the violator. Remediation which should be required of any violator should not be the basis for reduction of penalties imposed by the Act.

I'd like to comment briefly on some testimony that I've heard already this morning, if I may, Mr. Chairman, and let me start with the idea of environmental harm. Let me talk a little bit about the Federal Clean Water Act that was passed in 1972. Congress recognized in that Act that we should not in civil litigation -- and I submit we should not in criminal litigation -- have to relitigate the question of environmental harm. Congress found that the Federal Clean Water Act prior to 1972 which was based upon -- which could be enforced only by showing environmental harm, was a total failure. That was a finding of the congressional committee when they passed the 1972 Clean Water Act. What Congress did in the '72 Water Act was say, "We're going to prohibit all discharges into any body of water in this country, a discharge will only be allowed when a permit is granted by the agency, and a permit will be granted based upon the technology that exists that can effect that discharge," not whether that discharge will create environmental harm.

If we have technology available to us which can prevent pollution, that technology under the Clean Water Act must be used. I submit that this legislation should not be tied to environmental harm; that we should not, in a criminal prosecution, have to relitigate the basic finding that we have made in environmental legislation over the last 20 years. We have found through various pieces of legislation that the Legislature has enacted, that freshwater wetlands should be protected. We shouldn't have to relitigate the question of whether that's been harmed when we're bringing a criminal prosecution.

The same is true for every other environmental law in this State. That's what this bill does. It says, "We're not going to relitigate." It says, "Where harm is proved under the bill," and that is as it should be. But we should, as a basis, say what the laws that we have on the books have stated, the position that New Jersey takes with respect to environmental harm, and that those laws need not be relitigated in environmental prosecution.

I think the other message that this bill sends is that we want citizens of this State to spend their money on prevention of environmental crimes, not spend their money on defense of environmental crimes. This bill rightfully puts tools in the hands of prosecutors to protect the environment and the people of New Jersey. That it should do.

I have one more comment that I read in the paper and I hope that this is not true. I hope it's not indicative of what the defense bar -- this State is doing. But there was a comment in the paper by an attorney for a municipal utilities authority in the State, and I won't identify it-- I hope the comment is wrong, and I intend to pursue that -- but I just want to suggest that there was a comment in the paper by a counsel to a utilities authority that said, "The utility would be better off not meeting its permit, not spending the money to meet its permit and violating that law over a period of 20 years and paying the penalty." I think one message that we want to send in this bill is, that won't be tolerated; that you can't buy pollution in this State; that if, in fact, financial penalties are not enough to get compliance with environmental laws, then we may need criminal penalties. And I submit that we do need criminal penalties.

One more comment I want to make: that this bill does not make the Environmental Monitor responsible to the DEP. Nor do I think that the Environmental Monitor should be responsible to the DEP. The Environmental Monitor is responsible to the

court, and that's as it should be. And also the defendant has an opportunity and ability to approach the court for a modification of the probation order. So I think there is a balance here, and a balance struck in favor of protecting the environment.

In conclusion, we think that this Act is a giant step forward in the State's effort to prevent and reduce the violation of our environmental laws. And as always, NJPIRG is prepared to work with the Committee to even further improve this legislation. Thank you, Mr. Chairman.

ASSEMBLYMAN SMITH: Mr. Lloyd, thank you for your comments. And now for some opposing viewpoints, Phil Kirschner from the New Jersey Business & Industry Association. Mr. Kirschner?

P H I L I P K I R S C H N E R, ESQ.: I thank you very much, Mr. Chairman, members of the Committee. The New Jersey Business & Industry Association welcomes the opportunity to make its comments on this legislation. NJBIA represents over 13,000 businesses in this State; the vast majority -- over 80% of them -- small businesses employing less than 100 people and employing 1,100,000 people statewide.

NJBIA vigorously opposes this legislation. We believe that the State's efforts should be targeted through those willful and knowing offenders that cause harm to our environment. Sad to say, this legislation goes far beyond that kind of legitimate law enforcement goal.

It provides for criminal penalties of up to 10 years in jail in some instances for those that negligently cause a release into the environment. The bill itself violates the fundamental principle of fairness upon which our criminal law is built; that the "penalty should fit the crime," by making an accident a crime and by generally providing for excessive penalties, given the nature of the act.

Among the major problems that we have with the bill are the criminal penalties for negligence, as we said, up to 10 years for a negligent act. This is a tremendous, tremendous expansion of criminal liability as related to negligence, and is simply excessive and unjust and cannot be defended under any justification.

What negligence is, is a fancy legal term for an accident. It's a mistake. It's an act that is not intended to cause any harm whatsoever. It is not a crime. Even if the mistake has unfortunate consequences -- and accidents do have that sometimes, that's why we call them accidents -- there is an entire civil court system which awards damages often in hundreds of thousands of dollars and millions of dollars. There are administrative penalties, fines, that often run into the hundreds of thousands of dollars to compensate for the damage costs. To subject someone to a criminal indictment, a criminal trial, a possible jail term, and brand him for life a felon, for an accident, is unfair and unjust.

The goal of the criminal law should be to punish those who knowingly and willfully intended to cause some harm, and we support that; but not to send to jail those guilty of an accident, of a mistake. This section of the bill is just simply unfair and should be rejected in whole.

Another shocking aspect of this bill -- we call it absolutely shocking -- is not requiring the prosecution to prove intent to cause harm or the scienter requirement that is present in all our criminal laws. The bill increases the severity of the criminal penalty. Someone can receive one degree, which can be under this five to 10 years in prison we're talking about if the release occurs in an environmentally sensitive area, but it doesn't require the prosecution to prove intent to damage that area. If you are going to subject someone to a possible extra 10 years in prison for causing particular harm, the prosecution, at a minimum, should have to prove intent to commit that aspect of the offense.

As I've stated, section 7 is stunning in stating that it isn't relevant that the person was unaware that his conduct would have a significant impact on the environment and, "The prosecution shall not be required to establish that the person acted in accordance with any prescribed culpability requirement that might otherwise apply to any other material element of the offense." What do you mean, it isn't relevant? Of course it's relevant. It's ridiculous to say it's not relevant. In a criminal prosecution, intent or state of mind is, of course, always relevant.

It is absolutely critical whether a person knowingly and purposely sought to break the law and cause harm, or whether he accidentally or negligently did so. This section says that a person guilty of no more than an honest mistake can go to jail and the prosecution doesn't even have to prove the intent of the person that caused that particular harm. This type of "strict liability" is clearly inappropriate for a criminal prosecution. In criminal prosecutions, intent is always extremely important. To subject a person to further criminal liabilities of up to 10 years in jail without even requiring the government to prove a willful violation to cause that harm is fundamentally unjust and violates, we think, our constitutional precepts of fairness and due process.

The next thing I would like to comment on briefly -- again it goes somewhat towards that same theme -- is, there's no real distinction in this bill between hazardous and nonhazardous substances or, really, rather whether the complained-about release or conduct causes any harm to the environment or not. We believe that there is a big difference in terms of that kind of conduct. As we said, it's bad enough that one can be criminally charged under this bill with accidental conduct. It makes it worse that there isn't any distinction in the bill on whether the violation involves a hazardous substance or one that isn't hazardous; whether, in

fact, anything has leaked into the environment or whether it hasn't leaked into the environment. Those are just some fairness, common sense kinds of things. Of course, it makes a difference -- all those things.

There is a difference between nontoxic materials and toxic materials, and the bill should be amended to make such distinctions and to target the toxic and harmful substances; the ones that actually cause harm.

In terms of the criminal penalties beyond negligence, there is no question -- no question at all -- that knowing and purposeful violations must be treated much more seriously and differently than those that are accidentally committed. Those knowing and purposeful violations deserve the attention and resources of our law enforcement authorities. However, even in those situations the basic precept of the criminal law, that the penalty should fit the crime, still applies and should apply to this kind of conduct. To treat even knowing violations of the law that affect sensitive environmental areas, which under this bill can be groundwater -- and we're not minimizing that at all; groundwater can be anywhere -- to treat those as seriously as manslaughter, sexual assault, and robbery, is clearly excessive.

This type of act, in our view, is simply not the same as killing someone, or engaging in a kind of violent street crime that our citizens so rightly fear. It is simply not the same as killing someone, or putting someone to death.

Again, in terms of the mandatory minimum penalties, the bill calls for mandatory minimum penalties where there is a pecuniary gain or loss over a certain amount of money or there is a cover-up. Again, while granting the seriousness of such actions, the expansion of mandatory minimum terms -- which is a rare concept under our criminal statutes right now, and which is currently applied to crimes which involve the use of a firearm-- To expand that to an environmental violation, is overboard.

This is a rare concept and shouldn't be widened. These types of violations while of course, again, serious, are not the same as putting a gun in someone's face and robbing them at gunpoint and putting them in fear of their lives and treating them the same.

A couple of other things: The section in there, in terms of probationary conditions in the Environmental Monitor surviving the sale of a business-- The section of the bill which states that the conditions of probation and the imposition of an Environmental Monitor may remain even after the sale of the business, is not simply unjust. We believe it's counterproductive to the intent of the bill itself. This provision, in effect, makes the business nontransferable, because a clean buyer is not going to want to be saddled with the sins of another person. It is counterproductive in that the best thing for the public may be for another entity which has no connection at all with the offender and which has a clean environmental record, to buy the business. Yet this section makes that impossible as a practical thing and should be deleted.

There are other disturbing elements of the bill. I wanted to go into the previous ones in more depth, but again they are the distinctions in the bill between penalties for persons and corporations for the same act, which we believe are not only unjust, but we believe are unconstitutional. You are taking the exact act, the exact same offense, and treating two particular people differently, not on what they have done, but on the statutes of whether they're a corporation or whether they're a person. To treat for a criminal prosecution, penalties differently, based on who someone is as opposed to what they have done, again, is not just unjust, but we believe constitutionally flawed.

The expansive powers of the Monitor have been talked about, but one, in particular, which includes giving the

Monitor the power to select any employee in the corporation he or she wants to supervise environmental activities, is also unjust. To have a person come in, select anyone they want, regardless of who is in the corporation, regardless of whether the particular people in the corporation who are charged with environmental compliance and monitoring have done anything wrong or not, again is sort of an arbitrary type approach.

And last, making the defendant pay the cost of the prosecution if convicted-- We don't even make murderers pay the cost of the prosecution. To require this in terms of environmental violations, again, is unjust. In fairness, if this section remains, the State should pay the defendant's counsel fees if, in fact, the defendant is acquitted and the State fails to get a conviction. That would put everyone on a level playing field.

In short, we believe that this bill is excessive. The criminal penalties are unjust. It gives the State tremendous and unfair leverage over the most innocent defendant by raising the threat of a criminal prosecution, even for an accident, unless the company agrees to the State's terms and demands. The penalties imposed under this bill fail the basic test of the penalty bearing a reasonable relationship to the act committed. More balance needs to be shown in this bill. The BIA is willing to work with the Committee, but as previously said, we find precious little -- at least at this stage -- to work with. We would extend ourselves, however, in any way possible to talk with the Committee on it. I thank you very much.

ASSEMBLYMAN SMITH: But for those few objections, we'll note you in favor of the bill. Let me thank the first four speakers: Mr. Lyko from the Division of Criminal Justice, Mr. Bozarth from the Chemical Industry Council, Mr. Lloyd from New Jersey PIRG, and Mr. Kirschner from the New Jersey Business & Industry Association. I think the four of you have very

nicely contrasted the tension that exists in this bill between the various communities in the State. We're going to take a short five-minute break and we will resume shortly.

(RECESS)

AFTER RECESS:

ASSEMBLYMAN SMITH: For those people standing up in the back, if you'd like to have a conversation, just step out into the courtyard. The meeting is reconvened. Let me note for the record that Oliver J. Bartlett, Assistant Vice President, Government Relations, New Jersey Hospital Association, indicated that he wanted to testify. He had to leave. He had a statement in opposition to the bill which we are entering into the record. Our next speaker will be Clare Schulzki from the State Chamber of Commerce. Clare, if you'd come forward?

C L A R E L. S C H U L Z K I: Good afternoon, Mr. Chairman. Thank you for allowing me to testify. I'm just going to sum up my comments because I think our perspective was covered rather well through previous testimony.

The State Chamber strongly opposes ACS-1726 for the following reasons:

- 1) the severity of the penalties,
- 2) the fact that we already have hefty penalty provisions in the State for environmental violations which are enforced, and
- 3) the growing perception that New Jersey is not a good place to do business because of its overregulation.

The State Chamber strongly opposes the provision which provides for a criminal penalty of the third degree for an unintentional violation of environmental laws if it results in significant environmental impact. It seems to us that an

unintentional act is just that; unintentional and an accident. Yet the penalty could possibly carry five to 10 years in prison. This is clearly harsh for an accident.

The State Chamber remains opposed to this legislation because we believe it's unnecessary, it's harsh, and the penalties do not fit the crime. We already have deterrent penalties in this State, existing laws, and regulatory mechanisms that work. That's basically it. I mean we oppose, you can't--

ASSEMBLYMAN SMITH: Clare, in the words of Shakespeare, "Brevity is the soul of wit." Thank you.

MS. SCHULZKI: Okay.

ASSEMBLYMAN SMITH: Our next speaker will be William K. Gourley, Public Service Electric & Gas, IBEW, the International Building and Electrical Workers Union, I gather? Mr. Gourley? (Mr. Walsh accompanies Mr. Gourley to the witness table)

W I L L I A M J. W A L S H, JR.: Good morning, Mr. Chairman. My name is Bill Walsh, Public Service Electric & Gas. Before Mr. Gourley speaks, I'd like to again be brief and echo the comments that you heard this morning, particularly in the area of negligence.

One of the concerns that we have with respect to making negligence a criminal act is that in an environmental law area where it is so complex and complicated and subject to interpretation at times, we think that the whole basis for distinguishing between criminal and civil acts starts to become undermined to a degree. It's very difficult to rely on guilty knowledge and intent as the whole mark of criminal, rather than civil behavior; and that truly criminal behavior will likely meet the intent of purposeful, knowing, and willingly, that's already in the existing legislation -- existing law, so that you don't have to rely on a lesser capability of negligence.

And with that, I'd like to have Mr. Gourley who is an operator with the International Brotherhood of Electrical

Workers at our Bergen generating station give you his sense of this legislation.

W I L L I A M K. G O U R L E Y: Mr. Chairman and members of the Committee I appreciate the opportunity to speak on behalf of the working employees of Public Service Electric & Gas, as well as the 5000 members of the System Council U-2, the IBEW. While we applaud the Committee's efforts to clean up the environment, the problem remains that an accident caused by a malfunction of a piece of equipment in a generating station and the employees' attempts at corrective actions to deminimize the emissions release, would still be held liable -- criminally liable and subject to a prison term -- are unfair.

