

PUBLIC MEETING
of the
SENATE JUDICIARY COMMITTEE
(AN INQUIRY INTO THE DEPARTMENT OF LAW AND PUBLIC SAFETY'S
INVESTIGATION OF THE CHEMICAL CONTROL FIRE)

Held:
March 15, 1984
Room 114
State House Annex
Trenton, New Jersey

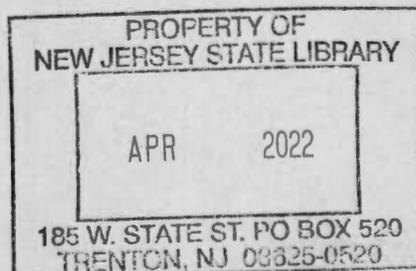
MEMBERS OF COMMITTEE PRESENT:

Senator John A. Lynch, Chairman
Senator John F. Russo, Vice Chairman
Senator Edward T. O'Connor, Jr.
Senator Carmen A. Orechio
Senator Raymond J. Zane
Senator Donald T. DiFrancesco
Senator William L. Gormley
Senator Lee B. Laskin

ALSO PRESENT:

Senator Raymond Lesniak
District 20

John J. Tumulty, Team Supervisor
Office of Legislative Services
Aide, Senate Judiciary Committee



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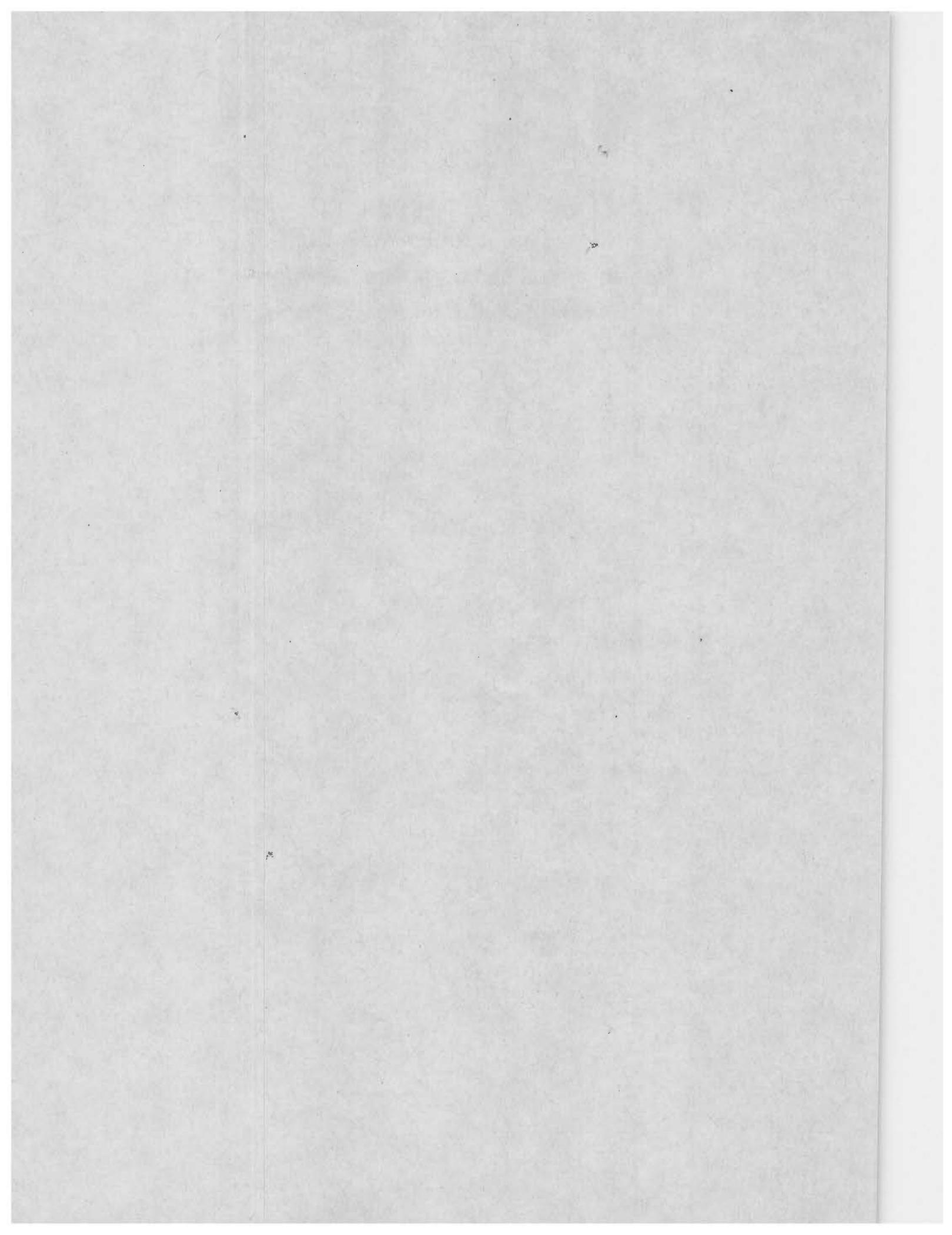


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Donald R. Belsole Director Division of Criminal Justice Department of Law and Public Safety	20
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SENATOR JOHN A. LYNCH (Chairman): Good morning. As most of you who are here today know, the Judiciary Committee is meeting in response to a request from Attorney General Kimmelman, to inform us as to the background and information gathering that has taken place in his office regarding the ongoing Chemical Control controversy.

We are pleased to see you here this morning, Mr. Attorney General, and we welcome you to the Committee. Do you want to let us know in the first instance how you intend to proceed, and who is going to be offering statements?

ATTORNEY GENERAL IRWIN I. KIMMELMAN: Senator, first I will make a statement and a presentation. Commissioner Hughey is here, and he has something he would like to address to the Committee. Aside from that, the Committee will be invited, if they so desire, to ask me questions. I have Colonel Pagano, Superintendent of the State Police, here, and Donald Belsole, Director of the Division of Criminal Justice.

I would like to begin, Senators, by indicating I have asked to be present this morning, because I share your concerns about certain allegations which continue to be made concerning the Chemical Control toxic cleanup, which took place some years ago in the City of Elizabeth. Also, I would like to share with you the determination made by the Attorney General's office, that the allegations, which we will talk about this morning, are without substance and, certainly, without sufficient foundation to be the basis of any criminal action.

Additionally, I asked to come before you this morning because I received a letter, dated February 17, 1984, from Senator Lesniak, who reacted to a piece in an editorial which indicated that the Attorney General's office may have a conflict. Because of that, the Senator indicated he would like to explore that subject to determine whether, if such a conflict existed, there should be the appointment of a special prosecutor. The Senator asked me in his letter to discuss the allegations bearing on that subject.

In doing so, I think I ought to give you gentlemen some brief background concerning Chemical Control. That is the name of a corporation which had a site in Elizabeth, somewhat less than three

acres on the Elizabeth River in the port area, which was designed for the storage of toxic wastes. It was a disposal facility for those wastes.

In January, 1979, over five years ago, the DEP determined that this site constituted a hazard, and that steps should be taken immediately to clean up the site and eliminate the hazard. A legal action was instituted in Superior Court in January, 1979, for that purpose. In March, just two or three months later, the Court appointed a receiver to take control of the site, under the auspices of the Department of Environmental Protection, which was proceeding to clean up the site.

The cleanup began at that time, and continued, but in April, 1980, just about four years ago, there was a fire at the site. The pictures here (the Attorney General indicates pictures on a stand in back of him, facing the Committee) were taken before the fire occurred. I will indicate the dates of the pictures later on. As a result of the fire, an intensive cleanup effort began and was concluded, but not before some \$26 million in public funds was expended. Because of the emergent nature of what had occurred, contracts for the cleanup were let without public bidding. They were let on the basis of time and materials and, in effect, were open-ended. We will get to that later on.

The investigation of this debacle -- as I will refer to it -- is not new to State government. It has been carried on now by three Attorneys General and two Administrations. In addition, the Program Integrity Unit of the Division of Criminal Justice has made an exhaustive investigation and analysis of what took place, and the national accounting firm of Coopers-Lybrand was also retained to conduct a similar exhaustive analysis, investigation and report. As a matter of fact, we continue to investigate this particular incident as allegations are brought to our attention.

Now, I indicated to you gentlemen that a fire occurred. As a result of that fire, some workmen alleged they had been injured, and they started a civil action to recover for their injuries. Those of you who are lawyers know that when you represent a plaintiff who claims

injuries, you sue everyone in sight, everyone or anyone possible who may have something to do with the incident, in the hope of collecting. That is what happened in this case. There are at least a dozen defendants. Some of the defendants are from the State of New Jersey -- the Department of Law and Public Safety, the Department of Environmental Protection, the Administrator of the New Jersey Spill Compensation Fund, and so forth.

One of the defendants, by virtue of his contractual relationship with the State, agreed to indemnify the State against any liability that might be alleged as a result of the cleanup work. That indemnification was backed by an insurance policy, so that when this civil action seeking damages for personal injuries sustained by two people was instituted, the State called upon the indemnification agreement and the insurance policy. The insurance company selected an attorney to represent the interests of the defendants in this litigation. So, as of the time the lawsuit was instituted, and as of today, the State of New Jersey and these named defendants -- the Department of Environmental Protection, the Department of Law and Public Safety, the Spill Fund Administrator, and so forth -- have absolutely no pecuniary interest in this lawsuit. As a matter of fact, the Attorney General is named daily as a defendant in all sorts of lawsuits. I have no personal interest in these lawsuits; I am named because I represent the State of New Jersey, and it is convenient to name the Attorney General. Because of my being named, that does not give rise to a conflict of interest on my part, especially in this situation, when there is absolutely no pecuniary interest on the part of the State of New Jersey.

I make these remarks, basically, in answer to your letter, Senator Lesniak, and I hope I have clarified for you what the position of the Attorney General's office is with respect to that civil litigation. We do monitor civil litigation; we do not appear in it. However, we do send a deputy to the depositions from time to time, and to other proceedings, so he can report back to our office what is taking place for informational purposes.

