
Public Hearing

before

SENATE ENVIRONMENT AND ENERGY COMMITTEE

Senate Concurrent Resolution 163

“Amends Constitution to dedicate all State moneys received from settlements and awards in cases of environmental contamination for certain environmental purposes”

LOCATION: Committee Room 10
State House Annex
Trenton, New Jersey

DATE: June 22, 2015
1:00 p.m.

MEMBERS OF COMMITTEE PRESENT:

Senator Bob Smith, Chair
Senator Linda R. Greenstein, Vice Chair
Senator Christopher “Kip” Bateman



ALSO PRESENT:

Judith L. Horowitz
Office of Legislative Services
Committee Aide

Kevil Duhon
Senate Majority
Committee Aide

Brian Ahrens
Senate Republican
Committee Aide

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



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New Jersey State Legislature
SENATE ENVIRONMENT
AND ENERGY COMMITTEE
STATE HOUSE ANNEX
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PUBLIC HEARING NOTICE

The Senate Environment and Energy Committee will hold a public hearing on Monday, June 22, 2015 at 1:00 PM in Committee Room 10, 3rd Floor, State House Annex, Trenton, New Jersey.

The public may address comments and questions to Judith L. Horowitz or Michael R. Molimock, Committee Aides, or make bill status and scheduling inquiries to Pamela Petrone, Secretary, at (609)847-3855, fax (609)292-0561, or e-mail: OLSAideSEN@njleg.org. Written and electronic comments, questions and testimony submitted to the committee by the public, as well as recordings and transcripts, if any, of oral testimony, are government records and will be available to the public upon request.

The public hearing will be held in accordance with Rule 24:3 of the New Jersey Senate on the following Senate Concurrent Resolution:

SCR-163 (1R)
Smith, B/Greenstein

Amends Constitution to dedicate all State moneys received from settlements and awards in cases of environmental contamination for certain environmental purposes.

Persons wishing to testify should submit 15 copies of written testimony to the committee on the day of the hearing.

Issued 6/16/15

For reasonable accommodation of a disability call the telephone number or fax number above, or for persons with hearing loss dial 711 for NJ Relay. The provision of assistive listening devices requires 24 hours' notice. CART or sign language interpretation requires 5 days' notice.

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[First Reprint]
**SENATE CONCURRENT
RESOLUTION No. 163**
STATE OF NEW JERSEY
216th LEGISLATURE

INTRODUCED MAY 7, 2015

Sponsored by:

Senator BOB SMITH
District 17 (Middlesex and Somerset)
Senator LINDA R. GREENSTEIN
District 14 (Mercer and Middlesex)

Co-Sponsored by:

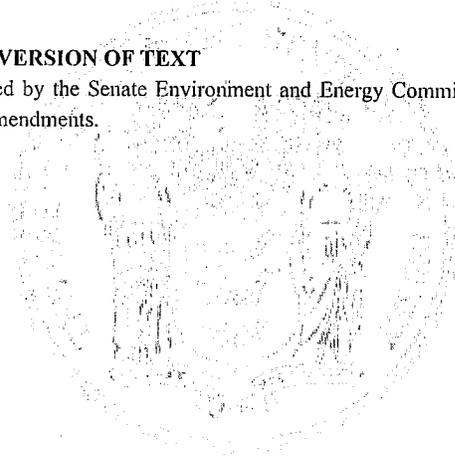
Senators P. Barnes, III, Codey, Lesniak, Scutari, Vitale and Turner

SYNOPSIS

Amends Constitution to dedicate all State moneys received from settlements and awards in cases of environmental contamination for certain environmental purposes.

CURRENT VERSION OF TEXT

As reported by the Senate Environment and Energy Committee on June 8, 2015, with amendments.



(Sponsorship Updated As Of: 6/16/2015)

1 A **CONCURRENT RESOLUTION** proposing to amend Article VIII,
2 Section II of the Constitution of the State of New Jersey by
3 adding a new paragraph thereto.

