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# *Committee Meeting*

of

## ASSEMBLY JUDICIARY COMMITTEE

*“The Committee will receive testimony from invited experts to discuss the Assembly’s pending public comment on the State’s \$225 million settlement with ExxonMobil”*

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**LOCATION:** Committee Room 12  
State House Annex  
Trenton, New Jersey

**DATE:** May 7, 2015  
10:00 a.m.

### **MEMBERS OF COMMITTEE PRESENT:**

Assemblyman John F. McKeon, Chair  
Assemblyman Gordon M. Johnson, Vice Chair  
Assemblyman Joseph A. Lagana  
Assemblyman Benjie E. Wimberly  
Assemblyman Michael Patrick Carroll  
Assemblywoman Holly Schepisi



### **ALSO PRESENT:**

Miriam Bavati  
Rafaela Garcia  
*Office of Legislative Services*  
*Committee Aides*

Kate McDonnell  
*Assembly Majority*  
*Committee Aide*

Kevin Logan  
*Assembly Republican*  
*Committee Aide*

*Meeting 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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JOHN F. McKEON  
Chair

GORDON M. JOHNSON  
Vice-Chair

JOSEPH A. LAGANA  
BENJIE E. WIMBERLY  
MICHAEL PATRICK CARROLL  
HOLLY SCHEPISI

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## New Jersey State Legislature

### ASSEMBLY JUDICIARY COMMITTEE

STATE HOUSE ANNEX

PO BOX 068

TRENTON NJ 08625-0068

#### COMMITTEE NOTICE

TO: MEMBERS OF THE ASSEMBLY JUDICIARY COMMITTEE

FROM: ASSEMBLYMAN JOHN F. McKEON, CHAIRMAN

SUBJECT: COMMITTEE MEETING - MAY 7, 2015

*The public may address comments and questions to Rafaela Garcia, Miriam Bavati, Committee Aides, or make bill status and scheduling inquiries to Denise Darmody, Secretary, at (609)847-3865, fax (609)292-6510, or e-mail: OLSAideAJU@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.*

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**The Assembly Judiciary Committee will meet on Thursday, May 7, 2015 at 10:00 AM in Committee Room 12, 4th Floor, State House Annex, Trenton, New Jersey.**

The Assembly Judiciary Committee will receive testimony from invited experts to discuss the Assembly's pending public comment on the State's \$225 million settlement with ExxonMobil.

Issued 5/1/15

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## TABLE OF CONTENTS

	<u>Page</u>
Neil Yoskin, Esq. Chair Environmental Practice Group Sokol, Behot and Fiorenzo Counsellors at Law, and Former Staff Attorney New Jersey Department of Environmental Protection	7
<b>APPENDIX:</b>	
Consent Judgment <i>New Jersey Department of Environmental Protection</i> v. <i>ExxonMobil Corporation</i> submitted by Assembly Judiciary Committee	1x
pnf: 1-52	

**ASSEMBLYMAN JOHN F. McKEON (Chair):** Okay, thank you all for being here.

I know we're missing Benjie; he's down in Committee, but we met before and he'll be here.

Let's go ahead and convene the meeting. Take roll, and then we'll get started.

MS. BAVATI (Committee Aide): Assemblywoman Schepisi.

ASSEMBLYWOMAN SCHEPISI: Here.

MS. BAVATI: Assemblyman Carroll.

ASSEMBLYMAN CARROLL: Here

MS. BAVATI: Assemblyman Wimberly is here.

Assemblyman Lagana.

ASSEMBLYMAN LAGANA: Here.

MS. BAVATI: Assemblyman Johnson.

**ASSEMBLYMAN GORDON M. JOHNSON (Vice Chair):**  
Here.

MS. BAVATI: Chairman McKeon.

ASSEMBLYMAN McKEON: Present.

MS. BAVATI: You have a quorum.

ASSEMBLYMAN McKEON: Thank you very much.

I would, first, like to acknowledge Assemblywoman Schepisi, who is here with us. The last we met on this topic we were all thinking about you, and it's wonderful to see you.

ASSEMBLYWOMAN SCHEPISI: Thank you.

ASSEMBLYMAN McKEON: And we're glad that Bramnick isn't here in your place. (laughter) With love and respect.

We just have one thing on the agenda today -- is our continuing discussion with respect to the Bayway settlement.

I'm going to take five minutes to kind of give us a little bit of history of what has gotten us here, and then we will go forward in proceeding with this continuing evaluative process.

The Bayway -- without getting too deep into all of it -- is 1,300 acres in Linden where a refinery was operated between 1909 and 1972. It also includes a 220-acre site in Bayonne, again where a refinery began to be operated, back in 1879 through 1992. There continues to be a small refinery operated there at the present.

The depth of the contamination of the property -- the best I could describe it -- involves 7 million gallons of oil. Preliminary findings were that that oil was anywhere between 7 feet to 17 feet deep in some areas. The effects, through various plumes on waters and otherwise, are profound. Compounds, through the chemical refinery component that was on site, that had been found include chromium, arsenic, mercury, and a rogue's gallery, if you will, of toxic substances and compounds.

The destruction of that natural habitat is to the extent that it's just no longer practical to restore it. It never could be -- that's just not something that could occur; but rather, it needed to be resolved through a remediation to some extent of cleanup.

So in 1991 there was a consent decree, and that occurred between the State of New Jersey to Exxon -- that they had to clean up the contamination as the damages, again, were so significant that it could never be restored to the pre-contamination condition.

The cleanup, particular as to feasibility based on the extent of the damages, that was totally uncontested. That cleanup is going to be ongoing, and it won't be complete, frankly, for generations.

Now, in 2004, after two years of negotiations with Exxon, when the State proceeded to put them on notice of a Natural Resource Damages claim -- that would be a suit for compensation to the people of New Jersey for what was lost, both in that resource, as well as in the use of that for the people of that area. In light of the fact that those negotiations did not come to fruition, a lawsuit was filed. The matter was litigated for 10 years, which included a 55-day damages-only trial where the State, through retained counsel with a national reputation for prosecuting such cases, presented evidence of a \$9 billion loss.

Shortly before the judge's decision, it was -- they asked that the matter be held off as negotiations continued. And it was leaked, and then confirmed by the DEP, that the case was settled for a sum of \$225 million.

There was a lot of anecdotal and some public innuendo as to why it was settled at that point in time. And, needless to say, there was a great public outcry. As such, the Speaker authorized this Committee to investigate the settlement.

I'll say from the outset that, as it relates to the innuendo of politics and otherwise, this Committee wasn't going to begin to look into any of that. I've said on the record before, I find Commissioner Martin and Attorney General (*sic*) Hoffman to be honorable people who I may have a difference of opinion with -- but that's not for this Committee as it relates to some of those types of allegations that were flying out there.

But this is solely and specifically relative to the meritorious -- whether it was appropriate to settle this matter for \$225 million.

So with the Speaker's imprimatur, this Committee met on March 19. Now, at that time, the written terms of the settlement were not yet disclosed. We learned that, as the law required public comment period, that the court could not approve this settlement without that public comment period passing. We also learned, at that time, that the DEP -- notwithstanding this was 150 years in the making and 10 years in litigation -- was making that public comment period only for a 30-day period of time.

I was very pleased that, in a bipartisan way, as much as it was symbolic as it would relate to this case, we had passed a statute that would indicate public comment periods would never be less than 60 days. And to the credit of DEP, as opposed to sticking to the 30-day timeframe when finally, on April 8, the settlement was made -- the written settlement was made public, they expanded the public comment period to June 6.

Now, as to the testimony at our initial hearing -- I was extremely disappointed that Exxon didn't respond to our request to be here to testify, to answer any questions. And, frankly, I was disappointed that Attorney General Hoffman and/or Commissioner Martin, equally, refused to come and testify. I again mention that they are honorable individuals; the AG's position is that he was ethically bound not to talk about the settlement or discuss it in any great detail as it could potentially compromise his client's -- meaning us -- position. And similarly, Commissioner Martin was under the advice of counsel not to appear for those reasons.