Now then, at this point I would like to address some of the allegations which concern and interest all of us. The first allegation, which concerned me because it concerned my Department, was an allegation, in so many words, that key documents have mysteriously disappeared. Key documents concerning the toxic waste cleanup mysteriously disappeared after they were given to the Division of Criminal Justice. That, Senators, is based upon -- according to a news report -- "a 148-page deposition taken eleven days ago," at the time of the newspaper article, which appeared on January 29, 1984. The deposition, the direct testimony, was 148 pages, but there were some seventy pages of cross-examination which, unfortunately, I believe were not brought to the attention of the reporter who wrote the article, so he did not have an opportunity to review that cross-examination.

In any event, the allegation that key documents mysteriously disappeared is based on a statement in this deposition, which was taken in the civil suit by the attorney for the allegedly injured plaintiffs suing for damages. The report in the paper is as follows. The witness at the time was Paul Giardina. Paul Giardina was a person attached to the Department of Environmental Protection at the time of the Chemical Control toxic waste cleanup. I said he was attached to DEP, because he was employed by the Federal Environmental Protection Agency, and he was on loan to DEP at the time. Mr. Giardina's deposition was taken. He was asked by the attorney for the plaintiffs if he had any recollection of missing documents dealing with drum counts. He explained, according to the article, "There were logbooks. These logbooks were daily records of what happened at the Chemical Control site. They were authored by the on-scene coordinators. Those were provided to the people in Criminal Justice." There was a paragraph here in the news report.

"To the best of my recollection, they got 100% of that information. There were weekly summary reports that were issued by the on-scene coordinators which itemized expenditures, drum counts, and what have you. It is my recollection at this time, that that information was incomplete. In other words, several of those reports might have been missing."

I went to the deposition to find out what the witness said. He said 90% of what was reported in the paper: there is no doubt about that. I just passed around to each of you Senators what the news report was -- which I just read -- and what the deposition was. If you look at the deposition, the witness says, "There were logbooks. These logbooks were daily records. They were authored by the on-scene coordinators. Those were provided to the people in Criminal Justice," and then he says this: "I found those there to be largely intact." That is not in the news article. "I found those there to be largely intact; that means," he goes on to say, "that to the best of my recollection, they got 100% of that information." That is all in one sentence, "To be best of my recollection, they got 100% of that information." That is not a new paragraph. But, a key phrase in this sentence somehow was omitted, and that distorted the purport of the man's testimony.

Now, let's get back to that testimony. He says of the daily log records of the drum count and the expenses: "I found those there to be largely intact." He goes on to say, "There were weekly summary reports that were issued. It is my recollection, at this time, that that information was incomplete." What information? The weekly summary reports. Weekly summary reports are made from the daily log records. The daily log records of the drum count are the original record. Then you make a weekly summary. That is why the word "summary" is used. The witness said of the daily records, which are the original records, which are the key records, "I found them to be intact." It was the weekly summary that he could not locate -- or he could not locate all of them. A weekly summary is not an original document.

I'll go back to the allegation here. "Key documents have mysteriously disappeared." The witness doesn't say they "disappeared." He doesn't use that word. And, he doesn't say they were "mysteriously missing." He doesn't use either of those words, "mysteriously" or "disappeared." But, there was cross-examination, which, unfortunately, was probably not available to the press at the time, although the cross-examination of the witness, Giardina, took

place on January 24, which was still prior to the article which appeared in the paper on January 29.

SENATOR RUSSO: General, excuse me. Why do you say it was not available to the media?

MR. KIMMELMAN: I don't know why, because the media, according to the article, indicated the article was based on a 148-page deposition.

SENATOR RUSSO: Are you referring to the Star-Ledger article?

MR. KIMMELMAN: Yes.

SENATOR RUSSO: What date was that?

MR. KIMMELMAN: January 29.

SENATOR RUSSO: Then, assuming it was not available to them at the time, or to the media in general, do you know if it has since been made available to them?

MR. KIMMELMAN: Yes. It is available to anyone. I don't know when, if ever, the paper got it. I got it because, as I will indicate to you in a short while, I said to the reporter, "I am going to order the deposition and read it myself." I read the cross-examination, as well as the direct examination. My point to you, Senators, is that the cross-examination also took place prior to the date of the article -- five days prior.

SENATOR RUSSO: I see.

MR. KIMMELMAN: What does the cross-examination say, when the witness is asked about missing documents?

Q. Do I understand that when you were unable to find certain documents at the Division of Criminal Justice, you were able to reduplicate them?

A. Find another copy at least?

Q. Yes.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

What documents, I say to you rhetorically, have mysteriously disappeared, when on cross-examination the witness says, "I was able to reduplicate them." "Is that correct?" "Yes." "Correct?" "Yes, sir." He nailed it right in.

I say to you, gentlemen, that no documents have disappeared, mysteriously or otherwise. Criminal Justice has every document that was turned over to them by DEP, or anyone else, in connection with the Chemical Control investigation. Documents include, in my report to you gentlemen, video tapes made of the scene. There are about three or four video tape cassettes, and they are all intact in the Division of Criminal Justice.

Beyond that allegation, there is another allegation which is very disturbing, not only to the Attorney General's office, but to the Department of Environmental Protection. That allegation is that top officials in DEP interfered to slow down the cleanup project. There was an editorial which used those words. "Top Departmental officials interfered to slow down the cleanup project and, without that interference" -- this is the innuendo -- "that cleanup might have been completed at lower cost and before a horrendous fire of suspicious origin catapulted flaming, exploding barrels into the night sky, threatening tens of thousands of area residents."

The fire was of suspicious origin, but you cannot go beyond that. The Union County Prosecutor's office investigated the fire and indicated that from their investigation, there was no arson. The State Police investigated the fire, and their determination was that they could not say whether there was, or was not arson. The evidence was inconclusive.

But, in any event, let's get back to the allegation that top DEP officials interfered to slow down the cleanup. That is the farthest thing from the truth. We are now back dealing in the year 1979. There was a Spill Fund Act promulgated by the Legislature, and it was the law at that time. The then Commissioner of DEP, who became Counsel to the Governor, Dan O'Hern, and the then Treasurer, Clifford Goldman, had legitimate concerns, and uncertainty -- legal uncertainty -- as to whether Spill Fund moneys could be used for the cleanup at the Chemical Control site. Apart from Commissioner O'Hern and Treasurer Goldman, some of the lower echelon employees of DEP, such as a man named Karl Birns -- who we will get to -- and Mr. Paul Giardina -- whose deposition was taken, and who indicated some sort of interference

with respect to a slowdown -- had the legal opinion that Spill Fund moneys could be used, without question and without restraint, to clean up the Chemical Control toxic waste site.

The issue was resolved. It was resolved by the Legislature. I would like to refer you gentlemen to a bill which was introduced in the Assembly, A-3542. This bill was referred to the Assembly Committee on Agriculture and Environment. On October 10, 1979 -- remember, that is before the fire occurred; the fire occurred in April, 1980 -- the DEP took over by virtue of the lawsuit in January, 1979 -- it was determined by the Treasurer and the then Commissioner and Counsel to the Governor that there were legitimate concerns over the use of Spill Fund moneys to be spent in this matter. So, a bill was introduced in the Legislature to resolve those concerns. On October 10, 1979, the new Commissioner of the Department of Environmental Protection, Jerry English -- Jerry Fitzgerald English -- appeared before this Assembly Committee with a statement, which I will only refer to in part. "The bill before you today is one part of a larger hazardous waste package being developed by this Administration." She indicated what the bill is in one respect: "The introduction of amendments to the New Jersey Spill Compensation and Control Act, which bill we are here to discuss today." And, she said this, "The improper disposal of hazardous waste materials has caused many serious problems, and will continue to do so until corrected. Many cases of improper disposal have recently caused great public concern, and have received large amounts of publicity and press coverage." Times have not changed.

She goes on in her statement: "The Chemical Control Corporation warehouse and disposal facility in Elizabeth, where tens of thousands of drums containing unknown hazardous waste are being stored-- It was this case, and the danger associated with it that precipitated the bill."

The statement next to the bill reads as follows, and I'll just paraphrase the key words. The purposes of this bill are -- and it lists many purposes -- to: Open the Fund -- to open the Fund, open the Spill Fund to ancient or imminent spills which pose a threat to public health and safety.

Chemical Control was something which occurred prior to the Spill Fund enactment. The purpose of this bill before the Legislature was to open the Fund to ancient spills, and the Legislature passed it. It became law on January 23, 1980, about a month and a half before the fire. At that point, the Department of Environmental Protection geared up to deal with this site on an accelerated basis. But, the fire occurred, and that was it.

I point this out to you, gentlemen, because the allegation is that top DEP officials interfered to slow down the cleanup. I hope you will realize that there were concerns, legitimate concerns, on the part of Commissioner O'Hern, and on the part of Treasurer Goldman, which resulted in a bill being passed by the Legislature. They had to be legitimate concerns; otherwise, the Legislature could have said, "The bill is not necessary."

SENATOR DiFRANCESCO: Mr. Kimmelman?

MR. KIMMELMAN: Yes, Senator DiFrancesco.

SENATOR DiFRANCESCO: Are these the amendments to the original Oil Compensation Fund? Is that what you are referring to?

MR. KIMMELMAN: Yes -- January, 1980. Senator Lesniak, may I ask you a question?

SENATOR LESNIAK: Surely.

MR. KIMMELMAN: Were you a member of the Assembly Committee at that time?

SENATOR LESNIAK: I was trying to ask you who the sponsor was.

SENATOR DiFRANCESCO: You may have been the sponsor of that bill.

SENATOR LESNIAK: Of course, I was.

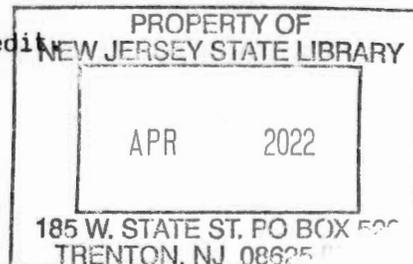
SENATOR RUSSO: I was the sponsor of the bill.