4
5 **BE IT RESOLVED** by the Senate of the State of New Jersey (the
6 General Assembly concurring):

7
8 1. The following proposed amendment to the Constitution of
9 the State of New Jersey is agreed to:

10
11 PROPOSED AMENDMENT

12
13 Amend Article VIII, Section II by adding a new paragraph 9 to
14 read as follows:

15 9. There shall be credited annually to a special account in the
16 General Fund an amount equivalent to the revenue annually derived
17 from all settlements and judicial and administrative awards
18 collected by the State in connection with claims based on
19 environmental contamination.

20 The amount annually credited pursuant to this paragraph shall be
21 dedicated, and shall be appropriated from time to time by the
22 Legislature, only for paying for costs incurred by the State to repair
23 damage to, restore, or permanently protect the State's natural
24 resources, ¹for the payment of the principal or interest on any
25 general obligation bond approved by the voters prior to July 1, 2015
26 and authorized to be issued for environmental purposes, as defined
27 by law, or any refunding bond connected therewith,¹ or for any of
28 the purposes enumerated in Article VIII, Section II, paragraph 6 of
29 the State Constitution, except that no ¹more than five percent of
30 the¹ moneys appropriated pursuant to this paragraph may be
31 expended for ¹[any direct or indirect]¹ administrative costs of the
32 State or its departments, agencies, or authorities ¹for the purposes
33 authorized in this paragraph¹.

34
35 2. When this proposed amendment to the Constitution is finally
36 agreed to pursuant to Article IX, paragraph 1 of the Constitution, it
37 shall be submitted to the people at the next general election
38 occurring more than three months after the final agreement and
39 shall be published at least once in at least one newspaper of each
40 county designated by the President of the Senate, the Speaker of the
41 General Assembly and the Secretary of State, not less than three
42 months prior to the general election.

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

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SEN committee amendments adopted June 8, 2015.

1 3. This proposed amendment to the Constitution shall be
 2 submitted to the people at that election in the following manner and
 3 form:

4 There shall be printed on each official ballot to be used at the
 5 general election, the following:

6 a. In every municipality in which voting machines are not used,
 7 a legend which shall immediately precede the question as follows:

8 If you favor the proposition printed below make a cross (X), plus
 9 (+), or check (✓) in the square opposite the word "Yes." If you are
 10 opposed thereto make a cross (X), plus (+) or check (✓) in the
 11 square opposite the word "No."

12 b. In every municipality the following question:
 13

	YES	<p style="text-align: center;">CONSTITUTIONAL AMENDMENT DEDICATING MONEYS FROM STATE ENVIRONMENTAL CONTAMINATION CASES</p> <p>Do you approve amending the Constitution to dedicate all ¹[money] <u>moneys</u>¹ collected by the State in cases of contamination of the environment? The ¹[money] <u>moneys</u>¹ would have to be used only for environmental purposes. ¹[The money may also be used to repay bonds that have already been issued to fund environmental programs.]¹</p>
	NO	<p style="text-align: center;">INTERPRETIVE STATEMENT</p> <p>This amendment would dedicate all moneys collected by the State through settlements or awards for legal claims based on environmental contamination. These moneys would be dedicated solely for environmental purposes. These purposes could include preserving, repairing, or restoring natural resources. They may also include cleaning contaminated sites and underground storage tank sites, ¹[or]¹ funding water quality programs ¹, <u>or preserving open space, farmland, or historic buildings or sites</u>¹. Currently, these moneys may be used for any State purpose.</p>

REPORT OF SENATE ENVIRONMENT AND ENERGY COMMITTEE

ON

SENATE CONCURRENT RESOLUTION NO. 163 SCA

In accordance with Rule 24:3 of the New Jersey Senate, a public hearing on Senate Concurrent Resolution No. 163 SCA, entitled "A Concurrent Resolution proposing to amend Article VIII, Section II of the Constitution of the State of New Jersey by adding a new paragraph thereto," was held in Trenton, New Jersey on June 22, 2015 before the Senate Environment and Energy Committee.

The following members of the committee were present:

Senator Bob Smith, Chairman

Senator Linda R. Greenstein, Vice-Chairwoman

~~Senator Richard J. Codey~~

Senator Christopher "Kip" Bateman

~~Senator Samuel D. Thompson~~

Pursuant to Rule 24:4 of the New Jersey Senate, the committee reports that the public hearing was held on Senate Concurrent Resolution No. SCR 163 SCA and that it may be ordered to a third reading for final passage.