At Budget hearings, where I had the privilege to question each of them, there was some additional information that they felt comfortable in sharing and providing to add a little bit of additional facts for our evaluative process. And anyone interested in those can get those recordings online, if you will, as it relates to what the two of them had to say.

Nonetheless, that hearing, I thought, was a good first step. We heard from Debbie Mans, who is an environmental expert from Baykeeper, to kind of lay out the ecological components of this. We heard from the Mayor of Linden who put a face on what the people directly contiguous to that would go through. And since those hearings, we now, again, on April May 6, have copies of the proposed complete settlement. We've secured copies of the post-trial briefs, expert submissions. We've had available to us case law -- both on the Exxon case, as well as cases that might have some bearing as it relates to Exxon itself. We've recently secured the trial transcripts, and will make them available to anybody who would like to review them as it relates to a full and thorough evaluation of this.

I will say, though, our due diligence aside, that I've been very frustrated. Frustrated, again, by Exxon; preliminarily, Commissioner Martin was willing to have this and a joint committee of this in the Senate be able to tour the site to get a feel and an idea, beyond pictures, what we were talking about; Exxon, through their corporate attorneys, made it very clear directly to me that that access was going to be denied. In addition, there has been, frankly, a lack of complete access that has come from the Attorney General and from the Commissioner. We've shared with our colleagues on this entire Committee our request and those responses -- but they've been limited; limited, in part, to the extent that a room has been



made available to us over at DEP where there are just boxes and boxes of information that would take months, frankly, to get through in the most thorough way that one would need to -- and with no guarantee that some certain key elements have not been parsed from those documents, based on the thought that it would be privileged; and, again, the same reason about compromising their position on a going-forward basis, frankly, if the matter doesn't resolve.

But with the short timeframe, nonetheless, we have, we have a lot of information and plenty of work to continue to do -- allowing us to weigh in through the public comment period -- or otherwise, as we'll discuss later -- to do our due diligence and our duty as members of this august body.

I'd like to introduce, to all of you, Neil Yoskin.

Neil, if you'd, if you will, come forward. Neil is an attorney-at-law. He's a University of Virginia graduate, as well as has earned his law degree from Temple. He served for six years as counsel in the New Jersey Department of Environmental Protection; and for the past 30-plus years as a private attorney practicing exclusively in environmental law, including extensive experience with NRD litigation.

Mr. Yoskin was retained, quite frankly -- beyond the incredible work of Kate McDonnell -- as our general counsel, delving into an area that is very specialized to be able to allow us to understand the nuances of the settlement agreement and the litigation as a whole.

So I'm going to now take him through, as a witness, if you will -- I don't know if *witness* is the right term -- but to allow all of us in the

public to understand what we've learned through many, many hours of our own review and process.

Mr. Yoskin, welcome to you.

**NEIL YOSKIN, Esq.:** Thank you.

**ASSEMBLYMAN McKEON:** Mr. Yoskin, can you give the panel just a brief history of the NRD program, I guess, just commencing with the genesis or the basis through the Public Trust Doctrine, and taking us through the Spill Act and right to 1990 with the NRD?

**MR. YOSKIN:** Well, the ability to collect natural resource damages is actually -- comes out of common law. So it has existed in this State, in one form or another--

**ASSEMBLYMAN McKEON:** You might have to push the button. (referring to PA microphone)

**MR. YOSKIN:** They were trying; it wasn't working. There it goes.

So again, natural resource damages, which generally refers to the ability to recover damages -- money damages for losses to natural resources -- existed in New Jersey and around the country as a common law doctrine for a long time. In New Jersey, the first court decision that held that we have a Public Trust Doctrine in New Jersey was in 1821. But it was never applied to natural resource damages. The Public Trust Doctrine in this state usually dealt with access to tidal waterways. At the same time, the ability of the State or anybody else to recover for damages to land also arose out of the common law doctrines of nuisance and trespass.

Beginning in the 1970s, there was a recognition that the country was facing chronic losses to its environmental resources, and lots of

states as well as Congress responded with statutory remedies. In our state, in 1977, the Legislature passed the Spill Compensation and Control Act, and the Spill Act gave the State the right to recover money damages for the cost of remediating environmental contamination. The statute was amended twice thereafter to make it clear that the definition of cost and damage included damages for the loss of natural resources. So if there was an industrial spill and wetlands were injured, wildlife habitat was injured, groundwater was impaired, that money damages, not just for the cost of fixing those problems, could be recovered -- but for the loss of the resource that they represented, both over time and in space. So 1977 -- Spill Act; two amendments: the 1990, most significantly, the Act was amended to make it clear that it included natural resource damages.

ASSEMBLYMAN McKEON: Okay. And I'm just going to ask you to illuminate-- And can you hear me, by the way? I shut all my lights off, but am I good? It's coming through the system? Great.

HEARING REPORTER: Well, no sir. Your mike has to be on for it to go out over the Internet.

ASSEMBLYMAN McKEON: Okay. Because, God forbid, those on the Internet don't hear what I have to say. (laughter) Hello, Commissioner Martin. (laughter)

Can you, Mr. Yoskin, please just illuminate, if you will again, what NRD damages are.

MR. YOSKIN: Sure. There are essentially four components to natural resource damages. The first is restoration costs, which is the cost of restoring a natural resource to its prior condition. The second is equivalent resource replacement, which is if a resource is damaged beyond repair, if a

wetland has been impaired to the point where you can't restore it, you try and calculate the cost of replacing that resource with an equivalent. The third element is loss of use. So if there's-- Let's say a potable water supply has been contaminated and that contamination is going to last for 20 years, there are methods for calculating the value of the lost use of that resource. And then finally, there are assessment costs, which are the cost to government of doing all of this -- of suing people, and doing the calculations, and making the proofs necessary to recover. So those are the four elements.

ASSEMBLYMAN McKEON: Okay. Now, in general, between 2002 and 2004, can you give us a brief history of what occurred relative to NRD?

MR. YOSKIN: Prior to 2002, natural resource damages were being assessed on a somewhat ad hoc basis. In 2002, Governor McGreevey -- I guess it was Governor McGreevey and Commissioner Campbell -- set up an Office of Natural Resource Damages to make this process more methodical, to identify potential cases in which the recovery of NRDs was appropriate. In 2003, the Department issued a policy guidance document which basically said, "Here's how we're going to try and assess natural resource damages, and here's how we're going to go about it." So there were means and methods; there was a preference expressed in that document for settlement, and the document called for notifying potentially responsible parties in advance of filing a lawsuit and negotiating with them.

ASSEMBLYMAN McKEON: As it relates to Exxon Bayway -- I'll just run through this, and you can confirm -- 2001, notice, Exxon received that notice.

MR. YOSKIN: Well, let's go back a step. In 1991--

ASSEMBLYMAN McKEON: Okay.

MR. YOSKIN: --Exxon signed an Administrative Consent Order with DEP, by which Exxon agreed to clean up the contamination at the two refineries. And that process was ongoing; let's just put that to the side. It's our understanding that between 2002 and 2004 there were negotiations with Exxon which eventually did not result in a settlement. And then in 2004, the State initiated litigation.

ASSEMBLYMAN McKEON: Okay. There were, I'll call them *legal milestones*. There were a number throughout the next decade, if you will. The first one occurred in 2005, which I believe was a favorable ruling by the trial judge for Exxon's position.

MR. YOSKIN: For Exxon's position -- that's correct. The trial judge ruled that -- I want to make sure I remember this correctly--

ASSEMBLYMAN McKEON: The compensatory restoration--

MR. YOSKIN: The trial judge ruled that compensatory restoration damages were not an element of recovery under the Spill Act.

ASSEMBLYMAN McKEON: Okay. And am I correct to say the State appealed that ruling?

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: On an interlocutory basis?

MR. YOSKIN: Yes. They appealed it on an interlocutory basis, which means the rest of the trial stops for a while, and then you just take that one issue up. And in 2007 the Appellate Division, in *DEP vs. Exxon*, reversed the trial judge and said the compensatory resource losses were cognizable losses under the Spill Act.