SENATOR DiFRANCESCO: You were, John?

SENATOR RUSSO: Yes, the original bill. The Oil Spill Compensation Fund bill was--

MR. KIMMELMAN: (interrupting) Maybe after today you'll all want to take credit for sponsoring it.

SENATOR LESNIAK: I'll take the credit.



SENATOR DiFRANCESCO: There was some question about whether that covered toxic waste.

(Inaudible due to cross-conversation by members of Committee.)

MR. KIMMELMAN: There are other allegations which get more serious, and one is an allegation that the cleanup chief, meaning Mr. Giardina, whose deposition was being taken, tells of an order to doctor the drum count. The allegation is that on-site personnel of DEP were instructed to falsify DEP documents and records as to the number of drums coming onto the site.

I was telephoned by the press on Friday afternoon, January 27, 1984. They indicated to me that a deposition had occurred; that was Mr. Giardina's deposition. In that deposition, the person said, "High DEP officials," or "an official ordered that documents be falsified." My response was -- and I will make the same response today -- "That is a most serious allegation, that official records were ordered to be falsified or doctored." I said I would order the depositions, Senators, which I did, and that I would read the depositions, and I would determine after I read the depositions what further action would be taken by the Attorney General's office, including the possible summoning of a grand jury.

I obtained the depositions. My first search was for the statement made which gave rise to this allegation that a high DEP official ordered that the drum count be doctored -- that documents of the DEP be falsified. The statement appears on Page 88 of Mr. Giardina's deposition.

Q. Did anyone in DEP ever tell you to change drum counts?

A. Yes.

Q. Can you tell me what you were told?

A. During the summer of 1980, after the fire had occurred, Mr. Karl Birns was either invited, or on his own, prepared a paper on the status of the Chemical Control cleanup for a professional organization.

I am going to emphasize a few words, was either "invited" or "on his own." Does that indicate to you that there was an official document involved here? Let's just put that aside for the moment.

Karl Birns, either invited, or on his own, prepared a paper. Karl Birns prepared a paper. In that paper, Mr. Birns indicated the amount of drums that had been cleaned up to date, or were projected to be cleaned up. That number was in, I believe, the 50,000 range, the high 50,000 range. "Mr. Birns prepared this report based on the information that came out of our daily working log." Get this, "Mr. Birns prepared this report based on the information that came out of our daily working log. It is my understanding that is how he got those numbers."

"It is my understanding that is how he got those numbers." Well, I read that, and it didn't seem to me to be an official document, because the man was invited, or on his own decided, to prepare a paper. But, there was another deposition taken on the very day I was telephoned by a reporter -- Friday, January 17. Unfortunately, Senators, the reporter obviously didn't know about the other deposition of Mr. Birns. Now we get to Mr. Birns, who Mr. Giardina just said prepared the document -- the document, the speech, the paper. "Mr. Birns prepared the report based upon the information that came out of our daily working log." Now, let's just see how that was prepared.

Here is Mr. Birns' deposition taken on January 27.

Q. Mr. Birns, I want to show you what has been marked P 12.

I would like you to take a look at that and tell me if you can identify it.

A. Yes.

Q. Would you look at all the pages, please? Can you identify that for us, please?

A. Yes.

Q. What is it?

A. It is a draft of a paper that was written by a woman on my staff, Andrea Breen.

Let's just stop with that sentence. Giardina said, "Mr. Birns prepared this report based upon information that came out of our daily working log." Mr. Birns said, "It is a draft of a paper that was written by a woman on my staff, Andrea Breen." Look at what he further says, and it is entitled, "Chemical Control Case History." "Andrea did the first draft on it. I redrafted it and updated it. It was

eventually submitted to a journal and published. I think I presented it at a conference, and it was published as a proceeding in the conference."

Q. Did the paper have to be reviewed by anyone else in DEP beside yourself?

A. Yes.

Q. Who reviewed that?

A. Paul Giardina (that is the man who testified in the civil case whom we are referring to), Paul Arbesman, and, I think, the attorneys for the Department looked at it, and, of course, the Review Committee for the conference.

Q. Limiting it to DEP, not the conference?

A. I think those, and there may well have been others. I probably gave a copy to George Tyler.

Q. Did you receive any comments or changes from Mr. Arbesman?

A. Yes, I did.

Q. What was that?

A. He asked that I change the estimated number of drums at the site, the drum count, down to the figure the State was using in its press briefings and for public consumption.

Q. Was that the number you had in your draft?

A. It was a number which was developed by a student on my staff, a summer interne, a woman by the name of Pat Deni. She was given some aerial photos of the site, some large aerial photos and, using a grid method -- trying to get an estimate of the number of drums by putting in a grid overlay -- counting the height of the drums, estimating the square footage of the site available for drum storage, and using that as a basis for developing a drum estimate -- the number of drums on the site -- she came up with a figure between 45,000 and 50,000 drums outside the buildings. There are buildings here, and no one can see from an aerial

photograph what is inside the buildings. She came up with a figure outside the buildings, and that was the figure I originally used in the paper.

What did Giardina say? Giardina said that Birns prepared it, "based upon information that came out of our daily working log." Birns said, when he was questioned, that he didn't prepare it; "it was prepared by a summer interne." It wasn't prepared from information that came out of the daily working log. She was given some aerial photos of the site -- some large aerial photos and, using the grid method, and so forth as I indicated, she came up with a drum count of between 45,000 and 50,000 drums outside the buildings.

Q. So, the draft you prepared and forwarded for review had 45,000 to 50,000 drums on it?

A. That is correct. Now, I used her figures, which were the figures Andrea used in putting together what was going to be a report on the site, one of the monthly reports. I used the figures that Andrea used.

Q. What was Mr. Arbesman's direction to you?

A. To change the number down to 36,000.

Q. And, did you do that?

A. Yes.

So, here we have a situation where a summer interne prepares a report from an aerial photo. She comes up with a number somewhere within the 45,000 to 50,000 range, as Birns said. Arbesman says, "You better reduce it to 36,000, because that is the figure we have been using in the Department." And, it was reduced. That is your allegation, gentlemen. We'll get to what the truth is, but that is the allegation. An official document was ordered altered. Fake data. Number one, it was not an official document. I didn't know that when I said this was a most serious allegation. Number two, the data was not faked at all. Mr. Arbesman said, "You better reduce it to the figure we're using, 36,000."

Now, what did we do? What did we do? We took aerial photos, we hired an expert, the Mark Hurd Corporation -- I believe they are from the Midwest -- and we utilized the State Police. We went over the

aerial photos using the grid method, using the square foot method, counting the height of the drums, and so forth. The expert hired by our Department came up with a report that there were 31,000 drums on the site, give or take 20%. Our expert told us you can never be accurate in this. So, we came up with 31,000, give or take an error of 20%. Let's be charitable. Thirty-one thousand in error on the plus side of 20%. That is another 6,000 drums. So, that is 37,000 drums on the site and, by golly, what did Paul Arbesman say to the person who submitted the draft of the paper? "You better use 36,000." He was right on the money. He couldn't have been more accurate, and we had to hire experts, and expend taxpayers' money to prove that the man knew what he was talking about, and was right on the money.

There has been an allegation along those same lines that there was a drum build-up in violation of a court order. The range of the number of drums on this site is unbelievable. Affidavits filed by DEP employees in the court proceeding indicated that the drum count was somewhere between 30,000 and 35,000 thousand dollars.

SENATOR RUSSO: Mr. Kimmelman, you said dollars. Did you mean dollars?

MR. KIMMELMAN: No, I meant drums, excuse me. The court action was instituted in January; the receiver was appointed on March 8, 1979. The receiver had to render a report to the Superior Court judge. His report was an estimate between 34,000 and 40,000 drums. So, now we have some affidavits, 30,000 to 35,000; the receiver said 35,000 to 40,000; and, other affidavits filed in the court proceeding range from 30,000 to 50,000. The State's verified complaint in January said there could be as many as 50,000. Affidavits of Federal EPA employees who visited the site in early 1979 contained estimates ranging from 20,000 to 30,000. A Super Fund application estimated 45,000 to 50,000 in 1978.

So, here we have estimates of the number of drums in this photo, and you can see them (Attorney General indicates photo on stand in back of him) ranging anywhere from 20,000 to 50,000. No one knew; no one made an exact count. You couldn't. Our expert said 31,000, plus or minus 20%, and the Deputy Commissioner of DEP said 36,000,

which was right smack within the range, and which was accurate. There was absolutely no basis for a charge against this man, that he ordered someone to fake official DEP documents. That's nonsense. The man was doing his job, and it turns out that he was absolutely correct.

Now, the allegation goes, as I indicated to you, Senators, that there was a build-up of drums in violation of the court order. Let me read you the court order. There was an injunction; on January 19, Judge Ackerman entered an injunction. What did the injunction say? It said, "It is further ordered that the defendants, Chemical Control," and he lists all the defendants, "and other persons in active concert or participation with said defendants as receive actual notice of this order, cease accepting for disposal and/or storage any further waste material at the Chemical Control facility in Elizabeth." That defendants and persons in active participation with the defendants cease accepting further drums for storage at the Chemical Control facility. Who was the plaintiff? The plaintiff was the State of New Jersey, Department of Environmental Protection. There was no injunction issued against the plaintiff. It was only the defendants who couldn't bring anything further on the site.