The Secretary is directed to enter this report in the Journal of the Senate.

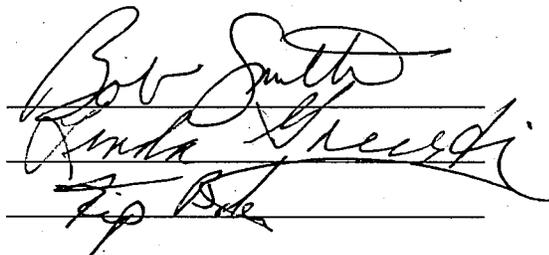


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SENATOR BOB SMITH (Chair): Good afternoon, everyone.
We're here today to have a hearing on SCR-163.

Senator Greenstein will be here momentarily; we have Senator Bateman present; and of course, I'm present -- Senator Smith.

We have a number of people who have turned in slips to testify. Let me ask you to--

Doug O'Malley, Environment New Jersey, in favor, no need to testify; Mr. Tomicki, League of American Families, there's no indication of in favor or in opposition.

Mr. Tomicki, are you here? Come on up.

SERGEANT-AT-ARMS: (off mike) Is that testimony, sir?

JOHN T. TOMICKI: No.

SERGEANT-AT-ARMS: Okay.

MR. TOMICKI: It's the bill.

SERGEANT-AT-ARMS: Have a seat.

MR. TOMICKI: Pardon?

SERGEANT-AT-ARMS: Have a seat.

MR. TOMICKI: Good afternoon, Mr. Chairman and members of the Committee. My name is John Tomicki, Executive Director of the League of American Families. We represent about 100,000 households in the State of New Jersey.

I recognize this is a public hearing where discussions concerning approval or disapproval -- you're not able to enter into a colloquy on it. You're here for the statutory requirement; so we would be very brief.

In looking at the text of the proposed legislation when you had it in Committee, it becomes somewhat confusing to an ordinary person.

You're saying, "Hey, we're going to do this for the principle purposes exhibited in Article *this*, or Article *this*, Section *that*." You have to kind of know what all that is. So when I look at the actual -- what will appear on the ballot, it poses -- it starts out with a question: "Do you believe we should dedicate--" And then a person will say, "Okay, dedicate it to *what*?"

So the monies would have to be used only for environmental purposes, and most people want to have a cleaner, safer environment. So anybody would say, "Yes," but when you look at the interpretative statement again, I have this constitutional issue; I don't think -- I think the intent of what you were trying to do is not carried out correctly in the proposed language to amend the Constitution, nor in the interpretive statement. Because if moneys that are going to come into the State as a result of some litigation or in a judgment -- in the past, as I understand it, it used to go into the General Fund. You're trying to say -- which makes sense to me, in one area -- if there was some incident that caused environmental damage and there is recovery -- okay, we want to put that money to that, to clean it up.

But the interpretive statement goes way beyond that; that, in effect, we can use it for other purposes -- underground storage tanks, preserving Open Space, farmland -- so it goes beyond. So I think what your intent was -- if I understood it correctly -- was to deal with those monies that are coming in as a result of environmental damage, where there is litigation and recovery. You're trying to say, "We don't want to put it in the General Fund anymore; we want to put it in a special fund."

That will become an interesting pressure issue, because then what will happen to the budget fight? Well, you'll say, "We used to put

\$30 million,” -- let’s just take a figure -- “into this to handle these other problems.” So what they’ll do is, “Oh, you have dedicated funds,” so it takes it out.

I understand where you were going. I know this is a public hearing. I don’t think it was -- respectfully, Senator, and you know the respect that I have for you on environmental issues -- I think it should have been phrased differently. I don’t know whether you’re going to get it up in time; whether there will be changes allowed on the floor -- another whole problem, but we will deal with that later.

Right now -- and we never speak about this much -- the League of American Families is a total volunteer organization. And right now, the lawyers with whom I’m dealing are with involved in trials, as well as the environmental people I deal with -- I haven’t been able to get everybody together; because I’m not all the expert on those issues. But we’ve been meeting; particularly as I shared before, we’re getting deeper into the carbon sequestration area. That’s a separate issue.