We, as the employees or the operators of a station -- and I don't know whether the members of the Committee have ever toured a generating station -- have approximately 1000 feet from the fire box to the exhaust stack where the emissions are monitored. When we are alerted to an emission release -- smoke -- we're alerted at 10% opacity and the law requires 20% opacity. So we have an early alert. We have an audible alarm at 20%, and upon immediate corrective action, it's still possible to smoke or to have an emission release for several minutes until the boiler is cleared up -- the gas passage.

We think it's unfair to hold the operators criminally liable and subject to a possible term in jail when through no fault of our own, there is a release. If the operator gets the alert and takes no action, I would say then he is criminally negligible. But if he takes the appropriate action, he has two alternatives: either he takes the action, or trips the unit. Upon tripping the unit, we're still going to have an emissions release for a considerable amount of time, plus the loss of megawatts. Each unit in the Bergen station puts out 275 million watts of power. It could cause other problems when those units are dumped to help clear up an emission release.

Public Service has for many years attempted to stay well within the law on violations of the environment. They are constantly sending us through training to handle the hazardous materials, to prevent releases to the waterways, to prevent releases to the airways. I have several books which are just the operating instructions for the operations of the units. There are many other volumes which instruct us on how to operate the rest of the station. Each operator has to follow the operating instructions; has to remain within the operating parameters, or he subjects himself to disciplinary action by the company.

To have another sword hanging over the employee's head, or a possible jail term, or possible monetary fine, just adds to the stress and confusion of the operations of the unit. And I don't believe that it's necessary, or should be the intent of the law to penalize an operator, or to penalize the employees. Bill?

ASSEMBLYMAN SMITH: Anything else?

MR. WALSH: That pretty much sums up, Mr. Chairman. I think what was particularly telling is that under existing regulations, 20% opacity for an air release is a violation if it lasts for three minutes in any thirty-minute period. I believe that is the way the regs are written.

Mr. Gourley relayed to you how-- Or, Mr. Gourley, rather, related to you how our alarms go off at 10%. Now there is still a significant number of actions that he can take. If at his station in particular you have a boiler which may be seven or 10 stories tall with 24 to 36 individual burners, if he's loading up the unit and gets an alarm as he is progressively loading individual burners into the system so that the unit can reach peak capacity, he's got a pretty good handle on the fact that he puts the burner in and an alarm goes off, and more than likely there's a problem with that particular burner.

When the unit is up and running for an extended period of time, all of a sudden an alarm is tripped, and it takes time for a mechanic to go out and -- it could be three specific floors, three different elevations on that boiler -- inspect burners. Now, if in the back of the operator's mind is, "I have three minutes before I potentially put myself in jeopardy of going to jail" and a minute-and-a-half goes by, if he hasn't heard from that station mechanic, the likely thing to do is just trip the entire unit.

Now, in wintertime or off-peak time, this might not be any particular problem in terms of area reliability. But in the summer on the hottest days, or when his machine is running off system -- and what I mean by off system is the PJM -- the power-pull has not called for that on an economic basis, maybe there are some transmission bottlenecks in the northern end of the State and the unit has to run to keep voltage up, or make sure that there is a supply in that area-- If the unit trips or if the operator is concerned about being criminally liable, he's obviously going to trip that unit.

Mr. Gourley has told you that if he does not follow company procedures, which start by initiating some action at a 10% or half the level of opacity which is required in the regs, he can subject himself to up to 10 days off with no pay. I can tell you that I think that is a significant incentive in itself to make sure that he follows those regs.

ASSEMBLYMAN SMITH: Why would it be your interpretation that the operator would be subject to the penalty? He's following company policies; he's following the operating procedures.

MR. WALSH: The concern is, Mr. Chairman, that -- and accidents will happen regardless of how good your operating procedures are and your maintenance procedures are-- Accidents will happen and someone will be liable, whether it's the

operator or the shift supervisor, or maybe it's a mechanic who didn't run up the stairs fast enough to inspect the burners. I'm not sure who would fall liable under this situation.

ASSEMBLYMAN SMITH: Go ahead.

ASSEMBLYMAN COHEN: Are you suggesting you might be in compliance with certain DEP regs or Federal regs but possibly facing a problem concerning criminal acts? If it's the same act, although it could be in compliance with DEP in terms of percentages, you still might be subject to a criminal penalty?

MR. WALSH: No, that's not what I meant to express--

ASSEMBLYMAN COHEN: That's my inquiry.

MR. WALSH: --Assemblyman Cohen. We have monitors that go off at -- to tell you you're approaching the level. The regs call for 20% opacity. When the stack reaches 10% opacity, then an alarm goes off. An alarm goes off to trigger the operator to send perhaps mechanics to investigate why you're smoking.

ASSEMBLYMAN COHEN: You can have a release, correct?

MR. WALSH: You can have a release that would be less than the regs.

ASSEMBLYMAN COHEN: But is it--

MR. WALSH: But it's an early warning system.

ASSEMBLYMAN COHEN: My question is that the criminal penalties provision deals with releases, and what I need to know -- not necessarily from you, but from the AG's Office -- is whether or not it's possible to have a release that may well be within the stance of a DEP reg but nonetheless be a criminal act under the penalties provision?

MR. WALSH: That I can't answer.

ASSEMBLYMAN SMITH: We're going to get the AG back up at the end of all of the testimony, because I'm sure there are going to be some questions concerning this. But why would Public Service not be able to install a system whereby when the opacity reached 19% the system-- You have an early warning that tells you you're at 10%?

MR. WALSH: Yes.

ASSEMBLYMAN SMITH: Why couldn't you have a system that turned off the system at 19%?

MR. WALSH: The system is the operator, Mr. Chairman. The concern is that the operator takes prudent actions and follows those procedures once he gets that early warning, without the hammer over his head of possibly going to jail, and rather than follow those procedures--

ASSEMBLYMAN SMITH: Right, but you're telling me that by accident there would be an illegal discharge. You're telling me that you have a detection system that at 10% opacity tells the operator that you are halfway to the legal limit and you want to find out what the problem is and solve it. Why can't you simply adjust your system to say at 19%, if the problem hasn't been solved, the system is shut down.

MR. WALSH: Perhaps Mr. Gourley can speak to that.

MR. GOURLEY: The system would be to shut the entire boiler turbine generator down and take 275 million watts of power out of the system, because that is the system. Now our normal procedure when we get the 10% alert is to check the last burner that was put in because that's in all probability the one that's giving us the problem. And that's taken out of service immediately.

ASSEMBLYMAN SMITH: Right.

MR. GOURLEY: Even at that, it's still possible to smoke for a period of time, several minutes, until that entire gas passage is cleared out; the thousand linear feet from the fire box to the stack, so it's possible even after corrective action to smoke beyond three minutes. There are other pieces of equipment -- depending on what fuel is being burned -- that could cause a problem and it takes time to track it down. Even with corrective action it's possible to smoke for five minutes depending on which fuel you're on. And the way I read your

bill, I would be subjected to possible criminal negligence because I smoked for more than three minutes in a 30-minute time frame.

ASSEMBLYMAN SMITH: If you're following the company's policies-- You have five operating manuals here. If you're following their policies, my interpretation is that you're not individually responsible. Your corporation may be responsible for having policies and procedures that are not environmentally protective. There may be an Environmental Monitor appointed. There could be several things that happen. But you're saying you're acting-- In effect, you've been ordered to act according to these procedures. You are carrying out company policy. It's not your individual action, or individual decision that's resulting in the release--

MR. GOURLEY: Upon reading the proposed legislation, the way I read it--

ASSEMBLYMAN SMITH: --and you're not grossly negligent as well. I mean the bill has as a standard, as a threshold, gross negligence. You are acting according to the procedures set down by your company. So, respectfully, I don't see you being individually liable.

MR. GOURLEY: The way I read it, it says, "Anyone who is aware of the discharge, the emission in violation of EP standards, is considered criminally negligible."

ASSEMBLYMAN SMITH: You know what we are going to do? We are going to ask the AG to come back to deal with that specific instance and get some clarification.

MR. GOURLEY: Because under that interpretation, I'm the operator. I'm the one that's going to be first aware of the situation. Now it's my responsibility, not only to follow the operating instructions, but to notify my supervisor, and now both of us become aware of it.

ASSEMBLYMAN SMITH: Right.

MR. GOURLEY: And under the wording that I read, now we are both responsible.

ASSEMBLYMAN SMITH: I don't think so, but we'll see.

ASSEMBLYMAN COHEN: Mr. Chairman?

ASSEMBLYMAN SMITH: Yeah, Mr. Cohen?

ASSEMBLYMAN COHEN: In terms of that hypothetical, the instance you've just described, do you then report-- You report that, make reports out to your company, correct?

MR. GOURLEY: Yes.

ASSEMBLYMAN COHEN: In turn, is there any time where that incident, or something worse than that -- that you may have to go through a process with the BPU or some other government agency to explain what happened or what measures you're taking to remediate?

MR. WALSH: With respect to response to a particular violation?

ASSEMBLYMAN COHEN: Right.

MR. WALSH: Once the violation-- Mr. Gourley can correct me on this if I'm wrong. Once there is a violation, the first thing they do is pick up the phone and call DEP to notify them of the violation.

ASSEMBLYMAN COHEN: So, that's a question I'm going to be dealing with, with the Attorney General's Office, in terms of what Fifth Amendment problems are raised by virtue of our own reporting system. The priority is to -- if a problem occurs -- report it, to let the governmental agencies know for certain for the protection of the public health, safety, and welfare, and then to remediate and abate; to limit the scope of any danger.

My question to the AG's Office is, if companies are taking that action, whether there's going to be a Fifth Amendment problem in terms of this criminal penalties statute where documented information provided through our normal administrative process-- Is that information then going to be

used to prosecute on the criminal side? That's a question that is going to have to be addressed because it would seem that many people, many businesses, might not take any action at all if their action and what information they provide can be construed to be used against them criminally.

MR. GOURLEY: If I may, the one operating instruction pertaining to violation limits of the New Jersey Air Pollution Control Code says, "When a stack emission violation occurs, steps are to be taken immediately to correct the condition, including a load reduction, if necessary. The New Jersey Department of Environmental Protection Emergency Action Line is to be notified and a reason given." And it goes on to say that the office is open 24 hours a day, telephone number, and whatnot. So that is the first thing that I have to do; take my corrective action, and go to find my supervisor. And if we exceed the 20% for three minutes in a 30-minutes time frame, we have to notify the DEP and we have forms to fill out. So as I said, the way I read the proposed legislation, I'm the one who is first aware of the situation and I notify my supervisor and he also becomes aware. And we're both criminally negligible as the legislation is written.

ASSEMBLYMAN SMITH: And just to make sure the record's clear, Mr. Gourley, on the slip indicating you wish to testify it says "PSE&G -- IBEW." Are you here as an individual, or are you here as a representative of the IBEW?

MR. GOURLEY: I'm here as a representative of the IBEW and--

ASSEMBLYMAN SMITH: Okay, and they've authorized you to indicate this position to the Committee?

MR. GOURLEY: Yes.

ASSEMBLYMAN SMITH: Okay.

MR. GOURLEY: --and as a control operator in Bergen station. That is my job--

ASSEMBLYMAN SMITH: Okay.

MR. GOURLEY: --operator of boilers.

ASSEMBLYMAN SMITH: Thank you.

MR. WALSH: Mr. Chairman, one final note.

ASSEMBLYMAN SMITH: Yes?

MR. WALSH: The times there are-- I think there's a side decision that has to be made here, particularly in a situation where an emergency or maximum electrical production situation occurs, where if your unit is running-- If Mr. Gourley's unit is running flat out for area protection and everything else we have available on the system is running flat out on the peak days, and all of a sudden his unit develops a problem, whether it's a burner situation where it starts to smoke, then there are two alternatives: Dump the load and put some people in the dark, or violate the law and put himself potentially liable for a criminal prosecution. If that's the decision-- If society wants a decision to shut the machine off, then that's what we'd like to know. We'll do whatever society wants, in that particular issue.

ASSEMBLYMAN SMITH: Well, actually the question you've raised is a question we dealt with earlier in the year, if you may remember with the bill that was proposed at that time. I don't think there are easy answers to it, but my understanding of the conclusion of that question was that Public Service and the Department of Environmental Protection and the AG's Office were supposed to work that out. I don't know if you have.

MR. WALSH: We're still working on it.

ASSEMBLYMAN SMITH: Still working on it, okay. Well, thank you for bringing your testimony in today. It is most appreciated.

MR. WALSH: Thank you.

ASSEMBLYMAN SMITH: The next speaker is Jane F. Kelly of the New Jersey Utilities Association. Ms. Kelly.

J A N E F. K E L L Y, ESQ.: Mr. Chairman, members of the Committee: I'm Jane Kelly, Executive Director of the New Jersey Utilities Association, and with me is Steve Schmidt who Chairs our Environmental Affairs Committee.

Our member companies are the State's investor-owned electric, gas, water, telecommunications, and sewerage public utilities. Mr. Chairman, to better explain who we are, our member companies employ over 70,000 people in this State, who collectively earn over \$2.2 billion annually in salaries and wages. There are approximately five million shareholders of NJUA member companies; 550,000 of which are New Jersey residents. Our utility plant gross worth is nearly \$25 billion; our current investment in research and development in New Jersey exceeds \$25 million; and we pay close to \$2 billion in taxes annually. Our members provide electricity to over three million customers, gas to over two million customers, and water to over 600,000 customers. Our members provide approximately 4.4 million telephone access lines in New Jersey. In short, Mr. Chairman, our members provide services, in one form or another, to every household or business in this State.

I appreciate the opportunity to appear before you today to comment relative to the Committee Substitute for Assembly Bill No. 1726.

It is our view that this bill is duplicative; that its penalties are excessive and bear no reasonable relationship to certain violations; and that its provisions confuse in their application, the significant distinction between knowing, purposeful, and reckless conduct on the one hand and negligent conduct on the other. We believe, Mr. Chairman, that the negative impact that the bill would have on the economic well-being of the State, and the average working person must be considered and balanced against the unlikelihood that the bill

will make any real difference in the frequency of environmental accidents.

Our industry is already subject to an extensive matrix of environmental laws, regulations, and inspections. We comply with the Superfund Amendments Reauthorization Act, the State and Federal Clean Water Acts, the State and Federal Clean Air Acts, the Resource Conservation and Recovery Act, the Toxic Substance Control Act, the Right to Know Act, the Toxic Catastrophe Prevention Act, and the Freshwater and Coastal Wetlands Protection Acts--

ASSEMBLYMAN SMITH: You obey the law.