What is the evidence in this case? Mr. Giardina and Mr. Birns, the two gentlemen who testified in this civil suit-- I indicated that Mr. Giardina was a EPA employee on loan to our Department. Birns was an employee of the Department, and now he is on loan to the State of Kansas on some pollution control project there. These two gentlemen testified in their depositions that drums, additional drums, did come onto the site. Seven to eleven trailer loads came onto the site. These trailer loads were abandoned in and around the area. They were asked on deposition:

Q. How many drums are in a trailer load?

A. Well, forty in the first tier; if you load up to a second tier, there will be eighty.

Q. Did any trailers ever come in with double tiers?

A. No, they were all single tier -- forty.

So, we have eleven trailer loads coming in -- the testimony is seven to eleven, but I'll say eleven -- with forty drums. That is 440 drums that came onto the site. They were brought to the site by DEP employees, who were not enjoined by virtue of this court order. Mayor Dunn of Elizabeth and then Senator Gregorio came across another trailer load of drums abandoned near a diner. That posed an imminent hazard and threat to the community. Mayor Dunn and Senator Gregorio, very properly, imposed upon DEP to immediately remove it. If any Senator, to this very day, calls DEP about a trailer load of hazardous drums in his district, DEP will take immediate steps to remove that trailer load. And, that was what was done here. Where was it removed to? It was removed to the only facility available in the area, the Chemical Control site. So, another load of drums came onto the site.

Then there is some testimony that the Division of Criminal Justice is privy to. They do not know how accurate it is, but it comes from another former -- I emphasize former -- DEP employee, Dr. Glenn Paulson, who said, "Well, there could have been two to three dozen more trailer loads coming in." Two to three dozen more. Birns and Giardina never saw a trailer load come onto the site that was fully loaded. They were always one tier, so forty drums. For the sake of argument, let's say thirty more trailer loads came onto the site, forty drums per trailer load, that's 1,200 drums. And, we know there were about 500 drums from the eleven loads we do know of, and the one load that Senator Gregorio and Mayor Dunn complained about. So, you have a total of maybe -- maybe -- 1,600 or 1,700 drums coming onto the site. Yet, there were allegations in the paper, as late as yesterday, that court documents show that up to 15,000 drums came onto the site in violation of the court order.

Gentlemen, those allegations are contained in the depositions by Mr. Birns and Mr. Giardina. They never made an accurate count. The only accurate counts that were made by us, that we know of, indicate that maybe 2,000 more drums came onto the site. It certainly wasn't in violation of the court order, because DEP was not barred from bringing additional material onto the site. It is a groundless allegation.

I have these photos here, and I hope that when you get an opportunity you will come up and take a look at them. (Attorney General uses photos on stand to illustrate his point.) This first large photo, Senators, was taken in November or December, 1978, before DEP went onto the site. The photo on top was taken six months later in May, 1979. The allegation is that this huge build-up of extra drums coming onto the site in violation of the court order took place during these dates. Let's assume that 15,000 drums came onto the site, and let's take some of these assertions that there were 45,000 drums on the site. Well, if 15,000 drums came onto the site and were part of that 45,000, or were part of 50,000, that is about a third. Fifteen thousand is a third of 45,000, and maybe 12% of 50,000. Look at the first photo, and then look at the second photo taken six months later. Any layman will tell you there is no way possible that the capacity increased by one-third. You'll see the same drums, stacked in the same manner. If you look closely, you'll see certain drums with white tops in a yard area, and you'll see the same white tops of the drums in another yard area. They were untouched. It's nonsense to say that 10,000, 15,000, or 20,000 drums came onto the site. That did not occur.

Now you Senators have every right to ask me, and to ask Commissioner Hughey, what steps have been, or are being taken to prevent a recurrence of what has happened at this site? There is no question that the Chemical Control cleanup left much to be desired, especially in the way of administrative control. What occurred was fraught with mismanagement; no doubt about it. On this large a scale, it was a first of its kind for the New Jersey DEP at that time. Neither Commissioner O'Hern nor Commissioner English was ever confronted with a cleanup of this magnitude before. Because of that, DEP at that time did not have any firm procedures in place to deal with such a precipitous situation as occurred there. What resulted, the benefit of hindsight tells us, was nothing more -- as I indicated to you earlier -- than a debacle. Hindsight tells us that four or five years later, where we are now. The Program Integrity Section of the Division of Criminal Justice investigated this. I told you that

Coopers-Lybrand investigated this. They furnished reports to the Commissioner of DEP. They furnished reports to the Treasurer. The Commissioner and the Treasurer have met, and Commissioner Hughey can tell you this better than I can. But, they now have procedures in place, especially as to cost containment. I told you that the contract here, let out in 1979 and 1980, was without public bidding. It was for time and materials, and it was completely open-ended. That is why the costs amounted to the sum of \$26 million.

That being the case, we cannot go back and restructure the agreement, and say, "You gentlemen were wrong, and you now ought to pay a criminal penalty for being wrong." That is the way the contract was. I took it as it was given to me. I can't drag the contracting parties or those responsible for the contract into the grand jury and tell them they are going to be made criminally responsible for something that hindsight now tells us was dead wrong. We don't work that way.

Additionally, I have taken steps to have my staff prepare an amendment to the existing Spill Fund bill -- you who are lawyers will understand -- which will impose strict liability, or vicarious liability, as the law professors prefer to use the term, on the generators of toxic waste. Even though the generators take steps to have their toxic waste disposed of by an independent contractor, if that independent contractor somehow falls down on the job, or doesn't do what he contracted to do, we suggest that the law be amended to make the original generator responsible for the cleanup of the toxic and hazardous material that that generator created. That amendment will be submitted to the Governor's Counsel's office within the next day or so. It will then be prepared for introduction into the Legislature by whomever chooses to sponsor it.

I think that if an amendment such as that, imposing strict or vicarious liability on generators under New Jersey law, is enacted, it will go a long way toward solving some of our problems. This is not a new concept. The Federal government already has this concept as part of its laws, especially the laws dealing with the creation of atomic waste material. The generator is absolutely responsible.

Now, I have taken more time than I think I should have. I have indicated to you gentlemen that I have personally gone over these depositions. I have personally gone over other evidence. I see no reason to reopen the Chemical Control investigation, by grand jury or otherwise. We are aware of other allegations concerning Chemical Control and related activities. These allegations being of recent origin, I am not at liberty to discuss them or disclose them, but the Division of Criminal Justice and the State Police, as always, will be running these allegations through and investigating every lead. A decision will be made in due course as to whether the allegations should be brought before a grand jury.

With respect to what I have discussed this morning, I see no evidence of criminality. I see evidence of mismanagement; I see evidence of inefficiency; I see evidence of waste, none of which rises to the level of criminality. As long as I remain Attorney General, the grand jury and the criminal process will not be used for the sake of political expediency, or for the sake of dealing with wild or unsubstantiated accusations. None of my predecessors have ever used the grand jury for that purpose, and I have every faith that my successors, likewise, will not use the grand jury for that purpose.

Thank you.

SENATOR LYNCH: I think we ought to open up the quorum for questions now, before we talk to Commissioner Hughey, to enable us to keep this in context. As far as the Committee is concerned, Senator Lesniak is here and he has also been offered the opportunity -- being the host Senator for the site in question, and being very interested -- to ask whatever questions which are germane to the subject matter of this presentation as are necessary.

Just a couple of clarifications. Was Dr. Paulson in the employ of DEP?

MR. KIMMELMAN: Yes, at the time.

SENATOR LYNCH: The allegation he made, or the statement he made with regard to the additional drums coming onto the site -- was that in the context of depositions that were taken of Dr. Paulson, or--

COMMISSIONER ROBERT E. HUGHEY: No, that was a result of his reports, I believe. Glenn Paulson headed the science group at DEP which, in 1979, contained the only people who were responding to hazardous waste at all. I think the comment he made, to put this in context, was -- this is offhanded now -- "Yes, we took drums, because mayors asked us to take drums. We took seven to ten trailer loads onto the site. Frankly, I would have taken more, and we may have taken more." I think he wanted to put into context the number of drums which may or may not have come onto the site. He was not disinclined to take responsibility for that.

SENATOR LYNCH: Does this statement appear in reports in your office, or just in newspaper reports?

COMMISSIONER HUGHEY: Just in newspaper reports.

SENATOR LYNCH: I take it he was never deposed.

DONALD R. BELSOLE: Senator, excuse me. Let me just clear the record. We investigated this matter; I have been investigating it since I got here last year. He was one of the fellows we wanted to talk to. He was in Europe for six months, but we finally tracked him down. He told us at Criminal Justice, "Yes, I let two to three dozen truckloads come on, because they were near schools, they were near diners, and I didn't know where I was going to put them. I'd do it today, and I'd do it next week. Tell the papers that, and tell your boss that." So, that information came to us when my people, a State Police officer and one of my lawyers, interviewed Dr. Paulson.

SENATOR LYNCH: There are no interoffice memos to indicate what came onto the site, what the contents were, analysis numbers, or anything like that?

MR. BELSOLE: No, sir.

MR. KIMMELMAN: There is nothing like that at all, Senator, just the statements of these various individuals that additional trailer loads did come onto the site.

SENATOR LYNCH: So, as far as the records of DEP are concerned, there are no indications of those trailer loads having come onto the site, or under what authorization they came onto the site, or under what--

MR. KIMMELMAN: (interrupting) Or under what circumstances?
That is correct.

SENATOR LYNCH: That would include the single trailer load that Mayor Dunn and Senator Gregorio had questions about?

MR. KIMMELMAN: That's right.

SENATOR LYNCH: With regard to the figure 36,000 that Paul Arbesman used, and that was the subject matter of his initial press reports, advisories, and so forth-- When that original number was struck, do you know what it was based on? Can you tell from the memorandums in your file?

COMMISSIONER HUGHEY: I can tell you even from the testimony of the civil case, from the same individual who later suggested that the counts were changing, and that was Paul Giardina. The entire Department-- As a matter of fact, I will quote it. It is on Page 134 of the cross-examination. "We all, Karl, Paul Arbesman, and everybody I talked to, always maintained a figure in the 35,000 to 45,000 range, which was the number, I guess, they had derived from court-type documents indicating such in December, 1978, and January, 1979."

SENATOR LYNCH: I'm not really looking at it from the standpoint of hindsight, what was testified to in the depositions. I am concerned about what your files indicate at DEP. When Paul Arbesman first came out with the 36,000 number, at that time, based upon what you have in your files, do you know how that figure was arrived at?