ASSEMBLYMAN McKEON: There was another significant legal decision made in 2009 relative, in general terms, to retroactivity. Could you explain that?

MR. YOSKIN: Yes. In 1994, in a case called *DEP vs. Ventron*, the Supreme Court ruled that DEP could compel responsible parties to clean up contamination which had occurred prior to the 1977 effective date of the Spill Act. The ruling was that the Legislature had made it clear that it intended the statute to be retroactive. Exxon argued, in this case, that the retroactive ruling did not apply to the loss of natural resource damages. And in 2009, the trial judge who was then hearing the case ruled in response to a motion for summary judgment by Exxon that that was not the case, and that the State was free to try to recover for damages which had occurred prior to the effective date of the Spill Act.

ASSEMBLYMAN McKEON: Which, in the instance of the Bayway, would have gone back as far as, I guess, as 1879 or 1872.

MR. YOSKIN: Eighteen seventy-two.

ASSEMBLYMAN McKEON: Okay. In 2013, as litigation pursued, there was another significant ruling, to my research.

MR. YOSKIN: Yes. The trial had been bifurcated. By that point, this case actually started in the Superior Court in Union County. DEP brought two separate actions directed at each site, respectively. At one point, it was removed to Federal court; and then it went back to State court. The two cases were consolidated, and when it moved forward in trial it still had Union County docket numbers but it was tried before Judge Hogan in Burlington County. And it was bifurcated. There was the first part of the case which dealt with whether Exxon was liable for the

contamination; and then if Exxon was found to be liable for the contamination, there would be a trial on the damages. And yes, in the first phase of the trial, Exxon was found to be liable for the contamination.

ASSEMBLYMAN McKEON: Okay. And then that led to the damages trial; I believe it commenced in January 2014?

MR. YOSKIN: Correct. It was tried over 56 days between January and September of 2014. There were roughly a dozen expert witnesses, six for each side.

ASSEMBLYMAN McKEON: And the jurist-- It was a bench trial, correct?

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: Okay. And the jurist acting in that capacity was Judge Hogan?

MR. YOSKIN: Judge Hogan. Michael Hogan is retired and is on recall for this case. He had been, at one point, counsel to Commissioner Shinn when Bob Shinn was Commissioner of DEP. So Judge Hogan was well versed in environmental law, and is very well regarded.

ASSEMBLYMAN McKEON: Okay. As it relates to the proofs that the State put forth, as it relates to the bottom economic line, what sum of damages did they suggest was appropriate for primary restoration?

MR. YOSKIN: Primary restoration -- the State's proofs called for \$2.6 billion in damages for cost of restoration.

ASSEMBLYMAN McKEON: And compensatory restoration?

MR. YOSKIN: And that's for the loss of use -- that was \$6.3 billion.

ASSEMBLYMAN McKEON: Okay -- give or take, roughly, combined, just over \$9 billion.

MR. YOSKIN: Just under \$9 -- \$8.9 billion.

ASSEMBLYMAN McKEON: It is \$8.9 billion -- okay.

MR. YOSKIN: And then there was \$1.2 million in assessment costs, so it took it over \$9 billion.

ASSEMBLYMAN McKEON: Okay. And to just play this out -- Exxon, obviously, objected to those numbers. Did their experts pose that there was any impact whatsoever, and put a monetary number on it?

MR. YOSKIN: No. They didn't pose that there was no impact; they said that the State had not met its burden of proof.

ASSEMBLYMAN McKEON: Okay. The sum that the matter was settled for, as we now know, is \$225 million. Is that correct?

MR. YOSKIN: According to the notice, yes.

ASSEMBLYMAN McKEON: Okay. And subject to what we'll run through now, there are a lot of appurtenances, if you will, to that settlement. But primarily Exxon, in an exchange for that sum, gets a full release for NRD claims relative to the Bayway.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. There's another component of that written release that further indemnifies Exxon should any of those contaminants migrate outside of the confines of their property. Is that the case?

MR. YOSKIN: Right. The release extends to all of the impacts associated with the facilities.



ASSEMBLYMAN McKEON: Which would include any of those compounds or toxins going off-site into other areas?

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: Okay. Now, and there's another component of that settlement that I would like to discuss that's set forth.

Now, there's still an active refinery on the Bayway site, correct?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. And since 1909, I guess, the Morses Creek receives the processed discharged water.

MR. YOSKIN: Correct. There's a water body which cuts through the Bayway refinery called Morses Creek, and that's where all of the processed discharge from the plant goes. And I guess the idea behind it is they can't operate the plant and clean up Morses Creek. So the consent judgment says that any cleanup of Morses Creek will be delayed until such time as the refinery stops operating.

ASSEMBLYMAN McKEON: You say the consent judgment; that's part of the settlement.

MR. YOSKIN: The draft settlement, yes.

ASSEMBLYMAN McKEON: The draft settlement agreement. So that the Morses Creek, having taken in those contaminants for *X* number of years, is going to be deferred as it relates to even performing a cleanup.

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: And is there a time limit as to how long that can continue -- another 10 years, another 20 years?

MR. YOSKIN: No.

ASSEMBLYMAN McKEON: So ad infinitum, to the extent that they want to operate it, there will have to be no cleanup.

MR. YOSKIN: That's what the draft judgment says.

ASSEMBLYMAN McKEON: Okay. And am I correct to say that there was a component of the trial testimony that referenced Moses Creek as it relates to its significance, as it relates to contamination?

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: And could you share that with the Committee?

MR. YOSKIN: The Appellate Division decision -- the 2007 decision -- made specific reference to testimony offered by John Sacco, who was the Director of DEP's Office of Natural Resource Damages, who said of all of the various environmental impacts on the site, that the most serious was to Moses Creek.

ASSEMBLYMAN McKEON: And then beyond, as we've established that that can continue on ad infinitum, beyond that we've released any NRD claims relative to whatever is going on at Moses Creek?

MR. YOSKIN: Correct, even though in theory there's an ongoing loss of use associated with that.

ASSEMBLYMAN McKEON: Okay. As it relates to another component of the settlement now, that is away from the Bayway site and nothing necessarily to do with the litigation, just a little bit of background: In 2007, DEP filed suit against 50 companies -- ExxonMobil being one of them -- for groundwater claims relating to MTBE. Correct?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. And, again, without killing everybody here in the environmental sciences -- MTBE, ironically it's an additive that was added to gasoline for the sake of clean air. But, as it turns out, being as simple as I can put it, the compound is slippery. So as opposed to the other gasolines that are getting kind of caught up in soil that's right there, the MTBE permeates and goes much further -- ergo, there are lawsuits related to the damage caused by that.

MR. YOSKIN: Correct. It accelerated the rate of gasoline leaks from gas stations all over the state.

ASSEMBLYMAN McKEON: Okay. Now, there are 860 of Exxon's stations that are part of that MTBE litigation, correct?

MR. YOSKIN: That's my understanding, yes.

ASSEMBLYMAN McKEON: Okay. And as a part of this litigation, the MTBE litigation, as it relates to those stations, is going to continue for Exxon.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: However, an important distinction is that the State has forfeited their rights to go after NRD damages concerning those 860 stations.

MR. YOSKIN: That's what the draft consent judgment says.

ASSEMBLYMAN McKEON: Okay. In addition, there's another 900 Exxon stations in New Jersey.

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: Okay. And the agreement indicates that the State releases all NRD claims relative to those 900 additional stations throughout the State of New Jersey.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. Were any of those 1,800 stations, give or take, discussed whatsoever through the 55 days of trial, or anything having to do with this litigation?

MR. YOSKIN: No. They have no bearing on the litigation.

ASSEMBLYMAN McKEON: Okay. In addition, the settlement calls for a release of the State's NRD rights on 16 separate sites.

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: Okay. As it relates to those 16 sites, they're all over the state, and they have a commonality to the extent of all being contaminated-- First off, each of those 16 sites has had some type of hazardous discharge. Would that be correct?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. And each of those 16 sites involves water contamination, correct?