MS. KELLY: --etc. We respectfully submit, Mr. Chairman, that the utilities industry maintains a strong commitment to preserving and protecting the environment that meets and exceeds the goals of this bill. It is a commitment born of concern, not coercion.

Our real concern is that the bill will have the opposite of the intended effect; that concern over severe penalties, including incarceration for even uncontrollable accidental conduct, may very well cause our workers to pause and even retreat from their job responsibilities, further labor/management discord, and discourage voluntary reporting. We do not dispute where an individual or a corporation maliciously or purposely seeks to damage the environment or the public health in the name of greed or convenience that they should be punished swiftly and severely. However, I would ask you to consider the following:

- 1) Our members' employees are required by law to perform maintenance work, such as the repair of the existing facilities and public rights-of-way. On occasion, such work might be conducted near environmentally sensitive wetlands, areas which are not clearly delineated. If a worker thinks that he or she is not in a wetlands area, but actually is and does his or her job, should he or she be labeled a criminal?

2) Our workers are sometimes required to pump out manholes prior to repair, inspection, or maintenance work, or to insure uninterrupted service in emergency situations. Where a worker discharges a substance into a storm drain and that substance is later found to be hazardous, is that worker a criminal?

3) Should the puff of smoke which results when a telephone emergency generator engine is started result in the imposition of criminal penalties?

4) Our industry uses some 40,000 motor vehicles in the course of our construction activities. Should a ruptured hydraulic line, particularly where it ruptures in an environmentally sensitive area, result in criminal charges?

5) Should an employee inadvertently transpose the numbers on a waste manifest document, is that employee a criminal?

6) Finally, Mr. Chairman, pursuant to legislation enacted in 1985, air releases must be reported to the DEP within 15 minutes. Such releases are generally the result of a contractor striking a pipeline or a buildup of pressure in the system causing a release of gas for safety purposes. And, I would add that that valve release system is mandated by the Federal DOT. If either of these occurred in an environmentally sensitive area and the DEP were notified, for instance, in 16 minutes, we would ask you to consider that pursuant to this bill, company officials would be guilty of third degree crime and subject to penalties from \$50,000 to \$250,000 or five to 10 years in prison, or both.

Mr. Chairman, I would ask that the Committee consider the concern our employees will no doubt have, and justifiably so, about performing their everyday work, should this bill be enacted into law. Regardless of how sound operating and maintenance procedures are, or how meticulous a worker is when performing his or her duties, accidents will happen. In the

course of negotiations or possibly on site, employers will inevitably be asked to indemnify their employees before they will perform certain tasks. We would ask the Committee to consider the impact that such a situation would have on our members' ability to provide quality and timely service to the public.

We would ask that the Committee, in considering this bill, keep in mind our customers and our employees. We would ask that the Committee be mindful that the recently enacted Clean Water Enforcement bill, the Oil Spill package of bills, and the bounty initiatives have yet to be given a chance to prove their impact. And finally, we would respectfully ask that the Committee look at the excessive nature of these penalties and the inappropriateness of certain mandatory minimum penalties, and amend this bill such that it is properly aimed at those who act purposely and maliciously to harm the environment and the public health.

Thank you.

ASSEMBLYMAN SMITH: Thank you. Are there any other comments? (no response) Okay. Thank you very much.

Before we get to our next speaker, I think the issue has been enjoined pretty intensely about when the law is triggered. And, I think the issue really comes down to, "What is gross negligence?" The examples cited by Mr. Gourley of Public Service and Ms. Kelly of the Utilities Association, I think, need to be addressed now, as opposed to later.

So, let me ask the Attorney General's Office to come forward and let's get a little testimony on that issue. That's Mr. Lyko of the Division of Criminal Justice. (Mr. Lyko and Ms. Hendricksen return to witness table)

Mr. Lyko and Ms. Hendricksen. What is the possibility that the instances cited by Mr. Gourley, the operator for Public Service, could result in a criminal prosecution of him as the operator, or the example cited by Ms. Kelly that the

worker for a utility authority who happens to be near a wetlands and subjects himself to criminal prosecution-- What are the possibilities of that happening under this legislation?

MR. LYKO: Mr. Chairman, first of all, let me add a note that the sound system in the back wasn't working well. I didn't hear all the details in Mr. Gourley's hypothetical. I would say, though, that the concept of negligence -- and I'll address your question more specifically in a moment -- in the criminal law is, in fact, very different than it is in the civil law. When, perhaps, many people think of negligence, they think of it in terms of the tort concept of negligence; If someone fell down on someone else's steps and was injured, there's a concept we have of negligence.

But as was pointed out by Mr. Lloyd in his testimony, in the criminal law sense the term negligence is defined in the penal code, as are the terms "recklessness" and "intentional" and "purposeful." These are all terms that are defined in the penal code; so they are terms of ought. So when we say that the criminal concept of negligence really is one of gross negligence, I say that because that is basically what the penal code says in its definition of "negligence."

Now the concept of negligence, Mr. Chairman, as you well know from some of the recent enactments by the Legislature in this State, has been written into criminal laws already. The two most obvious examples are in reverse order of when they were enacted. Most recently, the Clean Water Enforcement Act, of course, has a gradation of offenses that includes negligent offenses for one category of crime. Then last year, when the Legislature enacted the Regulated Medical Waste Management Act-- That also includes gradation of offenses -- criminal offenses that also include one offense for negligent conduct. And again, negligence, in this sense, refers to gross negligence.

It does not refer to the sort of accidental type of thing -- with due respect to some of the testimony of the witnesses, Ms. Kelly for example, who said that a worker faced incarceration for uncontrollable accidental conduct. That's simply not true. Or that a worker faces criminal prosecution for inadvertently transposing numbers in a hazardous waste manifest; simply not true. Because the proofs would simply not be able to establish either intentional conduct or even something like negligence under that hypothetical as it has been presented. Now certainly there may well be a case where someone caused a release and it was not accidental, and in such a situation, of course, that individual could be culpable.

Now, more to your question, Mr. Chairman, in the context of, let's say, a corporate violation. Could an individual actor -- let's say, within a corporation or a business -- also be prosecuted for a crime along with the corporation? The answer very clearly is yes, if the predicate for culpability is established. In other words, if that worker were, in fact, culpable just as the corporation was, and as you alluded to Mr. Chairman, in your question of the witness-- If an employee was typically following an established corporate practice and corporate policy, certainly a prosecutor would ever be hard-pressed to lay culpability at the doorstep of that employee as opposed to perhaps the corporation, if the policy and practice itself were found to be deficient. That may be the basis for corporate culpability.

Now, if I might, Mr. Chairman, address Assemblyman Cohen's concerns also, relating to the Fifth Amendment concerns.

ASSEMBLYMAN SMITH: Please.

MR. LYKO: As we all well know, the reporting obligations in the environmental laws in many ways are the underpinning of those laws. The agencies of State government are simply not big enough, and the taxpayers are not going to fund that number of members of staff, so that the agencies can

be out there inspecting everything, and, therefore, the environmental statutes are written in many ways with self-reporting in mind; similar to the income tax system. We can all cheat on our income tax if we choose, but we do so at our peril. Likewise with the reporting obligations under the Clean Water Act, under the New Jersey Spill Fund. The Spill Act requires that a company or anyone who causes a spill, report that spill to the regulatory agency. These are affirmative obligations in the law to report. Does that somehow violate the Fifth Amendment -- someone's Fifth Amendment privilege? First of all, as to a corporation or a business type entity, it is well established in the law that a corporation itself has no Fifth Amendment privilege.

ASSEMBLYMAN COHEN: Individuals do.

MR. LYKO: Indeed they do. That's right. But, if the reporting obligation is imposed on the business entity -- and it is -- then obviously the business entity can only act through its individuals. Some individual has to fill out the discharge monitoring report, for example, that is sent to DEP every month or couple of months. So, some individual is involved in it. But under the law, that is an obligation that the corporation has under its permit. The corporation can choose, or the responsible individuals in the corporation can choose not to send in the report, but then, of course, they're subject to having their permit yanked for not doing so. So, part of the condition that our citizens -- our corporate citizens and individual citizens -- have imposed on them to get a permit in the first place, is that they have to provide the reports that are required under the law. That doesn't violate someone's Fifth Amendment privilege.

ASSEMBLYMAN COHEN: We have an entire regulatory system where problems can either go to an administrative law judge for testimony, or for a hearing on certain violations.

MR. LYKO: Yes.

ASSEMBLYMAN COHEN: With that testimony by individuals as to what happened, what transpired-- Since the environmental prosecutor does not preempt all prosecutions statewide, only those that one may seek to prosecute, you have a situation where you go into the administrative law process and civil discovery process, and at the same time you may have a county prosecutor who may wish to prosecute, use all the information that is required to go through an abatement process, a violation process, a penalty process. There would seem to be some mixed problems.

MR. LYKO: Indeed. A very perceptive question, but I might add that it's already something that exists and happens everyday. For example, criminal investigations that my office conducts often involve companies that are the subject of parallel proceedings, parallel civil proceedings, that perhaps DEP or BPU has instituted -- either penalty actions, permit revocation actions, that type of thing. And it will be an administrative process, as you alluded to. There will be testimony in that process just as there would be in civil litigation.

Can a witness in those administrative proceedings invoke his or her privilege against self-incrimination? The answer is yes, they can. But, of course, then that inference in a civil context can be used against the one who invokes the privilege. It cannot be used in a criminal context. You can't draw an adverse inference against them. But the answer is, parallel proceedings already go on all the time because of the nature of State government.

Now obviously part of the function of the Environmental Prosecutors Bureau is created by this -- right now by executive order -- to coordinate all of these things; to make sure that one arm of the government knows what the other arm is doing, so some county prosecutor isn't unaware of what may be going on in the regulatory process or on the civil law

side. Coordination is clearly necessary, and that is one of the main reasons why the Governor chose to create the Office of the Environmental Prosecutor.

ASSEMBLYMAN COHEN: What would be their relationship in terms of the other county prosecutors?

MR. LYKO: Well certainly the function of the Environmental Prosecutor is not only to coordinate between, let's say, DEP and the New Jersey Division of Criminal Justice, which I represent, but also to coordinate with the county prosecutors. And indeed, Mr. Madonna and Ms. Hendricksen and their office are doing exactly that. They are coordinating all the environmental functions of all of those different offices.

ASSEMBLYMAN COHEN: How many prosecutions did you have last year under the Water Pollution Control Act? Do you know?

MR. LYKO: Oh, gosh, I don't have statistics with me, but certainly there were, I mean, easily a dozen criminal prosecutions.

ASSEMBLYMAN COHEN: Does your office have any statistics, let's say, over the last three or four years, concerning AG prosecutions under -- or investigations which didn't result in indictments or investigations which did and which were prosecuted under the environmental laws? I'm just curious. When the Water Pollution Control Act went into force, the idea was to set up a civil side of it and a possible criminal side. That is, that since remediation and abatement was a primary concern to avoid any further destruction of our resources, that the Commissioner of DEP had the ability, through the administrative process, to issue fines, to issue ACO's to go through an abatement process. If the DEP Commissioner found that the acts complained of were egregious or if one corporate entity was having a repetitive violation, they could then petition the Attorney General's Office and seek criminal prosecution.

MR. LYKO: And indeed, they do so now, Assemblyman Cohen. I would say that the Division of Criminal Justice receives probably 50% of its criminal cases from either direct or indirect referral from DEP. And, with regard to the statistics, they certainly are available. The Chairman, I know, has those, but I would be happy to provide them to you, Assemblyman Cohen, relating to the historical record of prosecutions.

ASSEMBLYMAN COHEN: Do you have any problem with any of the statutory language and possible vagueness problems?

MR. LYKO: Well, as I indicated, and I'm not prepared to go through all the details right now, but we certainly do have some concerns with the drafting in some of the provisions of the bill. I do not consider them to be major concerns. You know, a word here-- As you well know, Assemblyman Cohen, from your background, a word here and a word there in a criminal law can make a big difference and we have to be as precise as possible. That's why reference to gradation of the offenses with solid waste more than 10 cubic yards but less than 100-- It has to be very precise in the statute.

ASSEMBLYMAN COHEN: I have questions. I mean, you can have certain imprecisions in terms of civil liabilities, but when you are trying to define the parameters of permitted and unlawful conduct in order to prove matters where you have a beyond-a-reasonable-doubt stand, you have environmentally sensitive-- You have certain language which goes to the heart of any prosecution in this matter, where the language is a little difficult, and I'm just wondering if we do have some vagueness problems?

MR. LYKO: Well, I might suggest one of the reasons why environmental enforcement generally is a difficult job especially in the criminal arena is because one is dealing in an arena where everything is strictly construed against the State and yet where the environmental laws are otherwise

liberally construed, and I think where our citizenry wants them to be liberally construed. And so what often happens is you get a lot of scientific concepts and difficult concepts for, let's say, a lay jury to understand. I think most jurors can understand murder and robbery, but when you get into scientific concepts, these are difficult things to present. But that's the nature, I think, of environmental enforcement. I think we can tighten up the bill in that respect. As I indicated in my testimony, I think it's basically a sound bill.

ASSEMBLYMAN COHEN: If you can -- and I would appreciate it if you could -- or staff could provide for me what this bill may do in terms of the criminal aspect that is not provided, or where it increases penalties in terms of what already exists, like the Water Pollution Control Act and any other, you know, RICO and any other areas?

ASSEMBLYMAN SMITH: Mr. Lyko, just for the record, because I'm sure people will be reading this transcript in the future after it's published, could you just flesh out for the public record the standards by which the concept of gross negligence is adjudicated in a criminal court?

MR. LYKO: The basic definition of "negligence" -- "gross negligence" in the criminal law concept -- and I'll contrast it with "recklessness" since the two in the penal code are really fairly similar-- The definition of recklessness is that an actor has disregarded a known risk; in other words, the disregard of a risk of which the actor was aware. The concept of negligence in the criminal law differs slightly. It is the disregard of a risk of which the actor should have been aware. In other words, in one case the actor is aware of the risk and disregards it; that's recklessness. The other concept of negligence in the penal code is that the actor disregarded a risk which the actor should have been aware of. So they're really very close concepts, the concepts of negligence and recklessness.

And it's one of the reasons why one of the technical suggestions that we would make on the bill when we deal with the staff on it, is that we think that the concepts where the crimes are defined in this bill-- It makes more sense to have "purposely" and "knowingly" type violations grouped together as one degree of offense, and then to have recklessly and negligently grouped together with a lesser -- one lesser degree of offense. That's typically the way it's done in most of the environmental statutes, including the most recent enactments by the Legislature.

ASSEMBLYMAN SMITH: Good. Thank you. Are there other questions from members of the Committee for the AG's Office? We're going to still keep you around because we may have more questions, but are there any at this time? (no response) All right, Mr. Lyko and Ms. Hendricksen, thank you for again helping us.