COMMISSIONER HUGHEY: John, as the Attorney General has told you, the files have a lot of estimates on the number of drums. I think the estimate which continues to today -- the best count I have in anybody's files -- is from the investigation which was done most recently, which was actually a scientific investigation of aerial photos. Beyond that, most of the estimates are based on guesses and ranges, and you very rarely see just one number; you see a range.

SENATOR LYNCH: Prior to the first time DEP issued an advisory of some sort that there was a guesstimate of 36,000, is there any written documentation in your files to reflect that figure of 36,000 and how it was arrived at?

COMMISSIONER HUGHEY: John, I think I am going to let the Attorney General answer that, because as I am going to say in my testimony, I have yet to see an original file on this case.

MR. KIMMELMAN: Right. We have the original documents, Commissioner Hughey, and there is no firm figure at all.

SENATOR LYNCH: I have nothing further. Senator Russo?

SENATOR RUSSO: Mr. Kimmelman, let me just say in general that I, for one, find your testimony today shocking, shocking in the sense that-- You know, when we first read these newspaper accounts, it sounded awfully serious, as you said it also sounded to you yourself. Basically, some individuals were accused in the media of some very bad things. What I find shocking-- I want to be careful because there may be other sides to this story, although it is quite apparent that you thoroughly prepared your case, and I would like to compliment you on your testimony. It was presented extremely well. Absent anything to the contrary, I find it shocking that apparently there is hardly any basis for some of the things we have become so concerned about here, if, in fact, that remains the final determination and there is nothing further.

Frankly, what really surprises me, is that I personally would have considered the particular reporter one of the best, in the sense of being prepared and thorough. I am going to be very interested to find out why that cross-examination was not in his possession.

MR. KIMMELMAN: It was not made available to him for some reason, and I don't know why. He did not attend the proceedings.

SENATOR RUSSO: I understand.

MR. KIMMELMAN: There was a young attorney who took the depositions who advised that this testimony had occurred. But, this attorney did not point out all the transcripts that were available, or should have been obtained.

SENATOR RUSSO: Well, I think then maybe we ought to find out about this young attorney, as to why he would have presented only direct examination. I am not suggesting that the reporters should have known that where there is direct, there is cross, and sort it out. It may be that he had no reason to. But, to this day, of course, Mr.

Arbesman and others have had some serious allegations floating around in the media concerning their conduct and their actions.

What I am particularly concerned about now while we have you here, is one point in your testimony, where I think you said that out of the testimony that was available, an answer was quoted, but the next sentence was left out and it was very significant. I think that is what you indicated. Could you go over that once more, because that bothers me?

MR. KIMMELMAN: You have it in front of you. The witness was questioned about the drum count, and about records being missing. His answer was -- and you have it there -- "There were logbooks. These logbooks were daily records of what happened in the Chemical Control site. They were authored by the on-scene coordinators. Those were provided to the people in Criminal Justice." Then he says, "I found those there to be largely intact." Those words are not in the newspaper account. "I found them to be largely intact." It is the most key phrase I could imagine coming out of the deposition, when you're talking about missing documents, and the witness, on deposition, says, "I found those there to be largely intact." That was left out, and a new paragraph was started, "To the best of my recollection, they got 100% of those." But, in the deposition, that is not a new paragraph. "To the best of my recollection" is just part of an existing sentence. For some reason there was a misquote. I can't explain it, Senator.

SENATOR RUSSO: Okay. The next question I have, Mr. Kimmelman-- I know you covered this, but it sort of just drifted by me; I'm not sure I understood it. We talked about Giardina, but then in one particular article with the headline, "Second DEP Aide Tells of Fake Toxic Count," there is a reference that Karl Birns -- whom you mentioned -- said that Paul Arbesman directed him to lower the count by 9,000 to 14,000 drums, to conform with DEP's press briefings. Directed him to lower the count where, in some document?

MR. KIMMELMAN: No, I read that to you exactly, Senator. That was Mr. Birns' testimony, "It was the draft of the paper that was written by the woman on my staff." "Who reviewed it?" "Paul

Arbesman." "Did you receive any comments or changes from Mr. Arbesman?" "Yes, I did." "What was that?" "He asked that I change the estimated number of drums at the site, the drum count down to the figure that the State was using in its press briefings." Arbesman told him; he said so. "Arbesman told me to use 36,000 drums as the count, because that is the figure the Department was using." As I indicated, our own expert in the State Police went over the aerial photograph using the grid method, and he came up on the high side with the figure that Paul Arbesman utilized.

SENATOR RUSSO: Okay. Now, you covered the question about whether the record keeping in any way inflated costs. But, there are a couple other parts to this which concern me that I don't think we really touched upon. For example, one included an allegation about PERCS. Are you familiar with that?

MR. BELSOLE: Senator, what are you talking about, the cleaning of cars?

SENATOR RUSSO: Well, also, there is another one which refers to DEP supervisors who "detoured" gas supplies for their own vehicles, and little things of that sort. Now, when I see that, I certainly think the Attorney General's office would want to know about it.

MR. BELSOLE: Well, they did in 1980, 1981 and 1982. Their investigation would always come up with -- and I'm getting them as of today -- allegations. I could spend three hours here giving you allegations we received in the last two months. Basically, it was determined that either the conduct alleged did not warrant criminal prosecution, or could not be proven. Again, we are not in the business of making allegations. We have to prove things beyond a reasonable doubt. Specifically, with the allegation about gas, the allegation of people playing baseball in the loft area and not working -- there is a litany of allegations. Succinctly stated, we looked into them. Director after director looked into them, and found that they did not warrant criminal indictment before a grand jury.

SENATOR RUSSO: And, you're satisfied that you looked into them thoroughly?

MR. BELSOLE: May I take a moment to tell you what I have done?

SENATOR RUSSO: Surely.

MR. BELSOLE: You have to understand something. As you know, this happened in 1979. When I came on board in February of last year, I reopened this case for one reason, and one reason only, which, by the way, I told the reporter who concerns us here today. That was to find out whether or not there was, in fact, a drum build-up of 20,000 drums, or 15,000 drums, because, had there been such a build-up, then there would have been the greatest conspiracy you have ever seen in New Jersey, because how could you do that without having everyone on board with it?

I ordered the investigation to start on March 2. We got the aerial photographs submitted for analysis on June 3. Our budgets were kind of shaky at that time, so we had to split the cost between ourselves and the State Police to get Mark Hurd to give us an accurate count, because I had had it up to here with all the guesstimates I had in the file, and 20,000, 30,000, 50,000, 60,000 in the papers. I kept hearing 60,000.

Finally, we got the report from the expert. It showed 31,000, plus or minus 20%. The highest it could have been was 37,000. Then, I went out and got this photograph (indicating same photograph Mr. Kimmelman had used previously) which was used in a prior case. I sat in the office until three o'clock in the morning trying to count these damned things with a magnifying glass. (laughter)

We put so much time into this damned case over the past eight months, you wouldn't believe it. So, I suspect I will be here another year and you'll ask me what I'm doing at the Justice Complex. I mean, everything backs up.

I'm convinced -- I am utterly convinced, and you will be too when you look at this, and at the Mark Hurd report which you have, and which I gave to the newspaper last year. See, when I closed this thing out in terms of this drum build-up, I felt it only fair to the particular reporter, because he had spent so much time on it himself, to have him in and I laid this all out for him, the photographs, the Mark Hurd report, the analysis of the State Police officer and my lawyer-- It would take me all morning to give you everything that led

us to conclude that when you get through with everything here, there are 5,700 drums which we really cannot account for. That could mean they were brought on, or it could mean that when they emptied some of the crap that was on this property, they put it into two barrels, or three barrels.

I can look you all in the eye. I'm almost like a special prosecutor; I only got here last year. I could have been the hero of our time here and supplied the 20,000 drum build-up. But, I can look you all in the eye and tell you, I can't find it.

SENATOR RUSSO: Were the Hurd report and the other things you gave to the reporter, or to the media in general, ever printed?

MR. BELSOLE: No, as a matter of fact. I want to correct just one thing. To understand this, you have to understand the following. We are here addressing Birns and Giardina. Remember now, these articles-- Senator Russo, you said that there may be other things you might want to look into. Fine, but remember, the newspaper articles are based upon what -- the two depositions, and I sent you all copies. I don't know if they have all filtered down. But, you have copies of the depositions. There is nothing else. The newspaper articles are based upon the depositions. You have the depositions. If you read the depositions, you are going to see that Mr. Birns and Mr. Giardina, who I happen to believe, by the way, are just pretty good-minded people-- You know, they are trying to do the best they can; they're human beings also. However, if you look at their depositions -- not because I'm saying it -- you are going to see they say that the 20,000 drum build-up occurred between December, 1978, and April, 1979. I'll bet my future on it. Look at the depositions. You're going to have photographs of those two dates, and you're going to have the Hurd report for the two dates. Then, you go look at the articles and the 20,000. The Feds are now in, because they have the articles. Everyone has the articles.

I have been here since February. If I knew then what I know now, I would probably be in Morris County trying cases, as opposed to coming down here. But, I'll tell you all, we worked as hard as we

could. I'm sick of putting more time into this, but I'm doing it because we have more allegations. However, on this drum count, we can't prove it, and we're prosecutors. That's a harder job than being a newspaper reporter, and sometimes it's harder than your job. Thank you.

SENATOR LYNCH: Senator Lesniak?

SENATOR LESNIAK: Thank you, Mr. Chairman. Thank you, Mr. Kimmelman, because you share the same serious concerns about the allegations that I have. While you have lived with this for two years, I have lived with it for six years. You have lived with it for two years as Attorney General. I have lived with it for six years as an Assemblyman, as a Senator, and as a resident of the City of Elizabeth, not only a resident of the City of Elizabeth but, for a good period of that time, a resident within a half a mile of the Chemical Control site.