MR. YOSKIN: Groundwater contamination; that's correct.

ASSEMBLYMAN McKEON: Okay.

MR. YOSKIN: That's the most typical contamination pattern you see with that kind of facility.

ASSEMBLYMAN McKEON: Okay. And of those 16 sites -- and I'll get us through this as quickly as I can -- you have the list from the settlement agreement?

MR. YOSKIN: I do. There's a list appended to the settlement agreement.

ASSEMBLYMAN McKEON: Okay. And the first two sites are-- Well, let me just start with the first, Atlantic City Terminal. Can you explain that site, as best you can?

MR. YOSKIN: The Atlantic City Terminal-- Let me just back up a step. There were boxes of materials in the DEP file room that we were given access to for each of these sites. But they were hard -- it takes a long time to get through them. We also looked--

ASSEMBLYMAN McKEON: Let me just stop you for one second, Neil.

MR. YOSKIN: Sure.

ASSEMBLYMAN McKEON: If you can, Kate, when was it that we were given access to the--

MS. McCONNELL (Committee Aide): I believe late last week -- Thursday or Friday.

ASSEMBLYMAN McKEON: Sometime -- about less than a week ago we were, after asking for a period of time, we were advised that would be the response -- having access to the room.

So go ahead; I'm sorry, Neil.

MR. YOSKIN: So the other data source we looked at was, DEP has, on its website, a system called NJEMS, which is the New Jersey Environmental Management System. And you can go onto NJEMS and find sites and glean some information about them from there. So that was another source we looked at.

The Atlantic City Terminal on Absecon Boulevard, like a lot of these 16 facilities, was one of those terminals where trucks bring large amounts of gasoline or heating oil to a site; they're stored in tanks; and

then, on a daily basis, other trucks come, load up from the tanks, and then they make deliveries to retail locations.

ASSEMBLYMAN McKEON: So we'll call those *bulk oil sites* -- because as we run through these, a lot of them will be bulk oil sites.

MR. YOSKIN: I think it's better to call them *terminals*, because it might have been gasoline as well.

ASSEMBLYMAN McKEON: Okay.

MR. YOSKIN: So these two-- In Atlantic City, everybody knows the soils are sandy, the water table is high. So when you have releases of petroleum products in that kind of environment, everything sort of just shoots away and gets into the groundwater.

ASSEMBLYMAN McKEON: Neil, I know--

MR. YOSKIN: This was one of those sites.

ASSEMBLYMAN McKEON: I'm sorry, and I don't mean to be too familiar with *Neil*. Mr. Yoskin, I know the one terminal in Atlantic City operated since 1948.

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: Does that go back to when the discharge happened, if you can tell? Or--

MR. YOSKIN: No, you can't tell from the data. Most of these facilities were, when they were started -- might have been owned by independent operators, local companies. This was probably one of them. So it's not known -- we do not know precisely when the discharges occurred.

ASSEMBLYMAN McKEON: The next two we can group are Edison Research Labs and the Synthetics Plant -- they're industrial -- I guess industrial complex.

MR. YOSKIN: Yes, right on Route 27.

ASSEMBLYMAN McKEON: Okay. And again, no specific information -- other than something was discharged--

MR. YOSKIN: Something was discharged from there.

ASSEMBLYMAN McKEON: Okay. The next is the Flemington Terminal. You've gone through what terminals are; in a similar way, do we have any specific information as to what was--

MR. YOSKIN: No. It's on the northbound side of 202, right near Route 31. And we only know there were discharges. Because they're in the system, we know there were discharges.

ASSEMBLYMAN McKEON: Florham Park is the corporate headquarters of Exxon. That, too, is on the list?

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: And there was a discharge of some sort there, but it's hard to know what it was?

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: The next is noted as the Trenton Terminal; we've defined what terminals are.

MR. YOSKIN: Right, that's right down here on Lambertson Road. The same problem; we know there were discharges; it's because of the products they handle, we know that it was gasoline or heating oil. We don't know much more about it.

ASSEMBLYMAN McKEON: The next two are listed in Linden -- one is a terminal, and I won't have you repeat yourself; also a technical center.

MR. YOSKIN: Yes. Exxon has several research and development facilities around the state, and this was one of them.

ASSEMBLYMAN McKEON: And both of those sites had discharges?

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: Okay. And the commonality, again, with all of these up to this point is that they are a part of the settlement, to the extent that all NRD rights have been forfeited by the State?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. Long Branch Terminal -- same thing -- bulk distribution center?

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: Okay. Morristown Municipal Airport -- this is a little different. Can you explain that?

MR. YOSKIN: Yes, this is one of two airport fuel farms; one here, the other one is Teterboro. And I'm surmising that Exxon operates the fuel farm for -- in this case, this is a municipal airport, so you have gasoline for piston planes, and jet fuel for jet aircraft. And there appears to have been leaks there -- discharges.

ASSEMBLYMAN McKEON: Okay. And no information beyond that, other than we know, as a part of the settlement, we've given up our NRD rights.



MR. YOSKIN: Correct. And I do know that the Morristown Airport sits in kind of a bowl, in a low-lying area. And it's almost entirely surrounded by wetlands.

ASSEMBLYMAN McKEON: Okay. The next two sites are noted in Paulsboro: terminal -- we've gone through what that is, although this terminal, as I understand it, maybe is a little unique relative to its history.

MR. YOSKIN: Right.

ASSEMBLYMAN McKEON: My notes reflect Seaboard Oil was--

MR. YOSKIN: Yes. Seaboard Oil owned it at one time; if I recall, the facility was disassembled in 1984. There was a cleanup in 1991, and there is still groundwater monitoring wells monitoring product in the ground.

ASSEMBLYMAN McKEON: Now, I don't know if it's the terminal or the lube plant in Paulsboro, and I believe the lube plant is about 900 acres where there were contaminated groundwater issues like the rest of these. But the MTBE rights were also discharged relative to the Paulsboro site.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: So beyond the NRD rights having been forfeited, indeed, what was ever ongoing concerning the MTBE litigation has also been settled as a part of this release.

MR. YOSKIN: The MTBE litigation is not.

ASSEMBLYMAN McKEON: Well, with Paulsboro, I think it is.

MR. YOSKIN: It may be, it may be. I'm not sure.

ASSEMBLYMAN McKEON: Okay. That's what my records reflect. That was the one where MTBE was resolved.

MR. YOSKIN: Okay.

ASSEMBLYMAN McKEON: And that comes from the testimony of Commissioner Martin and/or Hoffman -- I don't remember which.

MR. YOSKIN: It was not reflected in the materials that I've seen.

ASSEMBLYMAN McKEON: Okay. The Tomah facility; I have no idea what that is.

MR. YOSKIN: It was a -- we believe it was a terminal.

ASSEMBLYMAN McKEON: Okay. And the Pennington facility -- also a terminal?

MR. YOSKIN: It's a bulk distribution terminal.

ASSEMBLYMAN McKEON: And Teterboro Airport?

MR. YOSKIN: Same thing as Morristown. It's a fuel farm with big tanks that hold jet fuel and gasoline.

ASSEMBLYMAN McKEON: And is Teterboro's topography, if you will, somewhat different or unique, as it relates to the whole groundwater issue?

MR. YOSKIN: Like Morristown, like most airports that were built in low-lying flat areas where you could build long runways, there's a high groundwater table there.

ASSEMBLYMAN McKEON: Okay. So all 16 of those matters cobbled together with the other 1,800 gas sites have been made part of this settlement?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: And none of them were at all referenced throughout the litigation itself.

MR. YOSKIN: They have nothing to do with the litigation.

ASSEMBLYMAN McKEON: Okay.

Now, there's another component of the settlement regarding surface water. Let's just start with a-- Well, let me go backwards. In 2006, the surface water claims, as it relates to the Bayway, were stayed, if you will. They were pulled away from the litigation and put in a box to be saved.