At this point our next witness will be Steve Wilson from TRW. Is Mr. Wilson in the audience? (affirmative response) Yes, he is. It's TRW Fastener Division, Controls and Fasteners Group, Glen Road, Mountainside, New Jersey.

S T E V E N R. W I L S O N: Thank you, Mr. Chairman and members of the Energy and Environment Committee, for allowing me to speak to you this morning concerning the proposed bill, A-1726. I am Steve Wilson. I'm the Plant Manager for TRW's manufacturing plant in Mountainside, New Jersey.

At this facility we manufacture spring steel fasteners. We are environmentally responsible. We've never had an environmental citation. We have an operating pollution system. We annually pay several hundred thousand dollars to properly handle hazardous waste. We provide ongoing training for employees. We have people specifically responsible as pollution control operators, as well as technical individuals.

I want to state that in any manufacturing facility, no matter how excellent a system you have operating, there's

always the possibility for an accident. As human beings there's always the possibility of a mistake. And as I understand the proposed legislation, if there is an accident or a mistake, myself and some of my people could end up in jail. Yet I believe that that's not fair and it's not reasonable.

For the record, I would also like to state that for four or five years there were four companies manufacturing spring steel fasteners in New Jersey. Right now, we're the only remaining company. Crest Products left New Jersey. They moved to Kentucky a few years ago. Jacobsen left New Jersey. They moved to Ohio. Titterman is part of Eaton Corporation, a major company. They're right now packing up, this day. They're moving to Canada and Ohio. We're the last remaining company.

With the costs in New Jersey, and now with the environmental bills such as the ones being proposed, there are more and more reasons for companies, particularly manufacturing companies, to leave the State. If that's the intent, if that's what the Legislature is intending, then that's the action that manufacturers have to take. We do not want to leave New Jersey. We have a good operation. We have some excellent employees. We'd like to stay in the State. However, this proposed legislation and the cost of operating in the State make it very difficult to be competitive.

And that's proven by the number of our competitors who have left the State. I'd also like to state that from time to time we do recruit for open positions. In the last year we've recruited for three or four different positions. Every time we run an advertisement we receive a number of resumes from people who are out of work because their companies have left New Jersey. And this is in addition to our competitors. There's a number of other companies-- I personally believe that the State does not have an accurate number of the companies leaving the State. I think it's understated. I know there have been

newspaper articles and some examples, but I believe the State does not have a complete handle on the full impact that different things are having in this State.

But again, I state that we do want to be a good corporate citizen. I have a family. I don't want to pollute the environment whether there's a fine or not; whether I go to jail or not. I have a seven-year-old daughter, and I have another baby on the way. And I want to be responsible. The existing fines do hurt us, and my career. If my facility receives a fine, that's a black mark against me. That has a big negative impact. If we receive a fine that impacts our profitability, it is not only the bonuses of all the managers in my facility, but it impacts the wages and benefits of everyone in the operation.

I can tell you that all the employees are sensitive about our environmental aspects. They realize that we handle materials that have to have certain procedures; they have to be handled in a certain manner. As I mentioned, we do have very good employees, but with a bill like this, at least my understanding is, that if there is a mistake or an accident, people could go to jail. I believe that's unfair, and I believe it does not make good business sense. Thank you very much.

ASSEMBLYMAN SMITH: Thank you, Mr. Wilson. Our next speaker will be Lisa M. Bromberg, Esq., Commerce and Industry Association. The address is 163 Madison Avenue. I assume that's New York?

L I S A M. B R O M B E R G, E S Q.: New Jersey.

ASSEMBLYMAN SMITH: New Jersey. Well what town is that?

MS. BROMBERG: Morristown.

ASSEMBLYMAN SMITH: Morristown.

MS. BROMBERG: Mr. Chairman, members of the Assembly Energy and Environment Committee, I thank you for the

opportunity to appear this morning. My comments are respectfully offered on behalf of the Commerce and Industry Association of New Jersey. Commerce and Industry represents approximately 2000 member firms in northern New Jersey. Accordingly, these comments represent the sentiments of a major segment of the business community which will be significantly, and we believe unfairly, impacted by this proposed legislation.

My name is Lisa Bromberg and I am associated with the firm of Porzio, Bromberg & Newman. I limit my practice to the area of environmental law. Before I start, let me maybe apologize for the fact that I will be repeating many of the comments that have been made already this morning. I apologize for taking your time but I believe that the -- I will say draconian nature because it is an unavoidable description of this legislation, warrants a repetition of these concerns.

I think that it is stating the obvious to assert that CIA, like every other professional and business group in New Jersey, supports the enactment of clear and protective environmental regulations, as well as statutes providing for evenhanded enforcement. We applaud the extraordinary efforts of the Legislature to create fair environmental provisions and to provide for appropriate enforcement.

We respectfully submit, however, that Assembly Bill No. 1726 is not such a bill. It does not create a fair, reasonable, logical, or affordable mechanism for the enforcement of existing environmental provisions in the State of New Jersey. Moreover, the extreme effects of this proposed legislation could only be justified, we believe, by a state of unprecedented environmental lawlessness that simply does not exist in the State of New Jersey.

The CIA regrets that it cannot support this bill. Let it be clear, however, that although we strongly object to the extreme and unjustified penalty scheme, we clearly recognize the need for and the beneficial effect of stringent enforcement

policies. We believe, however, that such a mechanism is already in place and that this proposed legislation is, therefore, unwarranted.

The business community can not help but view this proposed legislation as yet one more skirmish in the battle for the systematic elimination of industry in New Jersey. Already looking down the double-barreled gun of ECRA and the Clean Water Enforcement Act, industrial concerns very seriously consider this proposed legislation to be yet one more nail in the coffin of New Jersey business. At the same time that the business community is valiantly attempting to comply with the vast proliferation of ever-increasing environmental responsibilities, it is entirely unfair to burden it with the specter of significantly increased monetary penalties and the potential for criminal sanctions.

I will limit my comments this morning to those aspects of Assembly Bill No. 1726 which impact most directly on the business community, and they are as follows:

- 1) the creation of a new set of environmental crimes,
- 2) the punishment of negligent conduct,
- 3) the levying of increased penalties,
- 4) the reservation of different and greater penalties for business firms,
- 5) the imposition of a probationary term on business firms and the appointment of an Environmental Monitor, and
- 6) the easing of the prosecution's burden to prove intent.

The Comprehensive Pollution Control and Enforcement Act of 1990, as I understand the opening sections of this bill, are entitled -- create several new categories of offenses and assigns to them criminal sanctions. These include:

- 1) unlawful release,
- 2) activities associated with the transportation, disposal, and storage of solid waste,

- 3) activities in freshwater and coastal wetlands, and
- 4) activities in delineated floodways.

Several points must be made in regard to unlawful releases. First, an unlawful release is deemed to be a release of a hazardous or a nonhazardous substance. However, the definition goes on to state that a release is also deemed to be an unlawful release if it is in violation of the terms of the Spill Act, the Water Pollution Control Act, the Air Pollution Control Act, and the Pesticide Control Act. These laws, however, speak in terms of hazardous substances, pollutants, contaminants, and pesticides. One, this is going to lead to confusing enforcement, and two, the inclusion of nonhazardous substances will unnecessarily broaden the already existing statutory provisions.

Second, each of the statutes upon which the unlawful release section is based already provides civil and in some instances, criminal penalties for the violation of its terms. The Clean Water Enforcement Act, for example, greatly increases the penalties available for discharges in violation of the Water Pollution Control Act.

Third, 2C:17-2, which imposes criminal sanctions for causing or risking widespread injury or damage, has been broadly and successfully used to prosecute environmental crimes. A criminal predicate for environmental transgressions is, therefore, already in place.

Fourth, these new "crimes" will complicate an already complex area and lead to duplicative efforts. For example, one can only question what would happen in a case where there has been a violation of the Water Pollution Control Act? It would appear that the discharger could be held liable under the Water Pollution Control Act, the Clean Water Enforcement Act, and the Comprehensive Pollution Control and Environment Act of 1990. The Water Pollution Control Act already includes criminal sanctions. Unfortunately, as I read these Acts, the criminal

finances for violations of the Water Pollution Control Act differ from those made available under the proposed legislation. Which would apply? How am I to counsel my clients?

Similarly, would a discharge liable pursuant to the Spill Act also be subject to punishment under the Comprehensive Pollution Control and Enforcement Act?

We question why more is necessary? We question why more is appropriate? We submit that in this case, more, clearly is not better.

The second point that I will make this morning has to do with the punishment of negligent conduct. There has already been testimony, pro and con, as to exactly what type of negligent conduct would be subjected to the criminal sanctions imposed in this law. And I would submit that, although there is an argument that a distinction can be made between negligence in the tort sense and negligence in the criminal sense, the perception that this bill creates, that simple mistakes can lead to criminal sanctions is as important as the reality, and that if there are going to be changes made to this bill, the term "negligence" be defined with far greater certainty and far greater detail than it already is.

The CIA strongly objects to the criminalization of negligent conduct for environmental transgressions, particularly in view of the fact that such serious penalties can be imposed regardless of the absence of any environmental harm or damage. Criminal sanctions should be reserved for more serious offenses with demonstrated environmental degradation. They should not be used to bludgeon the business community into the fear of honest mistakes.

The third point has to do with the increased penalties. First, this legislation dramatically increases penalties already available under existing environmental rules and regulations, and then, increases the penalties generally imposed pursuant to the criminal code. If adopted, this rule

would result in an increase in penalties available for purposeful and knowing violations of the rules and regulations pertinent to transportation, generation, and disposal of hazardous waste by five times the existing penalty amount, and an increase of over 30 times the amount generally available under the Criminal Code.

It would mean an increase in penalties for the negligent violation of the regulations pertinent to the transportation, storage, and disposal of hazardous waste by over 10 times the amount generally available under the Criminal Code.

It would create criminal provisions for violations of regulations associated with coastal wetlands and the imposition of penalties of up to 50 times the amount generally available under the Criminal Code.

It would result in an increase of 10 times the penalty otherwise available for violations of the Air Pollution Control Act and of penalties 10 times the amount of penalties currently available for violations of the Spill Act.

There is no justification for these dramatic multiples.

My next point concerns the increased penalties for business firms. Business firms are accorded different treatment from individuals. In general, the penalties that may be assessed on business firms are two-and-a-half to three-and-a-half times greater than those penalties available for individuals. This discriminatory treatment would appear to be unsubstantiated and without any compelling interest. As a result, there are significant constitutional concerns having to do with equal protection and due process.

Let me give you an example: A business firm is defined as being a sole proprietorship. Would an individual be subject to increased penalties simply because of the fact that that particular individual would have chosen to incorporate or otherwise qualify as a business firm? The activities are being

done by one person. In addition, from an environmental point of view, one cannot help but question the difference of the impact -- what difference there would be on the environment if the activities were conducted by a business firm or by an individual?

The only apparent justification for such increased liabilities would be -- would appear to be -- the unfounded assumption that business entities generally have greater financial resources with which to justify such penalties or satisfy such penalties. The use of an individual's or an entity's financial status as the basis for the imposition of criminal penalties, however, is one that is not common to criminal jurisprudence in the United States and one that should not be endorsed. The CIA strongly opposes the aspect of the proposed legislation imposing increased penalties on business firms.

The next point concerns probationary terms that may be imposed on business firms and the appointment of an Environmental Monitor. A court must impose a probationary sentence on a business firm convicted of a first or second degree crime and has the discretion to do so if a firm is convicted of a third or fourth degree crime.

First, the relationship between imprisonment is unclear in this statute, or this proposed statute. Can a business firm sentenced to a term of imprisonment also be required to serve a probationary term? Is probation meant to replace imprisonment? Such clarification is immediately necessary.

Second, the potential terms of the probation are far too vague. Indeed, they are so vague as to raise questions of constitutional propriety. The members of the CIA strongly object to the imposition of a probationary term, particularly in view of the fact that there appears to be little or no

guidance in the proposed legislation as to exactly what those terms could be.

Compounding the problems inherent in the vague nature of the probationary term is the fact that the proposed legislation would specifically remove any right the business firm might otherwise have to refuse to be placed on probation or to reject the terms or conditions of the probation. There is no right of appeal provided from the terms of probation to be set by the court. There would also appear to be no mechanism by which a business firm could participate in, or contribute to the creation of those terms of probation. Indeed, a business firm could clearly expect to be held hostage to the terms of probation imposed by the court. Moreover, there is no assurance that these terms would recognize the ability of a business to comply with such terms to remain a viable business entity. This provision could clearly kill the goose that laid the golden egg by bankrupting the businesses concerned.

Interestingly, the proposed legislation reserves to the prosecuting attorney, the DEP, and the independent Environmental Monitor, the right to modify the terms of the probation. My review of this legislation, however, shows that no such right is reserved to the parties most concerned with these terms -- the business firms.

Provision is also made for the appointment of the Environmental Monitor. This proposal could mean that a business which has already paid an exorbitant fine, served a term of imprisonment, and/or been straddled with the draining effects of a probationary term could also be subjected to the control of an Environmental Monitor. An Environmental Monitor can be appointed if the prosecuting attorney can establish, only by a preponderance of the evidence, the likelihood that the business firm in question will commit another environmental crime. It is clear that Environmental Monitors will become

commonplace aspects of doing business in New Jersey and this will create yet another category of beneficiaries of the vastly proliferating environmental legislation.

One of the most burdensome aspects of the appointment of the Environmental Monitor, in addition to any interference the monitor may cause in the day-to-day operation of the business firm, is the fact that the Monitor will be required to prepare quarterly, certified progress reports. These reports will be required to be reprinted in any annual statement or report or any prospectus prepared by the firm for distribution to its shareholders or potential investors. Obviously, this will have a chilling effect on not only the investments in the business firm but on any potential sale of that business firm.

Similarly, the provision that the terms of probation will survive a sale or merger will have a similar effect. The fact that these provisions will preclude the sale of a business will, unfortunately, have no deterrent effect on the perpetrator of the crime.

The final aspect which I will address has to do with intent. CIA strenuously objects to the portion of the proposed legislation which would excuse the Prosecutor from having to establish intent. This bill provides that the degree of crime can be increased when the subject activity intrudes upon an environmentally sensitive or wildlife area or has a significant environmental effect. Legislation states, however, that it shall not be relevant that a person was unaware that his conduct occurred in such areas, and the prosecution shall not be required to establish that the person acted in accordance with any proscribed culpability. Accordingly, the prosecution need not establish that the subject party purposely, knowingly, recklessly, or negligently impacted an environmentally sensitive or wildlife area. It is entirely objectionable to permit the intensification of penalties in the absence of proof of intent to engage in such activities.