So, I share all of your frustrations, as I see some of them coming out, legitimate ones because, quite frankly, I'm tired and would love to see Chemical Control completely cleaned up and these allegations addressed, as we are doing here today in a proper forum. That is why I want to thank the Chairman and members for coming down here and doing this.

If I may, because of the perspective I have, I would like to address two issues which you spoke about, which are not really specifically related to this. First of all, with relation to the trailer that Mayor Dunn and Senator Gregorio were arguing over at the time -- in fact, it was an argument -- the trailer was in Linden. Believe me, I recall this very well. Senator Gregorio ordered it, or whatever he did, to get DEP to move it to the Chemical Control site. What Mayor Dunn was concerned about was that it was taken from Linden into Elizabeth to the Chemical Control site, not that it came off the Elizabeth streets, because, at the same time, I was arguing to get those trailers off the Elizabeth streets as well. But, that trailer was in Linden, not in Elizabeth.

In terms of the -- and this is really not a question for the Attorney General's office or your Department -- quote you used that top

officials interfered to slow down the cleanup process, let me say that I disagree with your analysis of that. At that time, respectfully, you were not here. But, I was, and I was the sponsor of the bill you referred to -- proudly, as you state -- and it amended Senator Russo's bill. If it weren't for Senator Russo's bill, we would not have been able to amend it to the way it is now being used to clean up, and it has wound up cleaning up, to a great extent, Chemical Control. It was the model for other states and, in fact, for the Super Fund. But, it was Senator Russo's original bill that provided a fund we could tap, in order to clean it up.

Yes, there was a serious disagreement as to whether the prior Spill Fund could be used and, yes, that bill was introduced in order to raise additional moneys and to clarify and ensure that the Spill Fund could be used. However, it was my position at the time-- There was a policy difference between the Administration and then Commissioner O'Hern as to whether that money should be tapped now and used now to mitigate that site and to lessen the danger that was really present. Those of us who were living in Elizabeth were really fearful at that time, and legitimately, as it turned out.

I took the approach that time of, "Let's clean it up; let's use that money." The approach of the Administration was, "We're not sure if we can." Because of the danger, I think my approach was correct, and their approach was not correct. But, nevertheless, that was a policy disagreement, which was ultimately clarified, and the legislation was sponsored.

MR. KIMMELMAN: Senator, the reference was to the use of the word "interfere." There was that difference, but does that difference rise to the connotation of an interference?

SENATOR LESNIAK: Absolutely not.

MR. KIMMELMAN: That is the whole point.

SENATOR LESNIAK: We did have very strong arguments, but they were over policy, whether it should be cleaned up right away with State moneys, whether it could be, and when it should be.

Now, to the reason why we are here, because I have to live with this daily, and so do you. I have expressed my true concerns. I

have also expressed the fact, and made it clear, that there is no reflection whatsoever on the ability of your office, nor, certainly, on your integrity. I think your presentaton today was very truthful, forthright, and very thorough.

I think my position is twofold. First of all, was there, in fact, a conflict, as has been suggested by allegations? Were you, in fact, a defender in one case and a plaintiff or prosecutor in another? Now, you stated that in terms of the civil case, which arose out of the same circumstances, that a defendant has an indemnification agreement.

MR. KIMMELMAN: One of the companies engaged in the cleanup was a company by the name of Peabody. Peabody indemnified the State of New Jersey from any damages arising out of the cleanup. The injuries, obviously, are alleged to have arisen out of the cleanup. A suit was begun, and we called upon our indemnifier to indemnify us. That is what happened.

SENATOR LESNIAK: And, that defendant is covered by the insurance policy?

MR. KIMMELMAN: Yes, and it applies to the State.

SENATOR LESNIAK: And, you are the third-party beneficiary under that insurance policy?

MR. KIMMELMAN: That is correct, Senator.

SENATOR LESNIAK: And, that insurance company has hired an attorney to defend the case?

MR. KIMMELMAN: Yes, Arthur N. D'Italia.

SENATOR LESNIAK: Has the State actually removed itself from the case, or has it participated?

MR. KIMMELMAN: The State has not participated in a case representing any defendant. We monitor the case.

SENATOR LESNIAK: By monitoring, you mean attending depositions?

MR. KIMMELMAN: Yes.

SENATOR LESNIAK: Does that include prepping the witnesses?

MR. KIMMELMAN: No.

SENATOR LESNIAK: No prepping of witnesses. The other issue, obviously, is the substance of the allegations. Quite frankly, even if

there was a conflict, and it appears there was not, but even if there was, the substance of the allegations has to lead to a determination that there is some merit to them. I have been living with this for six years, so I am somewhat confused, and I expect other people are confused as well. We have heard many dates about drum counts. If you could supply us with the dates of the counts that were made, and in what form they were made -- affidavits -- by whom, and the number, I think that would go a long way toward clarifying the issue, because that is, of course, a major concern as to when the drum build-up occurred. Quite frankly, I was always of the opinion (two or three inaudible words here) drums on that site, but I know there were trailers taken in. However, if we could have a clarification on those dates, that would be very helpful. Obviously, those are crucial to the determination.

Now, Mr. Kimmelman, this may be an improper question. Tell me if it is. Has any investigation ever been undertaken concerning how the original build-up resulted?

MR. KIMMELMAN: Yes, many years ago, and that was what prompted the institution of the lawsuit in January, 1979 -- the improper build-up, the improper storage, and the improper handling. That was brought to the attention of the Attorney General's office by the then DEP officials. It resulted in the injunction, as the Colonel just reminded me.

COLONEL CLINTON L. PAGANO, SR: The original injunction.

SENATOR LESNIAK: No, I'm talking about any investigation made by the Attorney General's office concerning the build-up itself.

MR. BELSOLE: Senator, let me answer your question. Number one--

SENATOR LESNIAK: (interrupting) Not the alleged build-up, but the original 30,000, or 50,000, or whatever it was.

MR. BELSOLE: That was Albert, Carracino, Conlon, etc. Yes, the Feds indicted all those people with the United States Attorney's office. That was back in 1981, I believe. They convicted Conlon and Albert, two principals of Chemical Control, for mail fraud. That was

the vehicle they used for their indictment. The Division of Criminal Justice -- the State powers to be in Criminal Justice -- in March, 1981, indicted the principals of Chemical Control, and several other parties. We charged "criminal makings of a nuisance." We won with respect to defendants Chemical Control and Colleton, but we lost the case as it reflected allegations or indictable crimes against Albert, Conlon and Northeast Pollution Control. That was a case which was handled before I ever arrived here. So, the answer to your question is, yes. The build-up prior to DEP becoming involved was the subject of investigations carried on by Federal authorities and State authorities. I can't tell you much more than that.

SENATOR LESNIAK: Well, Chemical Control was licensed as a disposal facility, not as a storage facility. In fact, they were storing materials, as opposed to just disposing of them.

MR. BELSOLE: Correct.

SENATOR LESNIAK: Quite frankly, I have never gotten it clear in my mind, even to this day, how something as visible as that could be allowed to build up to that stage.

MR. BELSOLE: I share your puzzlement.

SENATOR LESNIAK: I have one last question, and I guess it should be addressed to Commissioner Hughey. What is Karl Birns' role now in your Department? What does he do for the State that he is getting paid for?

COMMISSIONER HUGHEY: He doesn't do anything for the State that he is getting paid for. The State of Kansas is in the midst of trying to develop, for the first time, an emergency response program, and he is on loan there for a year.

SENATOR LESNIAK: Does Kansas do anything for us in return?

COMMISSIONER HUGHEY: They pay more than half of his salary. We have reached a stage where they can't do a whole lot for us. They do not have a program with us this year.

SENATOR LESNIAK: We're volunteering our efforts to help Kansas then?

COMMISSIONER HUGHEY: We volunteer our efforts to help a lot of people, but not Kansas in this case.

SENATOR LESNIAK: I have no further questions. Thank you.

SENATOR ORECHIO: Mr. Chairman, I would like to ask Commissioner Hughey a question. Why doesn't the State of Kansas pay his entire salary?

COMMISSIONER HUGHEY: Well, the first year they paid it on an IPA, which is a kind of reverse thing we do within governments where they pay half, plus benefits. In the second year, and there will be a second year presumably, they take him into their employ.

SENATOR ORECHIO: Do we have employees on loan from other states?

COMMISSIONER HUGHEY: Most of our employee exchanges happen with EPA. We borrow freely from EPA. Right now within my Department, we have probably thirty IPAs from EPA.

SENATOR ORECHIO: What about Paul Giardina, when he was on loan to the State? What was the structure of his salary?

COMMISSIONER HUGHEY: His salary was determined by what he came into us from EPA with, plus adjustments for the nature of the jobs he was asked to do within the Department. He came in to review one case, which some of you may remember. That was the Rollins case. Then, as this developed, he became part of the Hazardous Waste Program.

SENATOR ORECHIO: But, did the State pick up his entire salary, or did the Federal government pick up part of it?

COMMISSIONER HUGHEY: The State picked up his salary, with the exception of benefits, while he was with us.

SENATOR ORECHIO: So, we are more generous than either Kansas or the Federal government are to us?

COMMISSIONER HUGHEY: IPAs vary, Senator. We get some without any salary requirements on our part, and we get some where we do have to pick up on salary.

SENATOR ORECHIO: I have no other questions.

SENATOR LYNCH: Commissioner, when you refer to the original open-ended contract on time and materials -- I guess it was with Coastal back in 1979 -- from your records and so forth, why was it

considered, since there was a controversy about how this was going to be paid -- whether it would be paid out of the Spill Fund, or some other particular fund? Then there was an argument about whether it should be paid by Chemical Control or by the State. What was the emergency that led to this type of contract being arranged for, without going to some type of public bidding process, and without having any type of buttoned-up arrangement?

COMMISSIONER HUGHEY: I think, John, the best way I can answer that -- and this is all reflection, because I really don't know-- In 1979, we didn't have a Hazardous Waste Program. There was a Science Advisory Group, which was the same kind of group that developed the basis for us to investigate dioxins. They investigated them, but they were really not into cleanup.