MR. YOSKIN: That's correct. And there are a couple of reasons for this, and this is the same thing that was done with the Passaic River litigation. Unlike terrestrial resources and groundwater, Federal trustees and State trustees have coextensive jurisdiction over surface waters. And the proofs are a little different. So sometimes -- and it was the case in both of these cases -- the parties will agree to a standstill on the surface water component, and they'll just put it aside and try other issues first. That was done in this case.

ASSEMBLYMAN McKEON: Okay. And in this current settlement, there are conditions attached to any future surface water claim regarding the Bayway. Is that correct?

MR. YOSKIN: Correct. There are two unusual conditions.

ASSEMBLYMAN McKEON: Okay. And the first of those unusual conditions -- to use your notes -- is that before the State can move to file a claim for surface water, they would have to themselves come up with a formal natural resource damage assessment, correct?

MR. YOSKIN: Correct; which is -- usually it's the other way around. You file the complaint, and then--

ASSEMBLYMAN McKEON: Okay. So this is coming up, if you will, with the expert evaluation beforehand.

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: And the cost of such an evaluation would-- Approximate as best you can.

MR. YOSKIN: Done correctly -- and we've spoken to people who do this -- it would be in excess of \$1 million.

ASSEMBLYMAN McKEON: Okay. And that's very unusual, and not the current state of the law?

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: The second component -- which you said two unusual notes -- is that the State, in order to pursue a surface water claim, would have to first name all responsible parties.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: How is that different than litigation as ordinarily handled for such matters?

MR. YOSKIN: Well, the Spill Act has a pretty cutthroat philosophy to it. If DEP identifies that there's been a discharge somewhere, they only have to find one person who's responsible for the discharge and file a complaint against that person. That person will thereafter bring in

any other party who may have been responsible for any component of that discharge. So, for example, in the Passaic River litigation the State brought an action against just two companies. Those companies eventually brought in 163 parties, which brought in municipalities, municipal utility authorities, private landowners -- any private landowner in that watershed. So there, normally speaking, the parties would be doing it; this says that DEP, if it wants to refile the surface water claim, DEP has to do it.

ASSEMBLYMAN McKEON: So in order for the DEP -- because of where the Bayway is situated, for them to pursue a surface water claim they would have to bring in -- joint meeting; they would have to bring Passaic Water Authority; they would likely-- And they would have to bring in scores of individual homeowners on the contiguous sites of Bayonne, and Linden, and Elizabeth.

MR. YOSKIN: Certainly any property owner -- whoever had an activity that could have resulted in a discharge, yes.

ASSEMBLYMAN McKEON: So as a practical matter, this releases the surface water claims in light of these changes.

MR. YOSKIN: Yes.

ASSEMBLYMAN McKEON: Okay.

A couple of areas, and then I'm going to open you to questions that anybody may have.

Again, whether anecdotally, in part through Attorney General Hoffman's testimony before the Senate Budget Committee, he mentioned something to the extent that, at some point in time during the Corzine four years there was an offer to settle for \$550 million -- at least, what was placed on the record.

MR. YOSKIN: Right.

ASSEMBLYMAN McKEON: Now, I'll ask you to take judicial notice that Corzine was no longer Governor after January 5 or so, 2010. What changes occurred from January 2010 forward that may well have made what was a settlement demand no longer feasible -- or no longer adequate?

MR. YOSKIN: Well, I mean, two things have changed. One, there was a trial on the liability phase, and Exxon was found to be liable for the discharges. And there was a trial on the damages phase, which has -- it has resulted in this settlement.

ASSEMBLYMAN McKEON: Okay. The second component is that the vast majority of NRD matters that were either negotiated or filed have resolved.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: And most of them have resolved in a one- or two-year period.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Yes. And it's not your position to-- But from prior testimony, you know, the Governor -- and you'll be familiar with this -- the philosophy is not necessarily to get into lengthy litigation, but to secure funds in order to deal with environmental damages to correct that.

MR. YOSKIN: That's right. The policy guidance actually states a preference for that.

ASSEMBLYMAN McKEON: Okay. And this matter just didn't go that way, but rather it was the position of the *bad actor*, if you will, to litigate through these 10 years.

MR. YOSKIN: Correct.

ASSEMBLYMAN McKEON: Okay. Now, the two cases that did come to a conclusion -- one known as Essex Chemical in 2012, where there was an \$8 million claim by the State; and the second, Union Carbide in 2011, where there was a \$30 million claim by the State. Both were found in favor of the defendant.

MR. YOSKIN: That's correct.

ASSEMBLYMAN McKEON: Okay. And are those two cases distinguishable from the Bayway case?

MR. YOSKIN: They're distinguishable in the sense that in both of those cases the only natural resource involved was groundwater -- was damages to groundwater. And in the Bayway case the State has actually not made a claim for groundwater; it's for other resources.

ASSEMBLYMAN McKEON: So those precedents -- if you want to call them that -- although they weren't legal precedents, they were decisions by a judge.

MR. YOSKIN: They were fact sensitive, yes.

ASSEMBLYMAN McKEON: Fact-sensitive cases. Beyond the changes -- beyond the differences in facts, they involved groundwater as a major distinction; secondly, both cases had the commonality of the State DEP -- the Site Remediation part of DEP saying that a certain timeframe for remediation was adequate in both instances, right?

MR. YOSKIN: Right.

ASSEMBLYMAN McKEON: And you had the NRD section of DEP saying, “No it isn’t; it should be accelerated,” and because it wasn’t accelerated, they were entitled to damages.

MR. YOSKIN: Right. This was kind of odd. I mean, I’ll just pick the one -- the Essex Chemical case. Essex Chemical tried several different ways to treat its groundwater, and eventually settled on a methodology that, over a period of about 26 years, through a combination of what’s called *pumping and treating* and through the injection of some biological agents into the ground, would reduce the groundwater contamination to background. And the DEP Site Remediation program said, “Fine, it meets our standards,” which means that it’s fully protective of public health and environmental safety.

ASSEMBLYMAN McKEON: Yes.

MR. YOSKIN: The Natural Resource Damages group at DEP said, “That’s not good enough. There’s a methodology that we think you could use that would take only 10 years and would, therefore, reduce the period of time where there’s a loss of use.” And then they attempted to attach some value to that.

The judges in both cases said, “That doesn’t fly with us. If the Site Remediation people said it’s okay, it’s okay. And natural resource damages -- this isn’t a damage they’re trying-- They’re now trying to compel a different outcome, and they can’t do that.”

ASSEMBLYMAN McKEON: Okay. And there’s no such incongruity in the Bayway case?



MR. YOSKIN: No. My understanding is that the Office of Natural Resource Damages has accepted the clean-up strategies that have been agreed to by Exxon and by DEP Site Remediation Program.

ASSEMBLYMAN McKEON: Okay.

I appreciate and thank you for hanging with me through that, because I felt like I wanted to get that out to the public and to the Committee so we can share with everybody the benefits of the work that's being done. And again, we have much still to do.

I'm going to open it up to question to the members; and then, for the members' sake, to note that I plan on going through what our next steps will be leading up to the June 6 deadline, if you will. And each of you will be given an opportunity to speak, other than through questions, if you so desire.

Members?

Assemblywoman Schepisi.

ASSEMBLYWOMAN SCHEPISI: Thank you for coming before us today.

And first, just a couple of high-level questions, because I know I wasn't here for the last hearing so I'm just trying to understand a bit of this.

Are you currently representing any of the parties in this?

MR. YOSKIN: No.

ASSEMBLYWOMAN SCHEPISI: Okay. Have you been retained by anybody; are you here on your own free will?

MR. YOSKIN: No. My firm serves as counsel to the Senate and, on occasion, to the Assembly. And we're on retainer with both, so I

am here in that -- I was retained in that capacity under our existing Professional Services Agreement.

ASSEMBLYWOMAN SCHEPISI: Okay. And when -- were you counsel for the DEP at any point with this particular matter pending?

MR. YOSKIN: No.

ASSEMBLYWOMAN SCHEPISI: Okay.

MR. YOSKIN: No, I was at DEP from 1978 to 1984.