Finally, this proposed statute would excuse the prosecution from having to present evidence of present or future environmental damage unless the indictment or accusation so alleges. Accordingly, for crimes of the third and fourth degree which ordinarily do not involve a showing of any environmental damage, penalties may be imposed simply by virtue of proof of the Act, without any regard for the presence or absence of an adverse environmental effect.

In conclusion, CIA opposes Assembly Bill No. 1726, on the grounds that it:

- 1) unnecessarily establishes new categories of environmental offenses,
- 2) punishes negligent behavior,
- 3) dramatically increases the monetary penalties generally available under the Criminal Code or existing legislation,
- 4) singles out business firms for discriminatory treatment,
- 5) imposes wholly vague and potentially debilitating terms of probation, and
- 6) Removes the element of proof and intent.

We thank you for your patience in listening to these comments and we would like to offer our assistance, if any assistance can be given in making this a workable bill.

ASSEMBLYMAN SMITH: Thank you, Ms. Bromberg. Our next speaker is Jim Lynn from DuPont. Mr. Lynn.

J A M E S T. L Y N N, ESQ.: Thank you Mr. Chairman, members of the Committee. I'm Jim Lynn, Manager of State Affairs of the DuPont Company. I want to comment on two aspects of what has preceded me, first of all on Mr. Lyko's statements regarding his interpretation of criminal negligence, and the potential liability of individual employees. Then I would like to go into some examples of why DuPont, as a

company, is so concerned about this bill, particularly its criminal negligence provisions.

First of all, with respect to Mr. Lyko's statements, it's not that I disagree with any of them, I just think they raise as many questions as they attempt to answer. I realize that as a lawyer this is a very complicated and technical area.

Individual employees can be held criminally liable, as I understand his comments. It simply depends on the circumstances. And the circumstances, as Mr. Lyko correctly said, are admittedly vague under this particular bill as written and are in great need of clarification. That clarification is necessary, not only for fundamental fairness, but also, I think, for the constitutionality of this particular proposal.

Second, it's very clear that corporations are definitely exposed for criminal negligence. There seems to be no dispute there.

Third, negligence doesn't really mean negligence, according to Mr. Lyko. It means criminal negligence, which in turn means gross negligence, which in turn means a disregard for a known risk. This, as a representative of a chemical company, gives me cold comfort, because DuPont, particularly in the area of its hazardous waste management services, deals with known hazardous risks everyday. It is a known risk, and yet we are choosing to do it.

We do it to make money, but we also do it because it's of mutual benefit to this State. Governor Florio will agree with that benefit. That benefit is manifested in terms of having the largest wastewater treatment facility in the State, located at our Deepwater, Salem County facility. We are about to put approximately \$400 million into improvements in that facility so that we can continue to handle the vast majority of New Jersey generated waste. In so doing, we realize that we take a risk and we are putting on these additional third-stage

scrubbers and other forms of abatement -- pollution abatement control -- not out of altruism, but because we have to do this to continue to meet the increasingly stringent standards that have been imposed upon us, not just by the State of New Jersey, but by the Federal government.

We are committed to meeting those standards, but given the biological nature of this type of wastewater treatment process -- it's essentially in the first instance, bugs that eat the hazardous materials -- there are other back-up systems, but that is the essence of it. There are vagaries in that performance, even with the best available technology. So we enter into this with the commitment to try to meet all standards. But I can guarantee you that there will be slight variations which may constitute technical violations of existing regulations despite our best efforts, despite the best available technology, implemented and instituted at great cost to DuPont. We're willing to do this, and we know we have to do this.

But this bill, even if we have some sort of minor exceedence of a permit, despite the fact that we're going to put in all this advanced equipment, would still give rise to a negligent violation, which, even if there's no harm to the environment, none whatsoever -- no harm to any individual -- would put us at risk of a fourth degree crime. Now let's review what a fourth degree crime is. First of all, it can carry, in the State of New Jersey, a discretionary term of imprisonment of up to five years. Now the company is not going to go to jail. Presumably that was put in there because some individual is going to go to jail under this scheme, if we have some inadvertent violation.

ASSEMBLYMAN COHEN: A fourth degree is 18 months.

MR. LYNN: Okay. I stand corrected, but it's still a long time to have your plant manager or an operator in jail.

The crimes listed would be-- Fourth degree crimes include:

- * aggravated assault which recklessly causes bodily injury to another with a deadly weapon;

- * aggravated assault when one knowingly, under circumstances manifesting extreme indifference to human life, points a firearm at, or in the direction of another;

- * assault by auto when it is driven recklessly and causes either serious bodily injury or bodily harm to another;

- * recklessly endangering another, and so on and so forth.

And we can add to that, the inadvertent regulatory violation without any harm to the environment or any harm to any person. It doesn't make sense, but that is an accurate assessment of what this bill would do.

I submit, on behalf of the DuPont Company and the Chemical Industry Council of New Jersey, where I sit on the Board of Directors, that this State certainly has a legitimate interest in doing everything it can to protect the environment. My company is committed to that. The Chemical Industry Council and its member companies are committed to that, but the legitimate State interest has to be rationally applied. And I submit to you, that under this scheme, these penalties-- This type of strict criminal liability for inadvertence without harm is irrational and improper. Thank you very much.

ASSEMBLYMAN SMITH: Thank you, Mr. Lynn. Is there any other member of the public wishing to speak? (no response) All right, let me ask Mr. Lyko and Ms. Hendricksen to come on back up. We're giving you your exercise today.

Before I ask if there are any questions from members of the Committee, let me put to you the hypothetical put forward by Mr. Lynn in which he indicates that DuPont's facility in Salem County, which I visited, where they do have a

liquid waste -- hazardous waste treatment system -- which is certainly helping the State of New Jersey dispose of hazardous waste in an environmentally acceptable fashion-- Mr. Lynn put forward the hypothetical: What if, in their secondary sewerage treatment system -- which is a system in which bacteria consumes contaminants and renders them innocuous-- What if there's a minor exceedence of a permit; there's an upset in the plant and the degree of removal of contaminants is not quite up to the permit limitation? Under that hypothetical, would the operators and/or the plant managers be subject to criminal penalties under 1726? I guess this goes back again to what the definition of gross negligence is. Mr. Lyko? (Mr. Lyko returns to witness table)

MR. LYKO: I think it's really two questions, Mr. Chairman. Could they, technically, be prosecuted? And, would they be? Under the hypothetical, I suggest that the answer to both questions would be no. Would they be? Under the definition here -- we're talking about a minor exceedence of a permit. Is government going to concern itself with bringing the club of the criminal law which is the most serious club it could use, down upon minor violations? That is not the purpose of the criminal law. That is the purpose of other types of penalties, so would they be for a minor exceedence? It would not make sense. It would not be a good use of the State's resources. But, could they be? Well, under the hypothetical, as I heard it, even if there were some -- and the word that was used, at least as I heard it, was inadvertent regulatory violation-- Certainly, as was acknowledged by Mr. Lynn, DuPont deals, for example, with hazardous materials all the time and therefore has a known risk. But the question isn't whether a known risk is involved, but whether there was a disregard of that risk, and only if that could be established; only if there were evidence that the company had done something where it had really disregarded the risk, where it had not paid attention to

established practices or established policies, or its workers were simply not even instructed to pay attention to the environmental requirements of the State. That's a different ball game there in terms of whether they could be prosecuted. But under the hypothetical where there is that inadvertent type of violation, the answer is no.

ASSEMBLYMAN SMITH: Right. Just by way of information, I visited the Deepwater facility. When waste comes into the facility -- liquid waste in tank cars -- they receive a manifest indicating what's in the waste. DuPont then tests the waste to confirm the constituents that are in the waste, and then, based on what's in the waste, it exposes it to the appropriate kinds of treatment, which sounds as though DuPont is acting very, very responsibly in meeting its charges to treat the waste in an environmentally responsible fashion. If, on the other hand, they received a tank car, didn't look at the manifest, didn't test the material, just threw it into their treatment process, that hypothetical would be one where conceivably an operator or plant manager would be subject to criminal prosecution.

MR. LYKO: Conceivably, yes.

ASSEMBLYMAN SMITH: Let me allow members of the panel to ask questions, because I know that all the testimony this morning may have generated some questions for you. I know Assemblyman Cohen has a few. So, Assemblyman Cohen, take it away.

ASSEMBLYMAN COHEN: There's language in here concerning freshwater wetlands, coastal wetlands, delineated floodways, and also provisions-- It says it shall not be relevant that the person was unaware that prohibited conduct occurred in these particular areas.

Now for drug offenses -- drug-free school zones -- you have signs that are posted which are supposed to delineate the 1000 feet from the school zone. Aren't we going to have some

problems? I mean this is not to say that the Attorney General's Office or the county prosecutor, since they have limited resources to begin with, and since 80% of the cases that they're handling on both ends deal with drugs right now-- I don't know what resources we have to deal with this in a large pervasive way, but do we have any-- We're essentially giving purveyors of drugs more clearly defined areas of where you walk into this 1000-foot zone where there's a sign on the roadway behind or beside the schools, because they've been surveyed; giving them more notice of where their parameters are than delineated floodways, where the penalties are enhanced as a result of being in a particular area. Do you find that to be a problem, or is there some way to work around it?

MR. LYKO: Frankly, I don't find it to be a problem, and let me explain why. As you pointed out, and this point has been made in the testimony about this provision in the bill, this section 7 of the bill, what it contains is an enhancement of the criminal violation. It doesn't define the criminal violation. In other words, all of the other mental culpability elements that must be established to prove the predicate crime, must still be proven. All that this provision says is that for the enhancement provision, the violator need not be aware of those factors for the crime to be enhanced one degree.

The State is still going to be put to its proof in proving that the mental culpability requirement for the underlying crime, whether it be water pollution, or hazardous waste, or solid waste, is still there. And in that sense, it does parallel the drug law, because the 1000-foot provision in the drug law is a type of enhancement.

However, I suggest that it's probably clearer, if anything, in the environmental area when you're dealing with some aspect of an environmentally sensitive area. In some respects, perhaps it wouldn't be. In other respects, with the definition of environmentally sensitive area at the beginning

of the bill, things like reservoirs and certain Pineland areas and this sort of thing-- In many respects the violator may have actual notice of it, but even if he doesn't have actual notice of it, I, at least, suggest that as a matter of policy or that when harm is caused to such an area, that it is an area of public policy where we should encourage more stern penalties because of the harm that's caused to those types of environs.

ASSEMBLYMAN COHEN: It is obviously a State responsibility in the public interest to protect from those companies which would choose to use our natural resources as a free-of-charge landfill, and obviously a strong public interest in seeing that our sewer systems aren't being used secretively for becoming the method of convenience for tossing out pollutants and toxics. I'd like for you to consider what language can be added to deal with what I see as a very, very vague and unknowing area of defining freshwater wetlands, delineated floodways.

Builders have this problem. They're in the middle of a project on applications which are granted by a local planning board or zoning board, and three quarters of the way through the project they find out that they may be in a sensitive area, a wetlands area, and they have to then go spend \$3000 or \$4000 to get a new survey to find out exactly what the parameters are. Of course, one can say that if one's dumping in these areas to begin with they shouldn't be, on its face. But because you have certain enhanced penalty provisions it's--

My problem with a lot of the language in here is that there seems to be a lot of void for vagueness arguments, and I'd rather see something that is reasonably constitutionally permissible than to put something through where there are serious vagueness questions.

MR. LYKO: Perhaps we can use that example to discuss the issue a bit -- the alleged vagueness issue. As you know, Assemblyman Cohen, there already is in the law a criminal

provision in the freshwater wetlands statute. Now this bill would also add a provision into the coastal wetlands statute, although it would only be a disorderly person's offense. But my point is that illegal conduct in wetlands, if done with the requisite mental culpability requirement in the law, already is a criminal offense in this State. Now, the question of what a wetlands is-- You refer to the fact that in one portion of this bill it would be true that, for the enhanced penalty in section 7 of the bill, the violator would not need to know that it was a wetlands. Indeed, that would be an irrelevant consideration under that enhanced penalty. But, if the charge for which the violator were charged was doing the prohibited activity in the wetlands, the State would still have to prove the necessary mental culpability as to the understanding of the violator that it was a wetlands.

This is a proof problem that we have right now -- proof burden that we have -- and therefore, we can only charge and can only prosecute those violations where we have a reasonable belief, based on the evidence, that a person understood what was going on and had the necessary mental culpability requirement. I might add, with regard to the issue of the drug-free school zone as an analogy to the situation we're talking about, that it's my understanding that the posting of the signs that we see in so many locations that it is a drug-free school zone is not a requirement in the law. That is something that is done to assist people in knowing where they are and that they're within that drug-free school zone. But regardless of the presence of signs or anything, they can still be prosecuted, and perhaps we want to -- and I say this somewhat tongue-in-cheek -- put signs up with regard to environmentally sensitive areas.

ASSEMBLYMAN COHEN: The signs are supposed to act as a deterrent for keeping these individuals away from school areas. Does an habitual offender react to these provisions?

MR. LYKO: Well, there is a recidivist provision in this law. I believe it's in section 8. There's a provision relating to repeat offenders. Well, that would be on the bottom of page 9 of the bill, in section 8, that begins subsection b. It's an extended mandatory term where there is a prior conviction of an environmental offense. There's some technical drafting problem with this section, but that is the obvious intent.

ASSEMBLYMAN COHEN: But we also have, independent of this, an Habitual Offender's Act.

MR. LYKO: Yes, within the penal code.

ASSEMBLYMAN COHEN: Correct. What happens-- I think under the other provision of the penal code, I think it's three offenses, subjects you to a life term?

MR. LYKO: I can't answer that question, Assemblyman Cohen. I don't know.

ASSEMBLYMAN COHEN: In terms of raising issues that maybe I would like to address just for clarification, is whether or not the Habitual Offender's Act -- outside of this proposal or statute -- whether that supersedes the environmental aspect where there's two separate classifications, and whether or not we have some kind of problem where three convictions in this area -- whether they are de minimis or not, subjects someone to a life term?

MR. LYKO: That's a matter that we'll look into and have an answer for you.

ASSEMBLYMAN COHEN: Thank you.

ASSEMBLYMAN SMITH: I want you to know that we almost had to call the emergency medical team for Mr. Bozarth when you brought that issue up. (laughter) Assemblyman Albohn has a few questions.

ASSEMBLYMAN ALBOHN: One of the problems that I have with this whole Act is its lack of specificity, and lack of clarity. And I think Mr. Lyko sort of washed over some of

those things by saying that a minor exceedence wouldn't count, or that an inadvertent action wouldn't, or that only disregard of risk would count. It seems to be there's just no indication of how you define a "minor exceedence" or what becomes "inadvertent." And, of course, disregard of risk is always a result of hindsight, I suppose, in saying you should have seen that risk.