But for this -- we’re not opposed, we’re not supportive. We think it needs correction. And I don’t know whether there will be the time; I don’t know whether you intend on trying to get it up on the ballot by this November. I would have no idea; I don’t even know whether you can comment on that and let us know.

That’s all we have to say today. And thank you so much for your courtesy.

SENATOR SMITH: Thank you for your comments.

Madeline Emde, E-M-D-E, from New Jersey Audubon, in favor.

M A D E L I N E E M D E: Thanks for the opportunity to testify.

My name is Madeline Emde, and I'm a Conservation Associate at New Jersey Audubon Society. We're one of the oldest and largest conservation membership organizations in the state.

So I actually submitted written comments before the meeting, and I'll just be kind of going over a few things.

New Jersey Audubon has worked extensively to protect habitats across New Jersey, and has been an advocate and responder in protecting New Jersey's wildlife, wetlands, and other natural resources from oil spills. As a result, we have significant experience with the impact of various spills and discharges on birds, wetlands, and other wildlife habitat.

We've also supported statutory and regulatory efforts to protect New Jersey's natural resources from hazardous spills.

Natural resources damages is an incredibly important, statutorily authorized program that came as a result of our State's experiences with incremental spills and discharges, and our history of industrialization. NRD requires polluters to go beyond cleanup and pay for restoration and compensation for public loss of use of the natural resources. It recognizes incremental pollutions which can be just as devastating as catastrophic spills.

The raiding of funds has been a significant and widespread issue in the past several Administrations. The court decision *Camden v. Byrne* allowed for the appropriations to override other statutes, permitting this raiding of funds dedicated for one purpose to be used for another. Voter-approved constitutional amendments would be the way to protect these funds for their intended purposes.

We strongly support this resolution and the amendments to the resolution that were passed through Committee two weeks ago; and we hope that the funds for NRD will continue to be used with special attention to the nexus between injury and the use of payment. This can be within the same community through geographic tie, or by identifying a resource used by the impacted population.

And finally, we believe that it's important for the connection between the injury and the use of funds.

Thank you for the opportunity to testify.

SENATOR SMITH: Thank you, Madeline.

Stacy McCormack, Littoral Society, in favor, no need to testify;
Bill Wolfe, with amendments.

BILL WOLFE: Thank you, Mr. Chairman. Bill Wolfe, Bordentown.

I want to reiterate and follow up on our testimony. You recall that my concern was the failure to include compensation for lost use explicitly. And we just heard the last witness correctly characterize the purpose for natural resource injuries -- which is both restoration and compensation for lost use; that's the legal scope of that word. That word -- the *scope* of the injury compensation requirement under trustee law -- is broader than *restore*.

And I brought to your attention the fact that the Exxon settlement -- the majority of the injuries were compensatory damages that trace back through time. You have a time element. So you not only have a scope element, you have a timing element. So to reach back into the past-- And Senator Thompson objected, so this is not a -- it's not like we don't have a policy debate here. And so we had a case in controversy in the

Exxon settlement where that was going to be judicially resolved; it wasn't. We had a letter to the Legislature warning you that the Paulsboro oil depot damage assessment was reduced by 85 percent because it excluded compensatory damages. Now, we're talking about cats and dogs here. And you put the cat in there; you didn't put the dog in. So you have to have the cat and the dog in. So I would rather have the cat and the dog in -- particularly given that the dog is the majority of the money, all right?

So that has to be in there. And I'd rather waste a year and get it right than try to get it up on the ballot this year. Because it's going to be a problem in the Assembly, I understand, so I don't-- You know, it's a crap shoot. My point is, get it right. And don't take my word for it -- take the Commissioner's own letter, which lays that out in detail.

You know, consult -- call the Attorney General's Office and get some expert legal opinions -- court decisions that deal with the scope, the obligation, the timeframes, the triggers. You know, I'm not a lawyer, but I know an awful lot. And these are really significant, weighty legal issues that are right before us.

SENATOR SMITH: (addressing staff, off mike) He's saying we're not getting a lot of money coming in. He's saying we don't get compensatory.

Bill, just to make sure: Your position is, you think we're not getting all the money from the environmental settlements.