ASSEMBLYWOMAN SCHEPISI: Okay. So it was pre any of the litigation occurring here.

MR. YOSKIN: That's correct.

ASSEMBLYWOMAN SCHEPISI: Okay.

ASSEMBLYMAN McKEON: Pre-high school for you, Assemblywoman. (laughter)

ASSEMBLYWOMAN SCHEPISI: Actually, it really was. (laughter)

So you've really just had an opportunity, over the past couple of weeks, to review some of the materials that we've received and an offer by the DEP to take a look at some of the hundreds of thousands of pages of documents from this. Is that fair?

MR. YOSKIN: Correct. And material that we obtained from public records; that's correct.

ASSEMBLYWOMAN SCHEPISI: Okay. Understanding that the law on NRD cases is a little bit amorphous, and that you do have the precedent of Union Carbide, Essex Chemical -- which, after full trials -- and even Essex Chemical, when it was appealed to the Appellate Division -- DEP lost. Can you provide examples of any NRD cases that the DEP in the

State of New Jersey has won, and walk us through, maybe, how those facts are similar to this?

MR. YOSKIN: No. To the best of my knowledge, the only two cases that have been taken to verdicts on the damages phase were the Union Carbide and the Essex Chemical cases. I mean, in this case, on the liability phase, there was a ruling in favor of the State. But other than that, to the best of my knowledge, all of the cases -- all of the NRD cases have been settled.

ASSEMBLYWOMAN SCHEPISI: Okay. In the summer of 2008, it's my understanding that the previous Administration, under Governor Corzine, made a settlement offer to ExxonMobil of \$150 million, in cash.

MR. YOSKIN: Of what?

ASSEMBLYWOMAN SCHEPISI: Of \$150 million, in cash.

That settlement offer was flat-out rejected by ExxonMobil. And at that point, when that settlement offer was proffered, there had already been an establishment of liability by the trial court on ExxonMobil, which was reconfirmed by the Appellate Division. Isn't that correct?

MR. YOSKIN: No, the 2007 ruling wasn't the finding on liability; it was the finding that the State had the opportunity to go back and prove damages that pre-dated the Spill Act.

ASSEMBLYWOMAN SCHEPISI: But a Superior Court judge had ruled at that time that ExxonMobil was liable for causing the public nuisance by polluting the waterways, wetlands, and marshes by the sites in Bayonne and Linden.

MR. YOSKIN: That was the common law finding.

ASSEMBLYWOMAN SCHEPISI: Right.

MR. YOSKIN: That's correct.

ASSEMBLYWOMAN SCHEPISI: And so there was an establishment of some type of liability--

MR. YOSKIN: A partial finding, yes.

ASSEMBLYWOMAN SCHEPISI: --against ExxonMobil--

MR. YOSKIN: Yes.

ASSEMBLYWOMAN SCHEPISI: --prior to that settlement offer being proffered, correct?

MR. YOSKIN: According to the public record, yes.

ASSEMBLYWOMAN SCHEPISI: Okay. And in your 30-plus years of handling these types of matters have you represented any parties in settlements such as an NRD case?

MR. YOSKIN: My firm has, yes.

ASSEMBLYWOMAN SCHEPISI: Okay. And have you ever had an opportunity, or has your firm to your knowledge, ever been in a situation whereby a ceiling has been set and you've proffered a settlement offer on behalf of your client -- or you've then managed to get a higher amount than what was initially proffered as, kind of, your ceiling for a settlement?

MR. YOSKIN: Well, we would not have. We have only represented parties in cases like this, in multi-party settlements. So we never have had a situation where we just had one client who was a target of an NRD case.

So settlements in those cases tend to be -- there's a negotiation within the group, and then the group negotiates with the government, and

then the government comes back with a counteroffer, and then you have to go internally to decide whether you would agree to that number; and then how you're going to allocate it. So I don't think there's a clear answer to your question. There have been lots of settlements.

ASSEMBLYWOMAN SCHEPISI: Right. But to your personal knowledge, do you know of any instances of a settlement in which the cash portion ended up being higher than what the government first offered as a settlement amount?

MR. YOSKIN: I actually don't recall; I just don't know.

ASSEMBLYWOMAN SCHEPISI: Okay. And just for clarity, because I think -- you know, I'm even confused about this. We're talking about several different components where, yes, there are certain releases of gas stations on the NRD side that are not being released with respect to certain other claims on the MTBE suits. But it's my understanding that any of the releases that are taking place, or put forth in the settlement agreement -- that ExxonMobil still has the affirmative obligation to remediate each and every site. Is that correct?

MR. YOSKIN: That's correct.

ASSEMBLYWOMAN SCHEPISI: So when we're talking about the primary restoration, you really don't have the law of the land in New Jersey being primary restoration; it's more of remediation. And in the settlement you have the remediation, which is distinct from the monetary damages.

MR. YOSKIN: The law of the land is both, and the best way to understand it is to look at an example. There are areas in the Bayway refinery that were once wetlands, that have been so severely impacted that

the decision was made by Exxon and by DEP that the most effective clean-up remediation method was to cap the wetland.

ASSEMBLYWOMAN SCHEPISI: Right.

MR. YOSKIN: So that's remediation. But there has not been restoration of that wetlands -- so that's the other component that the State has the right to get compensated for -- which is restoration for that resource. That's the primary restoration cost. It might cost \$1 million to cap an acre of wetland, but it might have cost \$2 million to restore it. So the delta is \$1 million -- that's the primary restoration cost.

But what you said was true: Exxon is -- they're cleaning up the site to DEP's standards.

ASSEMBLYWOMAN SCHEPISI: Right. So every site that is listed is being cleaned up and remediated.

MR. YOSKIN: That's correct.

ASSEMBLYWOMAN SCHEPISI: And the monetary portion is really more of the assessment cost, or the compensatory damage.

MR. YOSKIN: That's correct.

ASSEMBLYWOMAN SCHEPISI: And it is fair to say that a previous settlement offer was made by the State of New Jersey for a cash component that was actually less than what this settlement agreement has.

MR. YOSKIN: I only know what was in the newspapers; I have no personal knowledge of this. I actually thought that the newspapers said \$550 million. But whatever the offer was, if an offer was made, an offer was made.

ASSEMBLYWOMAN SCHEPISI: It was \$150 million in cash, and then, I believe, \$400 million in restoration projects for other items.

MR. YOSKIN: Okay.

ASSEMBLYWOMAN SCHEPISI: And it was flat-out rejected. Are you familiar with the Exxon Valdez case?

MR. YOSKIN: Not from a legal prospective; I know about it, yes.

ASSEMBLYWOMAN SCHEPISI: Okay. Would it surprise you to know that, after over 10 to 15 years of actual litigation on it, there is a punitive damage award of close to \$5 billion that was subsequently overturned? And that for Exxon Valdez, the state of Alaska received \$500 million after all of those years and a finding of a \$5 billion judgment.

So understanding the complexity of these types of cases, understanding that when you have a corporate defendant such as an ExxonMobil, which has unlimited resources for attorneys and for ensuing decades of litigation, is it reasonable for a settlement such as this to take place?

MR. YOSKIN: You know-- Are you a lawyer?

ASSEMBLYWOMAN SCHEPISI: I am.

MR. YOSKIN: Well, then you know that there are two things that I can't make judgments about: one is what happened in the courtroom. There's no substitute for being in the courtroom and observing the testimony of the experts. So I can't really make any judgment about the relative strengths and weaknesses in the case.

And the other thing we know is that parties make settlements for a myriad of reasons. And not knowing what they are, it's difficult to say that what was done here suggests that what was done here was reasonable.

You know, I understand what you're saying -- that the Exxon Valdez settlement, on a proportional basis, or the recovery, seems to be on par or even less than what was done here. But to me it's like apples and oranges. I couldn't make an assessment.