They were a very small spill cleanup group -- spill cleanups in the context of the kinds of things you and I think of when we think of spill cleanups -- just a couple of drums. They did everything from an emergency contract, where there were a number of contractors-- It wasn't a sole source, but it was all under an emergency contract, which was time and materials.

When Chemical Control started -- and as the Attorney General noted, it was the biggest of its type -- there was no mechanism for contracting, other than the Spill Fund cleanup. I might add that it remained that way for a long time after Chemical Control. That was the only mechanism they had at that time in order to do a cleanup.

SENATOR LYNCH: Do your records show that there were submissions of proposals by several of the contractors on the list before the contract was let with Coastal?

COMMISSIONER HUGHEY: John, I can't answer that and be honest with you, because I really don't know what the records show. With the exception of the things I'm going to note today, I am clearly satisfied. I've watched five investigations, but I have not tried to involve myself in Chemical Control.

SENATOR LYNCH: The estimates I've read indicate that Coastal removed about 8000 drums. Do you know what they were paid?

COMMISSIONER HUGHEY: No, I don't, Senator.

SENATOR LYNCH: Do your records disclose how these materials were disposed of, in the first instance by Coastal, and later on by the other three contractors?

COMMISSIONER HUGHEY: They may very well. I think anything that has to do with the history of this case-- When I walked through the door, the records had been gone from DEP for a year. I have never, with one exception -- that is an exception I'm going to discuss today -- asked for any of the records on Chemical Control. I am really not in a position -- except for what is in Coopers-Lybrand, which we can share with you -- to answer those questions.

SENATOR LYNCH: General, do your records and investigation disclose where these materials were disposed of, and what method was used by Coastal and the other three contractors?

MR. KIMMELMAN: Yes, Mr. Belsole will give you the details.

MR. BELSOLE: The best answer to your question is contained in the Program Integrity Report, which I furnished to your staff about a week and a half ago -- also the Coopers-Lybrand report. That is the best answer you are going to get. There is no finite answer.

MR. KIMMELMAN: Senator, what you want to know is, some of the drums were repacked, and they were disposed of in landfill sites.

SENATOR LYNCH: In-State, out-of-State -- do you know percentages?

MR. KIMMELMAN: I don't know the percentages.

SENATOR LYNCH: Is much of this material diluted and put into our sewer systems?

MR. BELSOLE: I can't tell you, but I think it is hard to tell where all of this stuff is going. Don't forget, the cleanup occurred after the fire. Prior to the fire, only about 8000 drums had been removed to a generator program. The year prior to the fire was spent pretty much in the loft area, trying to get that cleaned up.

I'm not a Univac, and I wish I could give you this chapter-in-verse, but I'll refer you to the reports I submitted to your staff. If they do not answer your questions, then I'll have my staff put something together for you.

SENATOR LYNCH: I assume if you don't have ready answers to these, then the reports aren't going to give me a heck of a lot more indication of what happened.

MR. BELSOLE: No.

COMMISSIONER HUGHEY: Let me just make a clarification, so I don't have to go back after this hearing and start to look at landfills.

This was handled in three different ways; that is what the Coopers-Lybrand study will show you. Some of it was detoxified, some of it was sent back to generators -- and early on it was successful in sending it back to generators -- but, most of it was probably sent out-of-State.

SENATOR LYNCH: Detoxified means, in most instances, diluted?

MR. KIMMELMAN: Neutralized.

COMMISSIONER HUGHEY: The landfills that were used were secure landfills in other states.

COLONEL PAGANO: The explosives, Senator, were taken down to Earle, with the cooperation of our organization and BATF, and exploded there. The main thrust of the initial cleanup was to clean up the loft, where there was a commingling of explosives with all other kinds of unidentified materials. That was the original thrust -- to get the explosives out of there. The community really was concerned.

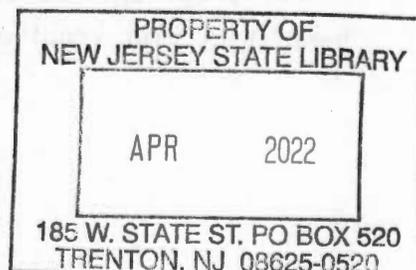
SENATOR LESNIAK: Mr. Chairman, if I may? Commissioner, has any cleanup of this matter been undertaken in the State, other than this?

COMMISSIONER HUGHEY: No, I think the closest, in terms of raw drums, Ray, is the one that is going on now at Syncon Resins, which is being done under the new contract format. It is still going to be a very expensive cleanup, which consists of 10,000 drums.

SENATOR LESNIAK: Do you know of any other cleanup in any other state?

COMMISSIONER HUGHEY: No, I don't.

SENATOR LYNCH: Are there any other questions? Senator Hirkala?



SENATOR HIRKALA: General Kimmelman, after the various editorials and new accounts concerning falsifying records, superiors who were told to downgrade the count, etc., upon the completion of your investigation, have you found any employee of the Department of Environmental Protection who could be charged with criminal negligence?

MR. KIMMELMAN: With respect to the particulars you mentioned, the answer is "no."

SENATOR HIRKALA: Thank you.

SENATOR LYNCH: Are there any other questions? (no response)

Commissioner Hughey, thank you for coming here today. Do you wish to offer a statement at this time?

COMMISSIONER HUGHEY: Thank you, Mr. Chairman. My statement is going to be very brief. Compared to Attorney General Kimmelman, my role in being here today for this Committee's purpose is very minor, but for a variety of reasons, this forum is most welcome.

Chemical Control, as you've heard today, is an issue that preceded me at the DEP, and given the experiences of the last two years, it may very well be here when I am no longer with the Department. While this cleanup appears to have a life of its own, and while that life is completely outside of my control, it has had, and continues to have, a continuous impact on the Department and on one of its most important programs.

Hazardous and toxic waste cleanup, as I think most of you have begun to realize, is not an easy task under the best of circumstances. As a field, it is relatively new; as a governmental priority, it is recent; as a topic, it is hotly debated; as a science, it is extremely complex; and, as a program, it is incredibly expensive.

All of this is true today and yet, what we are talking about with regard to Chemical Control, is an historical situation. This cleanup was one of the largest and earliest ever undertaken in the nation. It didn't occur within an established and effective program like we have today, which many consider a prototype for the entire country, but rather, it occurred in the program's infancy without the benefit of historical context.

Was Chemical Control mismanaged? Were mistakes made? Was too much money spent? Was anyone guilty of anything but inexperience? I don't know the answer to any of those questions. I do know that in the last two years, the entire program has changed. We now work from an extensive priority list. We now have a new, non-emergency contract in place, which took a full nine months to develop. We now have a sophisticated project and contract review in place, which took a year to implement, and we now have a project management and auditing process, which was developed for us by Coopers-Lybrand.

There is no doubt that an experience like Chemical Control contributed to the structuring of the current program. But neither, in my mind, is there any doubt that programs as complex as hazardous waste require a few years to mature. Unfortunately, time and experience don't come easily in this field. In recent testimony before another Senate Committee, within a half hour, the Department -- my Department -- was criticized both for moving too slowly and too quickly.

I have always taken the position with regard to Chemical Control that I would rely on the outcomes of the various ongoing investigations to determine whether further adjustments or actions were required. I still take that position, and in fact, there is little alternative, for as I've noted since arriving at DEP, I have not seen an original file on Chemical Control. I have also felt that there was little I could do about the repeated bad publicity resulting from the investigations, even though the cloud has not been very positive for my Department. Instead, we have talked about the job ahead and the record of the last two years, a record which shows pretty clearly that New Jersey, thanks to many of you, has the best program, the most aggressive program, and the best supported program in the country.

I haven't changed my position or feeling, but for purposes of today's hearing, I would like to spend a few minutes on history. The history I would like to deal with isn't about this program -- of what went wrong, if, in fact, anything did. I have a difficult enough time being topical and informative about my present concerns.

Additionally, it makes little sense for me, and I would suggest for anybody, to substitute his judgment for those who had to deal with the hard reality of Chemical Control.

Unfortunately, sometimes the frustration of a Chemical Control situation begins to impact on those who don't deserve it, and recently, in my opinion, there has been one of the most dramatic cases in point that I can recall. It is a point I want to emphasize to this Committee, because of its implications for those bright, dedicated people in government who make this whole thing work -- between your Committee meetings and between Commissioners.

I told a group of students -- I guess I tell them just about every week -- that part of the job description of the DEP Commissioner is to take the blame. I think that is true. I haven't seen it written into the description, but I assume it is true. I think that line should be properly drawn, and every critic should be responsible for observing it.

Recent news of the Chemical Control case, as you've heard today, carried with it headlines that documents of my Department had been doctored, and it implied that Paul Arbesman, the Deputy Commissioner, was somehow involved. Now, I think most of you know -- certainly the people who work on environmental issues know -- that I hold Paul in a very rare category. He is simply the best, most articulate, most giving, most capable, and most honest person I have ever met in government in twelve years. He is here because he cares, and he is really effective because he is an eternal optimist, even in the world of problems that is DEP.

The headlines and the implications behind them led me, for the first time since I've been here, to request information on Chemical Control. I asked for the transcripts from the civil trial. I read them carefully at the same time the Attorney General read them. I read them both in the original depositions, I read them from the cross-examinations, and I read them repeatedly.

Let me summarize one more time what you have already heard. Paul Arbesman suggested a change in a paper being given at a Washington conference, we think. It wasn't a document of my Department, it wasn't official, and the basis for its drum estimate was the work of a summer student intern who looked at some photographs. Paul suggested that the number be made consistent with the range being used Department-wide at

that time. The scientific estimate resulting from the Attorney General's recent investigation concluded and supported this range.