But it just seems to me, that the whole situation is stacked against the potential violator to the point where he becomes a violator no matter what he does, because the Department will have the opportunity to say, "Well, this was not a minor exceedence," and so on down the line. I don't know how you get around that sort of thing.

I'm one of the few people in this room, I suspect, who is not an attorney and a lot of these things are way over my head when it comes to the legal interpretation. But as an engineer who has often worked in these areas, I don't know how you can accommodate this kind of thing without being liable in the long run, depending on what the Department's interpretation is or what the court's interpretation is, or what your interpretation is. I don't know if you can clarify that for me or not, but I'm seriously concerned about the justice, or the kind of justice that will result from legislation such as this.

MR. LYKO: I certainly appreciate that comment. I appreciate it, in particular, because my office is the office that so often must grapple with these questions when allegations come to our attention of wrongdoing. For example, as I indicated, we get many of the referrals that my office receives for criminal investigation from DEP. Typically it's because DEP feels that there is an egregious violation or they have a chronically bad actor or something like that, so they send a particular matter to us. But when the referral comes to us, we look at it in the stringent -- with the stringent prism of criminal prosecution. In other words, can we prove with the

stringent standards of proof, beyond a reasonable doubt, that all the elements of the offense are satisfied?

And just to focus a minute on this mental culpability aspect which seems to be the one that so many people are concerned about, that typically is the type of area where our criminal investigation is the most difficult to arrive at its conclusion-- Usually the facts are fairly straightforward. For example, if the allegation were that someone were unlawfully transporting hazardous waste, well, we can typically prove that they were transporting it; there may be a witness to that effect. We can prove that it was hazardous waste because we obtained a sample and had it analyzed, and it was hazardous waste. So we've proven those elements, but the one element that we still haven't proven is, is the mental culpability element satisfied?

Now, for the particular offense that I'm talking about, the mental culpability element would be knowing. So one must go into the head of the violator and try to make -- infer from facts as to what the violator knew, or should have known, this type of thing. Basically all I can say is, it is always the most difficult part of proving a criminal violation -- the mental culpability element. But that is why it is in the law. It is written in the law because it is one of the elements that, in effect, protects a person from arbitrary prosecution; namely, that the standards written in the law for mental culpability, whether they be recklessness, knowing, purposeful, or negligent, or whatever the appropriate standard is, must be satisfied beyond a reasonable doubt by the prosecutor to the trier of fact, and if not, we won't prevail in the prosecution.

ASSEMBLYMAN ALBOHN: Of course this all ends up in extensive litigation on even the most trivial case for even the smallest potential violator.

MR. LYKO: I would hope that that wouldn't be the case in criminal prosecution. If, indeed, it is either a trivial

case or a small violation -- by whatever standard that is defined -- I would certainly hope that the State would not be prosecuting such cases as criminal cases. They simply don't belong in the criminal arena and I know that is the whole purpose of creating-- One of the whole purposes of creating the Office of the Environmental Prosecutor is to ensure consistency -- evenhanded consistency in the enforcement of the State's environmental laws.

ASSEMBLYMAN ALBOHN: That's all I have. I am still very nervous about this whole operation, frankly.

ASSEMBLYMAN SMITH: Thank you, Assemblyman Albohn. Are there any other questions from members of the Committee? (no response)

ASSEMBLYMAN COHEN: On page 8, indicating that section 7 (1) all relevant evidence-- That's not the section. There's a section -- I think it's in the sentencing area -- where you have the possibility of enhanced penalties--

MR. LYKO: Probably section 8--

ASSEMBLYMAN COHEN: In making its findings, the court shall take judicial notice of any evidence, testimony, or information adduced at the trial, plea hearing-- This is whether it's admissible or inadmissible or whether it's relevant or whether it violates Rule 55 or--

MR. LYKO: Well, this would be now in the sentencing phase. In other words, this assumes that the trial then has already concluded, and there is a guilty verdict. Then at the time of sentencing the court could take notice -- can take judicial notice of the prior evidence that's already been adduced at the trial.

ASSEMBLYMAN COHEN: I mean, in a death case the prosecutor can't introduce any at all. The State's still bound by rules of evidence.

MR. LYKO: Although I might add, in death cases, certainly you're much more stringently looked at by the

Appellate Court. A general rule in the sentencing proceeding is that the rules of evidence are substantially relaxed. Death cases obviously are considerably different, where there's a much more stringent standard of review that the court gives to death cases.

ASSEMBLYMAN COHEN: In terms of finding out what the State has prosecuted in terms of the Water Pollution Control Act, would your Office also have available statistics concerning criminal prosecutions in other environmental statutory areas?

MR. LYKO: We certainly have statistics and I believe we've broken them down by subject area, by water pollution, hazardous waste, this type of waste. I know Assemblyman Smith has received some of those statistics before, and as I indicated earlier, Assemblyman Cohen, we'd be happy to make sure you get those.

ASSEMBLYMAN COHEN: Thank you.

ASSEMBLYMAN SMITH: Any other questions or comments? (no response) All right, there being none, the public hearing on A-1726 and the public record on A-1726 is closed. Thank you all for attending today's hearing and presenting your views and suggestions.

(HEARING CONCLUDED)



APPENDIX



NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION

A-1726-ENVIRONMENTAL PENALTIES ACT
Testimony of Philip Kirschner, Esq.

Vice President
New Jersey Business and Industry Association

Assembly Energy and Environment Committee
October 2, 1990

The New Jersey Business and Industry Association is pleased to provide its comments on the Assembly Committee Substitute for A-1726, which provides for criminal penalties and fines as well as other penalties for those who violate certain provisions of the environmental laws. NJBIA believes that those who knowingly and willfully set out to illegally dispose of hazardous waste should be the focus of State law enforcement efforts. The legislation before you today, however, goes far beyond targeting these type of willful offenders.

It provides for possible criminal penalties of up to 5 years in jail for those who accidentally violate environmental laws, 10 years if the mistake causes damage to environmentally sensitive areas. The bill itself violates the fundamental principle of fairness upon which our criminal law is built that the "penalty should fit the crime," by making an accident a crime and by generally providing for excessive penalties, given the nature of the offense.

NJBIA will address the major areas of the bill that it opposes:

CRIMINAL PENALTIES FOR NEGLIGENCE

The bill provides for a possible criminal penalty of 5 years in prison, (fourth degree crime) for an accidental violation of the environmental laws.

It provides for a possible criminal penalty of 5 to 10 years in jail for an accidental violation if it results in significant adverse environmental impact. This is a tremendous expansion of criminal liability as related to negligence and is excessive and unjust.

Negligence is a simple mistake. It is an accident. It is an act that is not intended to cause harm. It is not a criminal act! Even if the mistake has unfortunate consequences, there is an entire civil court system which awards damages, often in six figures, and administrative penalties, such as large fines, to compensate for the damages caused. To subject someone to a criminal indictment, criminal trial, possible jail term and brand him a felon for an accident is unfair and unjust.

The goal of our criminal law should be to punish those who knowingly and willfully intend to cause harm, not to send to jail those guilty of an accident or mistake. This section of the bill is simply unfair. It should be deleted.

**NOT REQUIRING THE PROSECUTION TO PROVE INTENT
TO CAUSE HARM**

The bill increases the severity of the criminal penalty someone can receive one degree, which can mean an extra 5 years in prison, if the release occurs in an environmentally sensitive area, but it does not require the prosecution to prove intent to damage that area. If you are going to subject someone to an extra five years in prison for causing a particular harm, the prosecution should have to prove intent to commit that aspect of the offense. Section 7 (2) (a) on pg. 8 is stunning in stating that it is not relevant that the person was unaware that his conduct would have a significant impact on the environment and "the prosecution shall not be required to establish that the

person acted in accordance with any prescribed culpability requirement that may otherwise apply to any other material element of the offense." In a criminal prosecution intent or state of mind is of course always relevant!

It is critical whether a person knowingly and purposely sought to break the law and cause harm or whether he accidentally or negligently did so. This section says that a person guilty of no more than an honest mistake can go to jail and the prosecution doesn't even have to prove the intent of the person to cause the harm. This type of "strict liability" is clearly inappropriate for a criminal prosecution. In criminal prosecutions, intent is always extremely important. To subject a person to further criminal penalties without even requiring the government to prove a willful violation is fundamentally unjust and violates our most basic precepts of fairness and due process.

NO DISTINCTION BETWEEN HAZARDOUS AND NON-HAZARDOUS SUBSTANCES

There is no distinction in the bill between a violation involving hazardous substances and one involving non-hazardous substances. It is bad enough that one can be criminally charged with accidental conduct; it makes it worse that there isn't any distinction in the bill whether the violation involves a hazardous substance or one that is non-hazardous. There is a difference between non-toxic materials and toxic materials and the bill should be amended to make such distinctions and to target the toxic substances.

THE CRIMINAL PENALTIES ARE EXCESSIVE

There is no question that knowing and purposeful violations must be treated differently and more seriously than accidental conduct. Those knowing and purposeful violations deserve the attention and resources of

law enforcement authorities. The basic precept of criminal law, however, that the penalty should fit the crime should still be applicable throughout the bill and to this type of conduct. To treat even knowing violations of the law that affect sensitive environmental areas with the same penalty as manslaughter, sexual assault and robbery is excessive. A truckdriver of a company may get drunk at lunch and knowingly dump waste in violation of the law, and in violation of company policy. This does not make the company or even the driver a horrible monster that deserves a possible term of imprisonment of 10 to 20 years (second degree crime). This type of act is simple, not the same as killing someone, rape or intentional street crime designed to put a person in fear of his or her life, yet this bill treats them the same. We recommend that the penalties should be reduced to third degree crimes in these instances.

MANDATORY MINIMUM PENALTIES ARE INAPPROPRIATE

The bill calls for mandatory minimum penalties where there is a pecuniary gain or loss of a certain amount or a cover-up of the violation. While granting the seriousness of such actions, the expansion of mandatory minimum terms which currently are applied to crimes which involve the use of a firearm to environmental violations is overbroad. This is a rare concept and should not be widened. These type of environmental violations while of course serious, are not the same as putting a gun in someone's face and robbing them and they should not be treated the same.

PROBATIONARY CONDITIONS AND ENVIRONMENTAL MONITOR SHOULD NOT SURVIVE THE SALE OF THE BUSINESS

The section of the bill which states that the conditions of probation and the imposition of an environmental monitor may remain even after the sale of the business, is unjust and counter-productive to the intent of the bill. This provision makes the company non-transferrable, because a clean buyer is not going to want to be saddled with the sins of another person. It is counter-productive in that the best thing for the public may be for another entity which has no connection with the offender and has a clean environmental history, to buy the business. Yet this section makes that impossible and should be deleted.

There are other disturbing elements of this bill such as:

- a) the distinction between the penalties for persons and corporations for the same acts which is unjust,
- b) the expansive powers of the environmental monitor, including selecting any employee he or she wants to supervise environmental activities,
- c) Making the defendant pay the costs of the prosecution, if convicted. We do not even make murderers pay the State its fees. In fairness, if this section remains, the State should pay the defendants counsel fees if it fails to get a conviction.

In short this bill gives the government a nuclear arsenal to go after accidental and non-violent violations of environmental laws, many of which do not even involve hazardous substances. It gives the State tremendous and unfair leverage over the most innocent defendant by raising the threat of criminal prosecution, even for an accident, unless the company agrees to the State's terms and demands. The criminal penalties are unjust and excessive. The penalties imposed under this bill fail the test of bearing a reasonable relationship to the act. More balance needs to be shown in this bill.



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THE NJ STATE CHAMBER OF COMMERCE

COMMENTS AT THE

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

OCTOBER 2, 1990

Mr. Chairman, thank you for the opportunity to comment today on ACS-1726, which increases criminal penalties for environmental law violations.

The State Chamber and our member companies oppose this legislation for many reasons including: the severity of the penalties; the fact that we already have hefty penalty provisions in the state for environmental violations and are enforced; and the growing perception that New Jersey is not a good place to do business because of it's overregulated.

The State Chamber strongly opposes the provision which provides for a criminal penalty of the third degree for an unintentional violation of environmental laws if they result in significant environmental impact. It seems to us that an unintentional act is just that, unintentional and an accident. The penalty could possibly carry 5 to 10 years in prison! That is unduly harsh for an accident.

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The members of the State Chamber also are extremely concerned about Section 7 of the bill which dismisses intent as "not relevant" when prosecuting an individual for significant impact on the environment. We strongly disagree with this provision! Since when is intent not relevant in a criminal prosecution? How can we justify penalizing a person, with a possible jail sentence, who accidentally or negligently violates an environmental law as we would penalize someone who knowingly and purposely does violates that law?

We agree that criminal penalties for knowing and purposeful violations are necessary. However, to subject the violator to a penalty with a jail sentence of 10 to 20 years is unfair! A violation of this nature does not deserve to have the same penalty as robbery or other violent crimes.

That State Chamber is also opposed to the provision which sets up mandatory minimum penalties for a cover-up of a violation or a monetary gain. We understand that such knowing violations are serious. However, to expand mandatory minimum penalties which currently only apply to armed crimes to certain environmental violations is completely unfair.

In New Jersey we already have many civil and administrative penalties in place which are designed to compensate for

damages. This legislation will not only affect penalties for environmental violations, but it could have repercussions on the state's other criminal laws and penalties.

The State Chamber of Commerce remains opposed to this legislation because we believe that it is unnecessarily harsh and the penalties do not fit the crime. We already have deterrent penalties and existing laws in place that work.

Thank you for the opportunity to comment today.

TESTIMONY OF

JANE F. KELLY, ESQ.
EXECUTIVE DIRECTOR
NEW JERSEY UTILITIES ASSOCIATION

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I AM JANE KELLY, EXECUTIVE DIRECTOR OF THE NEW JERSEY UTILITIES ASSOCIATION. OUR MEMBER COMPANIES ARE THE STATE'S INVESTOR OWNED ELECTRIC, GAS, WATER, TELECOMMUNICATIONS AND SEWERAGE PUBLIC UTILITIES.

TO BETTER EXPLAIN WHO WE ARE, MR. CHAIRMAN, OUR MEMBER COMPANIES EMPLOY OVER 70 THOUSAND PEOPLE IN THIS STATE WHO, COLLECTIVELY, EARN OVER 2.2 BILLION DOLLARS ANNUALLY IN SALARY AND WAGES. THERE ARE APPROXIMATELY 5 MILLION SHARE HOLDERS OF NJUA UTILITY COMPANIES, 550,000 OF WHICH ARE NEW JERSEY RESIDENTS. OUR UTILITY PLANT GROSS WORTH IS NEARLY 25 BILLION DOLLARS. OUR CURRENT INVESTMENT IN RESEARCH AND DEVELOPMENT IN THIS STATE EXCEEDS 25 MILLION DOLLARS AND WE PAY CLOSE TO 2 BILLION DOLLARS IN TAXES ANNUALLY.