ASSEMBLYWOMAN SCHEPISI: All right. And that's part of the issue. I mean, we're sitting up here being asked to make an assessment of something that we haven't been privy to for a decade. We haven't been day in and day out understanding the nuances, understanding the predicates, understanding things that are taking place all around us. So I'm just trying to figure out the efficacy of us sitting here trying to second-guess the decisions being made here as to whether or not it's even appropriate for us to do so -- not being able to have, as you indicated, the intrinsic knowledge of what has brought us to this place.

MR. YOSKIN: I understand. I certainly can't answer that question, with respect to Bayway. But I would make the observation that the 16 sites -- the settlement for the 16 sites and the several hundred gas stations was, until this Notice of Proposed Settlement was issued, never a part of anything related to this case. But I understand your point with respect to the challenge, with respect to the first issue.

ASSEMBLYWOMAN SCHEPISI: Okay.

ASSEMBLYMAN McKEON: Good?

ASSEMBLYMAN CARROLL: Just very briefly, Mr. Chairman.

ASSEMBLYMAN McKEON: Sure.

ASSEMBLYMAN CARROLL: Not being a litigator, although sharing my colleague's problem of also being a lawyer. (laughter)

MR. YOSKIN: It's a burden we all bear.



ASSEMBLYMAN CARROLL: Yes, I know. It's my-- One of my old running mates used to say he was a recovering attorney. (laughter)

When I looked at this, my first question was-- Well, first of all, I mean, do you believe this settlement is fair?

MR. YOSKIN: I just, as I explained to the Assemblywoman, I don't have a basis for deciding whether it's fair or not.

ASSEMBLYMAN CARROLL: Based upon your experience as a litigator -- an environmental litigator -- let's assume, for the moment, that the judge comes back tomorrow with an award of *X* dollars -- whatever it turns out to be -- and Exxon doesn't like it and decides to appeal. Based upon your experience, roughly how long do you think it would take for that appeal to work its way through all the various and sundry appellate permutations?

MR. YOSKIN: Eighteen months through the Appellate Division.

ASSEMBLYMAN CARROLL: And then to the Supreme Court, perhaps?

MR. YOSKIN: If the Supreme Court chose to grant cert, which it wouldn't have to do, another year.

ASSEMBLYMAN CARROLL: And assuming, for the moment, that we don't win and have to go back and do it again -- as happened in the Exxon Valdez case?

MR. YOSKIN: A slightly different issue, but assuming then you would have -- you say, another entire trial?

ASSEMBLYMAN CARROLL: I'm just asking.

MR. YOSKIN: A long period of time.

ASSEMBLYMAN CARROLL: I mean, isn't that an inherent risk that you face? I mean, I must confess that I browsed through the Exxon briefs in such (indiscernible). They seem to be pretty persuaded that they've got a good case. Let's assume, for the moment, that they're right. Isn't there an inherent risk, ultimately, of possibly, perchance, getting nothing?

MR. YOSKIN: There's always-- It's why parties settle.

ASSEMBLYMAN CARROLL: I understand that.

MR. YOSKIN: There's always risk.

ASSEMBLYMAN CARROLL: So here today you can't offer us an opinion on this.

As an attorney, wouldn't it be best to have the counsel who actually tried the case sitting in court today -- or sitting before us today offering an opinion as to whether he or she thinks the settlement is reasonable, based upon his or her opinion of what happened in the courtroom?

MR. YOSKIN: If your question is would it better to have somebody who was in the courtroom, you would get a more informed opinion. I don't know that you would get a lawyer at this point, from either side, to do that. But of course you would-- And that's one of the reasons I'm not expressing an opinion, because I read the post-trial briefs and I've read some of the transcripts. But I don't know what happened in the courtroom. Judge Hogan could, tomorrow, decide there is zero liability; he could decide that there's \$8.9 billion in liability. And both parties, obviously, were concerned that both things could happen.

ASSEMBLYMAN CARROLL: Okay. And given that-- And again, I must confess, I don't do a lot of litigation. But in my experience, it's always been a situation where both parties to a particular settlement believe they're being treated fairly. Is that correct?

MR. YOSKIN: No. My experience is most judges, when they're confirming a settlement, remind the parties that a settlement is a good one if nobody's happy.

ASSEMBLYMAN CARROLL: Well, that's like a divorce. If anybody walks out of the courtroom happy, someone's made a mistake -- we know that. And this situation, again -- I understand where some of the newspaper folks and such like are incensed about it, because they read that \$9 billion number.

Again, if you fail to take into consideration the risk of ultimately getting nothing, then perhaps that opinion makes some sense, right?

MR. YOSKIN: Yes.

ASSEMBLYMAN CARROLL: Okay. But if you-- I mean-- And again, I want to come back to the Atlantic City analogy that the Chairman and I had a discussion about. If you have \$225 million or \$250 million on the table, in your experience as a litigator isn't that something to be very careful about running the risk of losing?

MR. YOSKIN: It depends on what you and your client decide are the client's needs. Are you saying, in absolute terms, is \$225 million a lot of money? Obviously it's a lot of money. And would going to verdict put it at risk? Theoretically, yes.

ASSEMBLYMAN CARROLL: Let's talk about-- And again, I understand that the law requires the judge to give deference to the opinion of the DEP Commissioner. That's correct, is it not?

MR. YOSKIN: That's correct.

ASSEMBLYMAN CARROLL: So--

MR. YOSKIN: On issues of fact, not of law.

ASSEMBLYMAN CARROLL: Well, in other words, when the judge passes on whether or not this settlement is fair, he has to defer at least partially to the DEP.

MR. YOSKIN: No, there's been no-- No, there's been no agency finding. That rule of deference -- that only applies to agency actions. If you're suggesting that the judge has to defer to the Commissioner's judgment that the settlement is a good one -- no, the judge's obligation is to find that the settlement is in the public interest.

ASSEMBLYMAN CARROLL: Okay. Well, then, let's-- In respect to that, having sat through 55 days worth of testimony and having been an experienced and accomplished environmental lawyer, as well as a judge, what more could this Committee or any outside advocate offer in terms of a comment that would better inform his opinion?

MR. YOSKIN: I think that the aspect of the settlement that may most trouble the judge is the inclusion of all these other sites.

ASSEMBLYMAN CARROLL: And, again, if he finds that to be contrary to the public interest, presumably he will reject the settlement, correct?

MR. YOSKIN: Presumably he will, or he'll do so conditionally.

ASSEMBLYMAN CARROLL: Okay. And if he approves it, again, because he's-- I don't know the judge but, again, you do -- apparently you do, or at least you're going by his reputation -- presumably he will not act in a manner which would in some way, shape, or form compromise the public interest.

MR. YOSKIN: I assume that he'll do his duties as the judge.

ASSEMBLYMAN CARROLL: Exactly. So coming back to, again, what this Committee, or any other advocate, or any other person out there in the community might do, what might we write down on a piece of paper or a letter-- Let's say we wanted to comment to the judge on the merits of this particular settlement. What might we say that would, in some way, shape, or form, better inform his opinion in light of what he's already sat through?

MR. YOSKIN: I would imagine that you would address those aspects of the settlement that have to do with these other sites.

ASSEMBLYMAN CARROLL: Which presumably he heard nothing about at the time of trial?

MR. YOSKIN: That's correct.

ASSEMBLYMAN CARROLL: Thank you.

ASSEMBLYMAN McKEON: Members, any specific questions?

ASSEMBLYMAN JOHNSON: I have a quick question.

ASSEMBLYMAN McKEON: Please.

ASSEMBLYMAN JOHNSON: It's still morning; good morning.

MR. YOSKIN: Good morning.

ASSEMBLYMAN JOHNSON: I need some definitions here. You talked about the Morses Creek and process discharge?

MR. YOSKIN: Yes.

ASSEMBLYMAN JOHNSON: What is *process discharge*? What does that mean?

MR. YOSKIN: Process discharge -- it's usually cooling water. Refineries use a tremendous amount of water.

ASSEMBLYMAN JOHNSON: Is it contaminated?

MR. YOSKIN: Pardon me?

ASSEMBLYMAN JOHNSON: Is that contaminated?