Paul Arbesman didn't do anything wrong. He happened, as is almost always the case, to be absolutely right. His reward was an unwarranted, unsubstantiated involvement in a case in which, given our general sense of neatness, everyone is looking for someone who made the fatal mistake. Someday we might find that person. God knows, we'll investigate long enough to do it. But, I hope we can do it on the basis of facts. I hope we can all contain ourselves until we do. In the meantime, I hope we all gain a renewed sense of how fragile the world of dedicated public officials is, and how damning the headlines can be to those who give so much. It is important to all of us that we constantly remind ourselves how lucky we are to have Paul Arbesman and the few exceptional people like him who make difficult programs a reality and make the process of government work.

I might add, because I think it is important to know, that I talked to the reporter who wrote these stories, and he did have the cross-examinations. He just didn't choose to use them.

I leave you with my sense of this whole thing. I don't get too emotional about many things, because I've got too many things to get emotional about. But, I don't think it is a bad week for the "Absence of Malice" to rerun on television.

Thank you very much.

SENATOR LYNCH: Are there any questions? Senator Russo?

SENATOR RUSSO: Commissioner Hughey, you did not hold back on the superlatives in your defense of Mr. Arbesman. I just want to say, if we ever find out in our discussions of this matter that the Star-Ledger series was justified, then I think for no other reason, you ought to resign just because of your bad judgment of people.

COMMISSIONER HUGHEY: I'd do it in a minute.

SENATOR RUSSO: Okay. On the other hand, if we find that what we've heard today is accurate, I really, for one, if we find that to be the case-- I think I asked the Chairman if the reporter, at some time, might be willing to talk to us about this subject. If what we've heard today is true, then someone ought to get his liable lawyer honed

up, because we've got some serious problems and some serious defamation of character -- if what we heard today is true, and if your judgment of Mr. Arbesman is correct.

It is going to be a difficult process. I don't know if we can resolve it in this Committee, because you really highlight the problem in our society. If these things were true, you'd grab those headlines, and boy, they'd get right to your gut. Of course, they sell papers, and if they are true, they should be exposed. The reporters should be commended for exposing them. But, if people's reputations have been harmed to the extent that you obviously believe, because of the defense of Mr. Arbesman you made, then we've got another very serious problem. I just hope we can resolve it one way or the other so we can find out where we're going in the future with regard to public officials, in general -- legislators, as well as people like Mr. Arbesman -- the news media, and the rights and protections of citizens and writers. We have to be a little careful though, because maybe we haven't heard the whole story.

I thought I was shocked before, but now you tell me that the writer had the cross-examinations, and he chose not to use them. That really bothers me, because I wanted to find out why he didn't have them. I thought that was difficult to understand. But, if what you say is true -- we don't know yet that it is, because we've heard your testimony and not his or anyone else's -- then I think we've got some serious problems to consider. Maybe there is a lot more information we had better get before we make final judgment. I think the problem is far more serious than we thought it would be when we came here. It is not only toxic waste; it is human beings, their lives and reputations, and the integrity of reporters, which shouldn't be defamed either, until we've heard their views and their versions. I think we have a lot to do, gentlemen.

SENATOR LYNCH: Are there any other questions?

SENATOR GORMLEY: I have a question both for the Commissioner and the General. I am curious to know the person hours that have been spent by all the Departments as a result of this article -- for example, in preparing for today and the amount of review time. You

know, we talk about waste. Obviously, as Senator Russo said, if it is warranted as further testimony provides, then maybe it was worth doing. But, if it is an unsubstantiated article, I would be curious to know how much time has been spent by all the Departments -- and I know it would only be a guesstimate -- as a result of an article like this? What toll does it take from actually cleaning up a dumpsite by your going over the review, while you're not able to prosecute, while you're not able to spend your time doing your actual job, and while you're covering your tracks? After an allegation is made, I guess the ratio is thirty to one, to provide the real facts and real figures, so that the public has the justified peace of mind they need to rectify a situation like this. How much waste might there be as a result of this article?

MR. KIMMELMAN: You're talking about unproductive time, in effect.

SENATOR GORMLEY: Whatever you care to call it.

MR. KIMMELMAN: Probably thousands of hours. If you want to just take my time alone, I've probably spent the better part of three weeks -- not 100% of my time -- going over depositions and thinking about what occurred and what I might say to you gentlemen.

COMMISSIONER HUGHEY: I think the way to answer it for me is that I am the only one who spent time on this, because obviously, I do feel strongly about it.

You know, this thing has been investigated five times. I don't think anyone in my Department cares what the end result of this investigation is, but we would sure like to be able to operate out from underneath a cloud that is five years old.

We now do things with the most sophisticated contracts in the country. That is why we volunteer help to other states. Yet today, for Price's Pit, under a Committee review, I'm going to be submitting a waiver for \$600,000. I think what happens, and I think it happens to everyone in this process-- I'm critical to some extent of the way this story was reported, but I'm not critical of the reporter, and I'm not critical of the people who gave depositions for the civil case, because they were under pressure too. Everyone gets frustrated, but what I

call it is the "flinch factor." Not everyone in the world wants to make a conscious decision, even by Committee, to spend \$600,000 to answer one of those critical cleanups that is currently on my list. It is going to be a \$20 million cleanup.

I think the extended impact of doing it right is serious enough. It is an overwhelming burden to carry. I think the impact of stringing along some sentences which seem to imply that one of the best people whom I've ever met in State government would ask anyone to doctor anything official -- and, I guarantee you he wouldn't-- I could probably use a lot of excuses to walk out the door, but I would love to use it for that reason. This is the kind of thing, that given the pressures of this job under the best of circumstances, you shouldn't have to live with.

MR. KIMMELMAN: Senator, I wasn't the Attorney General two weeks when I said I would look into Chemical Control, and I have looked into it for the past two years. It wasn't but six or seven months ago that we had a press conference, and we said, "The matter is closed. No indictments." Yet, new allegations came up, and we went through them. We continue to do that. There will be new allegations tomorrow and next week, and we're going to go through them again. That is the nature of our job.

SENATOR LYNCH: Colonel Pagano?

COLONEL PAGANO: Just one thing. I came here today because I have lived through this from the beginning, as has Senator Lesniak. Of the official group here, I am probably the only one who has had a role in this all the way through -- from the picking up of the trailers, the argument between the "nighters" as to where it was going to go and where it went, because that is where it belonged. That is who owned the damned thing. But, there have been a series of allegations that have gone on since this thing started.

I think that came about because of the frustration of the mess we found when we went there. Certainly, my role became very clear. In addition to the investigative role, I experienced, "What are we going to do if this thing blows up?" We had troopers on the site for three months around the clock monitoring, if you will, what were mere fireboxes.

The bottom line is, we have been crippled by allegations from the beginning. The gas allegation-- There was gas brought on the site. Was that in violation? No, it was not. It was during the energy crunch, and we couldn't take these people away from those sites to stand in long lines in order to get gasoline. We never found they were using the gasoline for their own cars, but they were told, in the event they might have been, "For Christ's sake, don't do it any longer."

There have been litanies of allegations: Troopers eating five sandwiches a day. I don't know where that came from, but I found after looking into it that Dr. Paulson had told them to eat five times a day, because that was the only way they could overcome the nausea.

These types of things have been plaguing us all the way through. Some of it is funny, but some of it becomes bothersome, because these things came in written form to the Governor and everybody else. We did look into everything, and as the Attorney General said, we will continue to look into everything.

By and large, though, given the nest that was there -- notwithstanding the fire and the emergency -- people have done a pretty darned good job in getting that mess cleaned up.

SENATOR LESNIAK: Mr. Chairman, I have one last thing, if I may. We have been talking about all of the allegations throughout this entire matter, as Mr. Kimmelman stated. I don't want to paint everything in one light in terms of the way the press has reported this, but isn't it a fact that as a result of many of the allegations -- I'm not talking about the recent one -- I'm talking about many of the allegations which were raised, in many instances, through the media -- that major changes have been made by the Department, very constructive and very costly changes, as a result of the way they approach contracts and the entire cleanup program?

COMMISSIONER HUGHEY: Ray, there is no question about it. I think the media has helped. I think this is the first time I can ever remember criticizing anything written.

We have made substantial changes in the program, but part of it is the reporting, part of it is what we found in Coopers-Lybrand,

and part of it is the maturity of the program. I think it is important for the Committee to put something like "mismanagement" in context. There is a big difference between mismanagement and no management. When you don't know how to manage something, then I don't think you can be accused of mismanagement. Since I've defended other people in my Department, I would also defend, for the moment, the other Commissioners.

I don't think any Commissioner knew what was happening when the Chemical Control situation occurred. I know that the emergency contract wasn't the way to do it, and sure, there are a lot of ways I could look back and say, "This is what I think I would have done," but, two years later, we've done them.

In both instances where we've made major changes, and you know about those changes, it has taken me a year to implement them. That was two years after the allegations which are currently being raised.

SENATOR LYNCH: Anyone else? I thought, Senator Lesniak, it was your legislation which had done all of this.

SENATOR LESNIAK: About 90% of it.

SENATOR LYNCH: That is what you said during your campaign. I didn't know you were going to give credit to the media.

Anyone else? (no response) All right, that concludes the meeting. We thank you Colonel Pagano, Commissioner Hughey, Mr. Belsole, and most importantly, Attorney General Kimmelman, who triggered this by his request to appear here in order to provide us with information about the ongoing controversy. Obviously, a lot of work has been done in preparation for this meeting. We appreciate that. I know it has been very informative, and I'm sure we'll have some further communication.

Senator Gormley?

SENATOR GORMLEY: Excuse me. Regarding the points brought up by Senator Russo, obviously another concern has come up, which I consider to have taken a longer toll than Chemical Control; that is, the effect this has had upon a particular individual, and the effect on his family. We know once allegations are made, families have to live with them forever.

That will be addressed, I assume, by the Committee -- that we are going to continue to pursue this. If, in fact, the Committee should make a recommendation to reject this editorial, we would make the endorsement by this Committee to consider action of that nature.

SENATOR LYNCH: We'll be going into Executive Session now. Hopefully, the next time the Senate convenes will be during the next six weeks or so.

Thank you very much.

MR. KIMMELMAN: We appreciate your time and attention.

SENATOR LYNCH: Thank you.

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