MR. WOLFE: Correct. And so--

SENATOR SMITH: And you believe compensatory, in particular, is not covered?

MR. WOLFE: Correct. And there are legal reasons, Mr. Chairman, hear me out.

SENATOR SMITH: All right.

MR. WOLFE: There's a legal reason, which I just tried to run through, very quickly. But there's also what's called a *discretionary issue*. And because this is a constitutional question that goes to the voters--

SENATOR SMITH: Right.

MR. WOLFE: --it's not the traditional dog-and-pony of a Legislature passes a law and delegates authority to the Executive Branch to implement. And it's not as if we don't have a track record with this Administration as to how they construe environmental law, all right? We know what they do -- and let's be clear.

So even with that knowledge, that would be sufficient to say, "You've got to be precise."

But there's also a scope issue. And the word *restore* does not include-- It could include, but it's a judicial question. Do you want to punt to the courts? Do you want to let the courts resolve this? This is what the Exxon deal-- This is what I've tried to get out. The background from the Exxon deal is not that Governor Christie cut a corrupt deal for campaign cash and all this other stuff. There were legal vulnerabilities in the State's argument about the methodology costing out and quantifying the resource injury. And that resolved around, like, do you go back to 1890, where -- and what were people doing in using wetlands in 1890? Were they paddling canoes by there? I mean, all this kind of stuff. So they bypassed that debate and they made a Habitat Equivalency evaluation. They just did

it on an acre-by-acre basis, getting away from the economic issues of how you do an economic valuation of an injury.

But that doesn't get you past the timing question -- you see what I mean? So they used-- If you read their Habitat Equivalency Analysis, you'd understand this stuff. They went back in time, and then they discounted, over that period of time -- like a cash, like a bank account, a discount, an economic discount function, to discount past and present values. But they used it for acreage. This is very complicated. So my point is, the lawyers-- This is like a legal minefield; they love this stuff because they, then, have a basis to legitimately argue. I don't even want to go there; put the word in there, and it takes it off the table. Because these guys are going to come back and say, "Look, the voters have spoken. They used the word *restore*. They just want the site restored; no punitive compensation."

SENATOR SMITH: It doesn't say that. Bill, it doesn't say that.

MR. WOLFE: It says *restore*.

MS. HOROWITZ: That's what they can use it for.

SENATOR SMITH: They say--

MR. WOLFE: Why even have this debate? Just put it in there. I mean, why leave something like that dangling?

SENATOR SMITH: It says, "The amount annually credited pursuant to this paragraph shall be dedicated, and shall be appropriated from time to time by the Legislature, only for paying for costs incurred by the State to repair damage to, restore, or permanently protect the State's natural resources; or for any of the purposes enumerated in Article VIII, Section II, paragraph 6 of the State Constitution, except that no more than

five percent of the moneys appropriated shall be expended for any administrative costs of the State or its departments, agencies, or authorities for the purposes authorized in this paragraph.”

And our view of that is that it basically means that it can be used for almost any environmental purpose.

MR. WOLFE: I’m not talking about the use of the money. I’m talking about how you determine how much.

SENATOR SMITH: All right, well--

MR. WOLFE: And there are two ways to determine how much.

SENATOR SMITH: The flip side of that, it says that -- where is it?

MR. WOLFE: I sent you the definition.

SENATOR SMITH: *All* settlements -- “There shall be credited annually to a special account in the General Fund an amount equivalent to the revenue annually derived from *all* settlements--

MR. WOLFE: Right; that’s a different issue.

SENATOR SMITH: --and judicial and administrative awards collected by the State in connection with claims based on environmental contamination.”

MR. WOLFE: I understand that. We’re talking about apples and oranges here.

What I’m trying to focus on is what does *the injury* mean? And you heard the prior testimony -- which was correct -- which says the injury, the compensation is for--

SENATOR SMITH: Yes; that, I think, is going to be a statutory issue.

MR. WOLFE: What I'm saying is--

SENATOR SMITH: I don't think it's constitutional.

MR. WOLFE: --by using the word in the Constitution *restore* without the other prong of *restore and compensate*, which is the-- If I'm the Natural Resource Trustee and I have this hat on, I get the compensation for -- I get the restoration of the resource, then I get a check for the lost use of that resource for 100 years. That was the debate in Exxon; that was the debate in Paulsboro.