OUR MEMBERS PROVIDE ELECTRICITY TO OVER 3 MILLION CUSTOMERS, GAS TO OVER 2 MILLION CUSTOMERS AND WATER TO OVER 600 THOUSAND CUSTOMERS. OUR MEMBERS PROVIDE APPROXIMATELY 4.4 MILLION TELEPHONE ACCESS LINES IN THIS STATE. OUR MEMBERS PROVIDE SERVICES IN ONE FORM OR ANOTHER TO EVERY HOUSEHOLD IN THE STATE.

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY AND COMMENT RELATIVE TO THE ASSEMBLY COMMITTEE SUBSTITUTE FOR ASSEMBLY BILL NO. 1726, THE "CRIMINAL PENALTIES" BILL.

IT IS OUR VIEW THAT THIS BILL IS DUPLICATIVE; THAT ITS PENALTIES ARE EXCESSIVE AND BEAR NO REASONABLE RELATIONSHIP TO CERTAIN VIOLATIONS; AND THAT ITS PROVISIONS CONFUSE, IN THEIR APPLICATION, THE SIGNIFICANT DISTINCTION BETWEEN KNOWING, PURPOSEFUL AND RECKLESS CONDUCT ON THE ONE HAND AND NEGLIGENT CONDUCT ON THE OTHER. WE BELIEVE, MR. CHAIRMAN, THAT THE NEGATIVE IMPACT THAT THE BILL WOULD HAVE ON THE ECONOMIC WELL BEING OF OUR STATE AND ON THE AVERAGE WORKING PERSON MUST BE CONSIDERED AND BALANCED AGAINST THE UNLIKELIHOOD THAT THIS BILL WILL MAKE ANY REAL DIFFERENCE IN THE FREQUENCY OF ENVIRONMENTAL ACCIDENTS.

OUR MEMBERS TAKE GREAT PAINS AND GO TO A GOOD DEAL OF EXPENSE IN ENSURING THEIR COMPLIANCE AND THEIR EMPLOYEES' COMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS.

OUR INDUSTRY IS SUBJECT TO AN EXTENSIVE MATRIX OF LAWS, REGULATIONS AND INSPECTIONS. WE COMPLY WITH THE SUPERFUND AMENDMENTS REAUTHORIZATION ACT (TITLE III), THE STATE AND FEDERAL CLEAN WATER ACTS, THE STATE AND FEDERAL CLEAN AIR ACTS, THE RESOURCE CONSERVATION AND RECOVERY ACT, THE TOXIC SUBSTANCE CONTROL ACT, THE WORKER AND COMMUNITY RIGHT TO KNOW ACT, THE TOXIC CATASTROPHE PREVENTION ACT, THE FRESHWATER AND COASTAL WETLANDS PROTECTION ACTS, THE STATE AND

FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACTS, THE NEW JERSEY ENVIRONMENTAL CLEANUP RESPONSIBILITY ACT AND THE NEW JERSEY SPILL COMPENSATION AND CONTROL ACT, TO NAME A FEW.

WE RESPECTFULLY SUBMIT, MR. CHAIRMAN, THAT THE UTILITIES INDUSTRY MAINTAINS A STRONG COMMITMENT TO PRESERVING THE ENVIRONMENT THAT MEETS AND EXCEEDS THE GOALS OF THIS BILL. IT IS A COMMITMENT BORN OF CONCERN, NOT COERCION.

OUR REAL CONCERN IS THAT THIS BILL WILL HAVE THE OPPOSITE OF THE DESIRED EFFECT. THAT CONCERN OVER SEVERE PENALTIES INCLUDING INCARCERATION, FOR EVEN UNCONTROLLABLE ACCIDENTAL CONDUCT, MAY VERY WELL CAUSE OUR WORKERS TO PAUSE AND EVEN RETREAT FROM THEIR JOB RESPONSIBILITIES, FURTHER LABOR/MANAGEMENT DISCORD AND DISCOURAGE VOLUNTARY REPORTING. WE DO NOT DISPUTE, WHERE AN INDIVIDUAL OR CORPORATION MALICIOUSLY OR PURPOSELY SEEKS TO DAMAGE THE ENVIRONMENT OR THE PUBLIC HEALTH IN THE NAME OF GREED OR CONVENIENCE THAT THEY SHOULD BE PUNISHED SWIFTLY AND SEVERELY. HOWEVER, I WOULD ASK YOU TO CONSIDER THE FOLLOWING:

1. OUR MEMBERS' EMPLOYEES ARE REQUIRED BY LAW TO PERFORM MAINTENANCE WORK, SUCH AS THE REPAIR OF EXISTING FACILITIES, IN PUBLIC RIGHTS OF WAY. ON OCCASION, SUCH WORK MIGHT BE CONDUCTED NEAR ENVIRONMENTALLY SENSITIVE WETLANDS AREAS NOT CLEARLY DELINEATED. IF A WORKER THINKS THAT HE OR SHE IS NOT IN A WETLANDS AREA BUT ACTUALLY IS AND DOES HIS JOB, SHOULD HE OR SHE BE LABELLED A CRIMINAL?

2. OUR WORKERS ARE SOMETIMES REQUIRED TO PUMP OUT MANHOLES PRIOR TO REPAIR, INSPECTION OR MAINTENANCE WORK OR TO INSURE UNINTERRUPTED SERVICE IN EMERGENCY SITUATIONS. WHERE A WORKER DISCHARGES A SUBSTANCE INTO A STORM DRAIN, AND THAT SUBSTANCE IS LATER DETERMINED TO BE HAZARDOUS, SHOULD THAT WORKER BE CONSIDERED A CRIMINAL?
3. SHOULD THE PUFF OF SMOKE WHICH RESULTS WHEN A TELEPHONE EMERGENCY GENERATOR ENGINE IS STARTED RESULT IN THE IMPOSITION OF CRIMINAL PENALTIES?
4. OUR INDUSTRY USES SOME 40 THOUSAND MOTOR VEHICLES IN THE COURSE OF OUR CONSTRUCTION ACTIVITIES. SHOULD A RUPTURED HYDRAULIC LINE, PARTICULARLY WHERE IT RUPTURES IN AN ENVIRONMENTALLY SENSITIVE AREA, RESULT IN CRIMINAL CHARGES?
5. SHOULD AN EMPLOYEE INADVERTANTLY TRANSPOSE THE NUMBERS ON A WASTE MANIFEST DOCUMENT, IS THAT EMPLOYEE A CRIMINAL?
6. FINALLY, MR. CHAIRMAN, PURSUANT TO LEGISLATION ENACTED IN 1985, AIR RELEASES MUST BE REPORTED TO THE DEP WITHIN FIFTEEN MINUTES. SUCH RELEASES ARE GENERALLY THE RESULT OF A CONTRACTOR STRIKING A PIPELINE OR A BUILDUP OF PRESSURE IN THE SYSTEM CAUSING A RELEASE OF GAS FOR SAFETY PURPOSES. IF EITHER OF THESE OCCURRED IN AN ENVIRONMENTALLY SENSITIVE AREA AND THE DEP WERE NOTIFIED IN SIXTEEN MINUTES, WE WOULD ASK YOU TO CONSIDER THAT UNDER THIS BILL COMPANY OFFICIALS WOULD BE GUILTY OF A THIRD DEGREE CRIME AND SUBJECT TO PENALTIES FROM \$50,000 TO \$250,000 OR 5 TO 10 YEARS IN PRISON OR BOTH.

MR. CHAIRMAN, I WOULD ASK THAT THE COMMITTEE CONSIDER THE CONCERN OUR EMPLOYEES WILL NO DOUBT HAVE, AND JUSTIFIABLY SO, ABOUT PERFORMING THEIR EVERYDAY WORK SHOULD THIS BILL BE ENACTED INTO LAW. REGARDLESS OF HOW SOUND OPERATING AND MAINTENANCE PROCEDURES ARE, OR HOW METICULOUS A WORKER IS WHEN PERFORMING HIS OR HER DUTIES, ACCIDENTS WILL HAPPEN. IN THE COURSE OF NEGOTIATIONS OR POSSIBLY ON SITE, EMPLOYERS WILL INEVITABLY BE ASKED TO INDEMNIFY THEIR EMPLOYEES BEFORE THEY WILL PERFORM CERTAIN TASKS. WE WOULD ASK THAT THE COMMITTEE CONSIDER THE IMPACT THAT SUCH A SITUATION COULD HAVE ON OUR MEMBERS' ABILITY TO PROVIDE QUALITY AND TIMELY SERVICE TO THE PUBLIC.

MR. CHAIRMAN, WE WOULD ASK THAT THE COMMITTEE, IN CONSIDERING THIS BILL, KEEP IN MIND OUR RATEPAYERS AND EMPLOYEES; WE WOULD ASK THAT THE COMMITTEE BE MINDFUL THAT THE RECENTLY ENACTED CLEAN WATER BILL, THE OIL SPILL PACKAGE OF BILLS AND BOUNTY HUNTER INITIATIVES HAVE NOT YET BEEN GIVEN A CHANCE TO PROVE THEIR IMPACT; AND FINALLY, WE WOULD RESPECTFULLY ASK THAT THE COMMITTEE LOOK AT THE EXCESSIVE NATURE OF THESE PENALTIES AND THE INAPPROPRIATENESS OF CERTAIN MANDATORY MINIMUM PENALTIES AND AMEND THIS BILL SUCH THAT IT IS PROPERLY AIMED AT THOSE WHO ACT PURPOSELY AND MALICIOUSLY TO HARM OUR ENVIRONMENT AND THE PUBLIC HEALTH.

THANK YOU.

PORZIO, BROMBERG & NEWMAN

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October 1, 1990

Robert G. Smith, Chairman
Assembly Energy and Environment Committee
44 Stelton Road, Room 50
Piscataway, New Jersey 08854

Re: Assembly Bill No. 1726
Submitted on Behalf of the
Commerce and Industry Association

Dear Assemblyman Smith:

This letter constitutes the written statement of the presentation to be made to the Members of the Assembly Energy and Environment Committee on Tuesday, October 2, 1990, in regard to Assembly Bill No. 1726 (the "proposed legislation"). These comments are respectfully offered on behalf of the Commerce and Industry Association of New Jersey ("CIA").

INTRODUCTION

The CIA represents approximately 2,000 member firms in northern New Jersey. Accordingly, these comments represent the sentiments of a major segment of the business community which will be significantly and, we believe, unfairly impacted by this proposed legislation.

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The office of Porzio, Bromberg & Newman, P.C., appearing on behalf of the CIA, limits its practice to litigation and environmental law.

It is stating the obvious to assert that the CIA, like every other professional and business group in New Jersey, supports the enactment of clear and protective environmental rules and regulations as well as statutes providing for the even-handed enforcement of such mandates. Let it be noted at the outset that the CIA endorses and applauds the extraordinary efforts of the legislature to create fair environmental provisions and to provide for the appropriate enforcement of such provisions. The CIA respectfully submits, however, that Assembly Bill No. 1726 is not such a Bill. It does not create a fair, reasonable, logical, or affordable mechanism for the enforcement of the existing environmental provisions in the State of New Jersey. Moreover, the draconian effects of the proposed legislation's penalty provisions could only be justified by a state of unprecedented environmental lawlessness that simply does not exist in New Jersey.

After a great deal of study and review, the CIA regrets that it can not support this Bill. Let it be clear, however, that although the CIA strongly objects to the extreme and unjustified penalty scheme that would be created by the proposed legislation, it clearly recognizes the need for and the beneficial effect of a stringent enforcement policy. The CIA believes, however, that such a mechanism is already in place and that this proposed legislation is, therefore, unwarranted.

The business community can not help but view this proposed legislation as yet one more skirmish in the battle for the systematic elimination of industry in New Jersey. Already looking down the double-barreled gun of ECRA and the Clean Water Enforcement Act, industrial concerns consider this proposed legislation to be yet one more nail in the coffin of New Jersey's moribund commercial community. At a time when New Jersey business is valiantly attempting to comply with the vast proliferation of ever increasing environmental responsibilities, it is entirely unfair to burden it

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with the specter of significantly increased monetary penalties and the potential for criminal sanctions.

I will limit my comments this morning to those aspects of Assembly Bill No. 1726 which impact most directly upon the business community. They are as follows:

1. the creation of a new set of environmental crimes;
2. the punishment of negligent conduct;
3. the levying of increased penalties, in general;
4. the reservation of different and greater penalties for "business firms";
5. the imposition of a probationary term on business firms and the appointment of an environmental monitor; and
6. the easing of the prosecution's burden to prove intent.

NEW ENVIRONMENTAL CRIMES

That section of the Bill entitled "Comprehensive Pollution Control and Enforcement Act of 1990" creates several new categories of offenses and assigns to those categories criminal sanctions including fines and incarceration. The new offenses include the following:

1. unlawful releases;

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2. activities associated with the transportation, disposal, and storage of solid waste;
3. activities in freshwater or coastal wetlands; and
4. activities in delineated floodways.

Several points must be made in regard to unlawful releases. First, an unlawful release is deemed to be a release of a hazardous or a nonhazardous substance. A release is also deemed to be an unlawful release if it is in violation of the provisions of the Spill Compensation and Control Act (the "Spill Act") (N.J.S.A. 58:10-23.11 et seq.)¹, the Water Pollution Control Act (N.J.S.A. 58:10A-1), the Air Pollution Control Act (1954) (N.J.S.A. 26:2C-1), and the Pesticide Control Act of 1971 (N.J.S.A. 13:1F-1). These laws, however, address discharges of hazardous substances, pollutants, contaminants, and pesticides. The inclusion of "non-hazardous substances" would seem, therefore, to be an unnecessary broadening of the already existing statutory provisions.

Second, each of the statutes upon which the unlawful release section is based already provide civil and, in some instances, criminal penalties for violations of its terms. The Clean Water Enforcement Act, for example, greatly increases the penalties for discharges in violation of the Water Pollution Control Act.

Third, N.J.A.C. 2C:17-2, which imposes criminal sanctions for causing or risking widespread injury or damage, has been broadly and successfully used to prosecute environmental crimes. A criminal predicate for environmental transgressions is already in place.

¹ It is presumed that the reference in the definition of "unlawful release" is to the Spill Act although the statutory citation is to N.J.S.A. 58:10-23.1 rather than N.J.S.A. 58:10-23.11.