SENATOR SMITH: Yes, we think we have it covered. But I'm going to let you and Judy arm wrestle, (laughter) and whoever wins--

MR. WOLFE: I'll tell you, me and Judy arm wrestled on the Highlands Act -- who won? Bingo.

SENATOR SMITH: I don't remember-- What is that?

MS. HOROWITZ: I don't know what he's talking about.

SENATOR SMITH: I don't know what you're talking about there, Bill.

MR. WOLFE: I do.

SENATOR SMITH: All right, so New Jersey Recreation and Park Association, in favor, no need to testify; Dave Pringle, in favor.

Mr. Pringle.

D A V I D P R I N G L E: Thank you, Mr. Chair. David Pringle, New Jersey Campaign Director for Clean Water Action.

We strongly support the resolution -- constitutional amendment. Thank you for making it happen.

Most importantly, it stops the raids of environmental funds; and it's especially important because if we don't do this, it's the equivalent

of putting up the State's natural resources for sale or letting them get trashed to fund the general operating expenses of the State. And while this is after the fact, that's in fact what we're going to be doing if we continue to raid these funds. And I don't think anybody would say let's -- if we had a pristine wetlands in these areas, we would trash them and then fund the General Fund. And that's what we would be doing here without this constitutional dedication.

My reading of the question is it doesn't cover compensatory damages; it doesn't say the State can't go after them. It just says that whatever damages there are, it wouldn't be necessarily constitutionally dedicated. So I would hope the State would continue to go after them.

I would prefer to see compensatory damages also constitutionally dedicated, but we also can't afford to wait another year. If the Exxon settlement happens this year, that's minimally tens, and likely hundreds of millions of dollars. So we can't afford to wait until 2016 to constitutionally dedicate this. If we can get language fixed and still get on the ballot this year, then *mazel tov*. But I'll take this, and attempt to-- I'll take half a loaf now, and try to make more of a loaf, on this one, better later.

Thank you.

SENATOR SMITH: Thank you for your comments.

Jeff Tittel, Sierra Club.

J E F F T I T T E L: Thank you.

As we head into Budget Week, and try to nail down another budget, we know what happens is that everything in this building becomes part of the art of deal. And our concern is that when you have these kinds

of budget shortfalls, the environment becomes a convenient excuse to raid those funds. And for us, we believe that this dedication is critical because it sends a very clear message, once the voters approve it, that when you damage, pollute, destroy natural resources that belong to all of us, the funding should go back to environmental programs to try to make those communities and those people whole -- but also for other programs that benefit the State to help mitigate for that damage.

And that's why we're here, because it's really upholding the concept of *polluter pay*. And it becomes even more glaring because of the old saying, "Fool me once, shame on you; fool me twice, shame on me." They already did it on the Passaic River last year. We do not want to see it ever happen again.

And that's why we're here. Because the Exxon settlement -- maybe it was settled for a lot less money because they're trying to grab the money for the budget holes. Maybe the reason that we took 16 additional sites; and took \$8.9 billion -- that could have been \$10 billion, or \$12 billion, or \$15 billion and settled it for \$225 million is to plug a budget hole or fund something. And so I think it's critical.

And my only, sort of, sad part of this is that I wish we could do it with the Clean Energy funds too, because of the raids that have been happening there. And so for us, we think that this is not only an important issue, but remember: These lands are all held in the public trust. They belong to the people of New Jersey. When you destroy or damage them, you're supposed to compensate the public, not the politicians. So this goes a long way to ensuring that our Constitution protects the public and

protects the Public Trust Doctrine, and protects those resources that belong to all of us.

So thank you.

SENATOR SMITH: Thank you, Mr. Tittel.

Anyone else? (no response)

As there are no other members of the public wishing to speak, we are going to close the public hearing.

Thank you for participating; thank you, Senator Greenstein and Senator Bateman.

And Senator Sweeney said he's going to have a summer session; hopefully we'll get it passed before that deadline. And I am hopeful that we can talk to the Assembly and see if they'll have a summer session as well.

Everyone have a great day. Thank you for coming.

(HEARING CONCLUDED)