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Fourth, these new "crimes" will complicate an already complex area and lead to duplicative efforts. For example, one can only question what would happen in a case in which there has been a violation of the provisions of the Water Pollution Control Act. It would appear that the discharger could be held liable under the Water Pollution Control Act, the Clean Water Enforcement Act, and the Comprehensive Pollution Control and Enforcement Act of 1990. The Water Pollution Control Act already includes criminal sanctions. The criminal fines for violations of the Water Pollution Control Act differ from those available under the proposed legislation for presumably the same activity. Which would apply?

Similarly, would a discharge liable pursuant to the Spill Act also be subject to punishment pursuant to the Comprehensive Pollution Control and Enforcement Act?

New crimes are also created for violations of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., the Coastal Wetlands Act (N.J.S.A. 13:9A-1 et seq.), the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.), and the Flood Hazard Area Control Act (N.J.S.A. 58:16A-50 et seq.). These Acts, however, all have existing violation provisions which already impose civil penalties and, in some instances, criminal penalties.

Why is more necessary? Why is more appropriate? The CIA believes that in this case more clearly is not better. These additional penalty provisions are unnecessary, confusing, complex and burdensome.

PUNISHMENT OF NEGLIGENT CONDUCT

The proposed legislation designates criminal sanctions for persons who purposely, knowingly, recklessly, or negligently cause unlawful releases. Purposeful, knowing, or reckless conduct is deemed to be a crime of the third degree except in specified instances where it will be increased to a crime of the first or second degree. Negligent activity is generally deemed to be a crime of the fourth degree. This means that purely accidental conduct,

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over which an individual or business may have had little or no control, of which the individual or business may have been entirely unaware, and of which the individual or business did not intend could, nevertheless, result in a fine of \$15,000.00 to \$75,000.00 or, in the case of a business firm, \$50,000.00 to \$250,000.00, and a term of imprisonment not to exceed 18 months.

This is a chilling prospect particularly when it can be assumed to apply to releases resulting from honest mistakes, errors and accidents, and in instances in which there may be no resultant adverse environmental impact. Virtually no business or entity can assure error-free activities. Although it is surely laudable to encourage fail-safe systems, it is entirely inappropriate to punish efforts which fall short of perfection with 18 months in a jail cell. The price that must be paid in New Jersey for the failure to assure perfect operations in every instance is a stiff monetary penalty and the specter of spending 1-1/2 years in jail. One can only wonder what business would voluntarily expose itself to the potential for such extreme measures.

Similarly, the Comprehensive Pollution Control and Enforcement Act of 1990 would create a second degree crime for those who may purposely, knowingly, recklessly, or negligently store solid waste in amounts greater than or equal to 1,000 cubic yards. As you are well aware, there are many rules and regulations already applicable to the storage of solid waste. An accidental or unwitting failure to comply with any one of these rapidly proliferating rules and regulations would, however, subject the person responsible for such activity to a penalty of \$25,000.00 to \$125,000.00 and a term of imprisonment of five to ten years.

This proposed legislation also establishes criminal sanctions for the negligent violation of the Solid Waste Management Act (N.J.S.A. 13:1E-9), Coastal Wetlands (N.J.S.A. 13:9A-9), the Air Pollution Control Act (N.J.S.A. 26:2C-1 et seq.), and the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.). These include the imposition of fines ranging from \$2,500.00 to \$100,000.00 and imprisonment of up to 18 months.

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The CIA strongly objects to the criminalization of negligent conduct for environmental transgressions, particularly in view of the fact that such serious penalties can be imposed regardless of the absence of any environmental harm or damage. Criminal sanctions should be reserved to more serious offenses with demonstrated environmental degradation. They should not be used to bludgeon the business community into fear of honest mistakes.

INCREASED PENALTIES

This proposed legislation not only dramatically increases the penalties already available under existing penalty provisions but also increases the penalties generally imposed pursuant to the New Jersey Criminal Code. Sections 18 through 26 of the proposed legislation would result in significant increases in existing penalties and in potentially applicable criminal fines. More specifically, this Bill, if adopted, would result in:

1. an increase in penalties available for purposeful and knowing violations of the regulations pertinent to the transportation, generation and disposal of hazardous waste by 5 times the existing penalty amount and, an increase of over 30 times the amount of penalties generally available under the Criminal Code for third degree offenses;
2. an increase in penalties for the negligent violation of the regulations pertinent to the transportation, storage, and disposal of hazardous waste by over 10 times the amount generally available pursuant to the Criminal Code;

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3. the creation of criminal provisions for violations of the regulations associated with coastal wetlands and the imposition of monetary penalties of up to 50 times the amount generally available under the penalty provision of the Criminal Code;
4. an increase of 10 times the penalty otherwise available under the Criminal Code and previously available under the Air Pollution Control Act for third degree crimes for violations of that Act; and
5. creation of criminal sanctions for violations of the Spill Act and an increase of up to 10 times the amount of penalty generally available for third degree crimes.

The new environmental crimes, then, include criminal fines that are dramatic multiples of typically and previously available amounts. There appears to be no justification, however, for such a significant and dramatic increase in the otherwise available penalties and the CIA objects to these increases.

INCREASED PENALTIES FOR BUSINESS FIRMS

A business firm is defined in the pending legislation as "any corporation, association, partnership, self-proprietorship, trust or other commercial entity". Business firms are accorded different treatment from individuals. The sections of the proposed legislature which increase the sanctions available for environmental crimes committed by business firms are limited to those concerned with unlawful releases and solid waste. In general, the penalties that may be assessed upon business firms are 2-1/2 to 3-1/2 times greater than those penalties available for individuals. This

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discriminatory treatment, however, would appear to be unsubstantiated and without any compelling interest. Accordingly, there are significant constitutional concerns of equal protection and substantive due process.

In view of the fact that the definition of a business firm can include a sole proprietorship, there would appear to be little or no justification for the significantly increased penalties that are imposed on business concerns. One must question why an individual would be subject to increased penalties simply by virtue of the fact that that particular individual may have chosen to incorporate or otherwise qualify as a business firm. The CIA takes great exception to the increase of penalties allowable for business firms pursuant to the proposed legislation. Significant constitutional challenges will clearly plague these provisions should they be adopted.

The only categories which seem able to escape the otherwise draconian effect of the penalties available to business firms are governmental entities and individuals. From an environmental point of view, one can not help but question what the difference of the impact on the environment would be if the activities are conducted by a business entity or by an individual. The only apparent justification for such increased liabilities would appear to be the unfounded assumption that business entities generally have greater financial resources with which to satisfy such penalties. The use of an individual's or an entity's financial status as a basis for imposition of criminal penalties is, however, one that is not common to criminal jurisprudence in the United States and one which should not be endorsed. The CIA strongly opposes that aspect of the proposed legislation imposing increased penalties on business entities.

**THE IMPOSITION OF A PROBATIONARY TERM ON BUSINESS FIRMS
AND THE APPOINTMENT OF AN ENVIRONMENTAL MONITOR**

In addition to the increased monetary penalties that would be imposed upon business firms, this proposed legislation would also seek to impose upon such concerns a probationary sentence. Indeed,

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a Court must impose a probationary sentence on a business firm convicted of a first or second degree crime and has the discretion to do so if a firm is convicted of a third or fourth degree crime.

First, the relationship between imprisonment and probation is unclear. Can a business firm sentenced to a term of imprisonment also be required to serve a probationary term? Is probation meant to replace imprisonment? Such clarification is immediately necessary.

Second, the potential terms of the probation are also far too vague. Indeed, they are so vague as to raise questions of constitutional propriety. The members of the CIA object to the imposition of a probationary term, particularly in view of the fact that there appears to be little or no guidance in the proposed legislation as to exactly what terms could be imposed on a business firm pursuant to probation.

Compounding the problems inherent in the vague nature of the probationary term is the fact that the proposed legislation would remove any right the business firm might otherwise have to refuse to be placed on probation or to reject the terms or conditions of the probation. There is no right of appeal provided from the terms of probation to be set by the Court. There would also seem to be no mechanism by which a business firm could participate in or contribute to the creation of the conditions of the probation. Indeed, a business firm could clearly expect to be held hostage to the terms of probation imposed by the Court. Without any guidance as to how the Court is to reach the terms of probation, there can be no assurance that these terms will recognize the ability of a business to comply with such terms and, more importantly, to remain a viable business entity. This provision could clearly kill the goose that laid the golden egg by bankrupting the business and thereby limiting its ability to make any environmental contribution whatsoever.

Interestingly, the proposed legislation reserves to the prosecuting attorney, the New Jersey Department of Environmental Protection, and the independent environmental monitor the right to modify the terms of probation. No such right, however, is reserved

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to the party most concerned with the terms of probation - i.e. - the business firm.

Provision is also made for the appointment of an environmental monitor. This proposal could mean that a business which has already paid an exorbitant fine, served a term of imprisonment and been straddled with the draining effects of a probationary term could also be subjected to the control of an environmental monitor. An environmental monitor can be appointed if the prosecuting attorney can establish, only by a preponderance of the evidence, the likelihood that the business firm in question will commit another environmental crime. Other criteria permitting such an appointment are also provided. Given the broad character of the circumstances under which a environmental monitor may be appointed, it is likely that environmental monitors will become commonplace. This will create yet another category of beneficiaries of environmental legislation.

One of the most burdensome aspects of the appointment of the environmental monitor, in addition to any interference the monitor may cause in the day-to-day operation of the business firm, is the fact that the environmental monitor will be required to prepare quarterly progress reports in the form of certified statements. These quarterly, certified statements are required to be reprinted in any annual report or prospectus prepared by the firm for distribution to its shareholders or potential investors. Obviously, this will have a chilling effect on not only investments in the business firm but on any potential sale of the business firm. Further complicating any sale of the business firm is the fact that this proposed legislation indicates that the terms of probation shall continue beyond the sale, merger, consolidation, or reorganization of a business firm.

Any conditions or terms of the probation shall remain in full force and effect and successors shall be made jointly and severally liable. Not only will this have no deterrent effect on the perpetrator of the crime, i.e. - the seller who will now no longer be associated with the business firm, but this will clearly frighten away potential buyers. The most unfortunate aspect of this provision

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is that it will preclude the sale of the business to an individual who may be more environmentally sensitive than the present owner of the business. This provides yet another reason for businesses, already leary about locating in New Jersey, to choose to establish themselves in Texas or other more receptive States.

INTENT

The CIA strenuously objects to that portion of the proposed legislation which would excuse the prosecutor from having to establish intent as an element of a criminal activity. Assembly Bill No. 1726 provides that the degree of a crime can be increased when the subject activity impacts upon an environmentally sensitive or wildlife area or has a significant adverse environmental effect. This legislation states that it shall not be relevant that a person was unaware that the prohibited conduct occurred in such areas and, moreover, the prosecution shall not be required to establish that the person acted in accordance with any prescribed culpability requirement that may otherwise apply. Accordingly, the prosecution need not establish that the subject party purposely, knowingly, recklessly, or negligently impacted an environmentally sensitive or wildlife area or engaged in activities having a significant adverse environmental effect. It is entirely objectionable to permit the intensification of penalties in the absence of proof of intent to engage in activities warranting such increased sanctions. The State must prove all elements of a crime. Intent is essential and should not be eliminated in this case.

Moreover, this proposed statute would excuse the prosecution from having to present evidence of present or future environmental damage unless the indictment or accusation so alleges. Accordingly, for crimes of the third and fourth degree, which ordinarily do not involve a showing of any environmental damage, penalties may be imposed simply by virtue of proof of the Act - i.e. - without any regard for the presence or absence of an adverse environmental effect. It seems incongruous and inappropriate, however, to impose significant penalties including stiff monetary

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finest and terms of imprisonment, ranging up to five years, for so-called criminal activity not having any impact on the environment.

CONCLUSION

In conclusion, the CIA opposes Assembly Bill No. 1726 on the grounds that:

1. it unnecessarily establishes new categories of environmental offenses;
2. it punishes negligent behavior which can result from unanticipated accidents, honest mistakes, oversights, and errors that can be expected to occur and can not be entirely eliminated in any endeavor engaged in by human beings;
3. it dramatically increases the monetary penalties generally available pursuant to the Criminal Code or previously available under the penalty provisions in existing environmental statutes;
4. it singles out business firms for discriminatory treatment;
5. it imposes wholly vague and potentially debilitating terms of probation on business firms and precludes any right of appeal therefrom; and
6. it removes the element of proof of intent from environmental crimes.

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It is the hope of the CIA that these comments have been helpful. We would be happy to discuss them further should you or any of your committee members wish to do so.

Please accept our gratitude for this opportunity to be heard.

Respectfully submitted,

Lisa M. Bromberg
Lisa M. Bromberg

LMB/mk/L2795

cc: Mr. Neil M. Cohen, Vice Chairman
Mr. Thomas J. Duch
Mr. Arthur R. Albohn
Mr. Jack Collins
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T E S T I M O N Y

A-1726

**BEFORE THE
ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE**

PRESENTED BY

**OLIVER J. BARTLETT
ASSISTANT VICE PRESIDENT
GOVERNMENT RELATIONS
THE NEW JERSEY HOSPITAL ASSOCIATION**

October 1, 1990

28X

GOOD MORNING AND THANK YOU MR. CHAIRMAN FOR THE OPPORTUNITY TO ADDRESS THE COMMITTEE. MY NAME IS OLIVER J. BARTLETT AND I AM HERE TODAY ON BEHALF OF THE NEW JERSEY HOSPITAL ASSOCIATION TO OPPOSE THE "NEW JERSEY ENVIRONMENTAL CRIMES AND PENALTIES ACT," A-1726.

HOSPITALS ALREADY FOLLOW STRICT GUIDELINES MANDATED BY BOTH STATE AND FEDERAL LAW, "THE MEDICAL WASTE TRACKING ACT OF 1988" AND "THE COMPREHENSIVE REGULATED MEDICAL WASTE MANAGEMENT ACT." THE INTENT OF THESE LAWS WAS TO BOTH ESTABLISH GUIDELINES FOR WASTE MANAGEMENT AND DISPOSAL, AND TO IDENTIFY AND HOLD RESPONSIBLE THOSE FACILITIES AND INDIVIDUALS WHO VIOLATE ENVIRONMENTAL LAW.

THE NEW JERSEY HOSPITAL ASSOCIATION OPPOSES A-1726 BECAUSE OF THE EXCESSIVE NATURE OF THE PENALTIES IT IMPOSES. TO TREAT CASES OF SIMPLE NEGLECT WITH PRISON TERMS IS AN UNREASONABLE AND UNJUST CONCEPT. ENVIRONMENTAL RESPONSIBILITY IS EVERYONE'S RESPONSIBILITY, BUT THE SEVERITY OF THE PENALTY FOR CAUSING ENVIRONMENTAL DAMAGE SHOULD BE COMMENSURATE WITH THE SEVERITY OF THE OFFENSE.

THANK YOU.

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