MR. YOSKIN: Well, no -- there's two components to process discharge. One is cooling water, and then if -- the other is, if there are aspects of the operation of the refinery that actually involve contact between water and chemicals, that would be treated and then discharged. And that would be process wastewater. So you have cooling water and process wastewater.

ASSEMBLYMAN JOHNSON: So you refer to process wastewater?

MR. YOSKIN: Well, the settlement doesn't actually specify whether it's just cooling water or whether it's both. I can tell you that refineries are closely regulated so if there's a wastewater component to it, it's treated and there's a permit requirement.

ASSEMBLYMAN JOHNSON: Okay. I think that's all I have. My other questions were answered.

The Bayway plant is located in Linden, New Jersey. Did the people of Linden -- the residents of Linden -- was there like an open-type of a town meeting to discuss this settlement prior to it being decided?

MR. YOSKIN: No. DEP's only obligation under the Spill Act is to publish notice of a proposed settlement. It's actually not even required to take public comment. It's doing so; it has set up a website, and it's invited public comment. But the statute doesn't even require that.

ASSEMBLYMAN JOHNSON: So these 16 sites that are listed here throughout New Jersey -- the local townships, towns, boroughs, cities where this contamination has occurred, they have no say as to what the settlement should be?

MR. YOSKIN: That's correct.

ASSEMBLYMAN JOHNSON: As it impacts their particular jurisdictions?

MR. YOSKIN: That's correct. They actually get a say. DEP's site cleanup law requires public notices -- signs, and letters, and stuff -- but they have no say in the settlement, no.

ASSEMBLYMAN JOHNSON: Okay.

Thank you, Chair.

ASSEMBLYMAN McKEON: Thank you.

Any other members have any questions for Mr. Yoskin?

ASSEMBLYMAN WIMBERLY: Just a quick--

ASSEMBLYMAN McKEON: Assemblyman Wimberly.

ASSEMBLYMAN WIMBERLY: Thank you, Chairman.

You answered a question, basically, through Assemblyman Johnson about the residents. And through the public hearings I'm just

curious to see the true impact. We heard from the elected officials from Linden and Bayonne; but the real impact, you know-- We haven't heard much about the health impact on the residents in that area, and I'm curious to see if there has been findings over these many years with this. And obviously they have no say in the settlement, but their lifestyles, obviously, have been changed by this situation. I don't think you can put a dollar amount on it, be it property value or health value.

So Chairman, I look forward to continuing to hear from the people and getting information on this settlement.

Thank you.

ASSEMBLYMAN McKEON: Thank you very much, Assemblyman.

Any other members with questions? (no response)

Mr. Yoskin, thank you very much.

MR. YOSKIN: Thank you; thank you, Mr. Chairman.

ASSEMBLYMAN McKEON: With that, I have some thoughts about what the Committee plans on doing. But I'll open it up to any of the members who would like to set forth any final comment before we proceed and then adjourn.

ASSEMBLYMAN LAGANA: Mr. Chairman.

ASSEMBLYMAN McKEON: Assemblywoman, do you--

ASSEMBLYWOMAN SCHEPISI: Just real briefly. And I understand why the Chairman is holding these types of hearings. And it's good to get information to ensure that something is being done that makes sense.



I just have some concerns that if we, as legislators, intervene in the settlement negotiations -- pursuant to our codes of ethical conduct and rules of professional conduct -- that we could be potentially putting forth a dangerous precedent that has previously occurred in the past amongst some of our members who have been admonished for doing so.

So while I support having the public discourse about it, I just have concerns that if we are going to do something proactively with respect to trying to influence a trial court judge in any sort of fashion, that it could come back to haunt us.

ASSEMBLYMAN McKEON: Thank you, Assemblywoman.

ASSEMBLYMAN CARROLL: Having a Marci Hochman moment?

ASSEMBLYMAN McKEON: Assemblyman?

ASSEMBLYWOMAN SCHEPISI: He called me Marci Hochman. (laughter)

ASSEMBLYMAN CARROLL: No, I was just saying had a Marci Hochman moment. (laughter)

ASSEMBLYMAN McKEON: Members? Assemblyman Lagana?

ASSEMBLYMAN LAGANA: Thank you, Chairman.

I just want to take this opportunity to thank you and the rest of this Committee for taking part in this hearing. This is a very important issue; it's been in the news a lot. And I think the most important aspect of what we're doing here is asking questions. And we heard from counsel that DEP doesn't even have to take public comment, and that they really have

no say in the settlement. And we understand that to be a function of the Executive Branch.

But that does, I think, really put the onus on this Committee to ask the questions that the public can't ask, and to get answers. And I think that's what really -- primarily what we're doing here. And in my opinion, obviously not sitting through trial or reading trial transcripts-- I am an attorney myself, and to put an adequate number on what a settlement should be or shouldn't be is not really up to me to determine, because I really have no clue. But just judging from what the State was asking for, we have a \$9 billion number; we have a \$250,000 (*sic*) settlement.

ASSEMBLYMAN CARROLL: Million.

ASSEMBLYMAN LAGANA: Million -- \$250 million settlement; thank you. That would really be wholly inadequate. (laughter)

ASSEMBLYMAN CARROLL: One or two zeros make a heck of a difference, you know? (laughter)

ASSEMBLYMAN LAGANA: Makes a big difference, makes a big difference.

But the real question and, in my opinion, disservice is that only \$50 million of it will be used for actually restorative and compensatory purposes. And I think that we should really be looking at that part. All of it should be spent on that; that's what it's meant for.

The good part about this is that, no matter what, Exxon will have to clean up the site no matter how long it takes and no matter how much it costs. So at least we have that.

But again, I look forward to continuing these hearings and getting more facts to the people who we represent.

Thank you.

ASSEMBLYMAN McKEON: Thank you.

Assemblyman Wimberly or Assemblyman--

ASSEMBLYMAN WIMBERLY: No, I'm good.

ASSEMBLYMAN McKEON: We're good? Okay.

Thanks to everyone. I want to take another two or three minutes of everyone's time.

And again, thanks -- not only to the Committee members for your diligence, especially on a day that we don't regularly -- aren't regularly scheduled to meet; and for your professionalism in the way things have been handled.

And special thanks to Ms. McDonnell and Mr. Naideck, who I have made continuously crazy in trying to wrap my mind around all of this and do something in a thoughtful, as opposed to just a rhetorical, way.

There are just some conclusions -- and part of this has been teased through the testimony of Attorney General Hoffman and Commissioner Martin. You know, from 2004 to 2009 -- going back to Governor McGreevey, through the end of the Corzine term -- there were 151 NRD suits that were filed. Since Governor Christie has taken office, there has been one. We know that beyond-- The NRD aspect of the litigation, that hasn't been pursued in the Passaic River yet; the Solvay site in Paulsboro; the Superfund site in Ringwood, the Ford Motor Company; Troy and White Chemical in Newark -- we know that they're ripe to pursue NRD matters, but they're not.

Maybe my colleague, Assemblywoman Schepisi-- And I'm not saying that you do, but clearly all these places have to get cleaned up.

That's the law. That's separate and distinct from NRD. So if there's a lack of belief in NRD -- as one would think would be demonstrated through having removed that on some 1,800 sites, as well as taking those other 16 sites that Exxon was responsible for -- well, that's a sea change as to what the law is and a philosophy that I find troublesome.

I also just note, as it relates to Exxon Valdez -- that did settle after an arduous court battle -- no question, that's Exxon's M.O. -- for \$500 million. Where there was 7 million gallons that were on the Bayway site, I think the Exxon Valdez was 10 million -- and on some level easier to deal with because they were identifiable, it happened in an instant, and could be dealt with from a cleanup perspective -- as opposed to 150 years of damages.

I also note that these are things that I think that we're entitled to on a going-forward basis. I think to start with, that there are 1,760 sites -- Exxon sites. There must be NRD evaluations. Because if there are not NRD evaluations and the State has forfeited its rights to NRD, then they've just abrogated their responsibility. So the Attorney General, the Commissioner -- whomever -- should provide those evaluations for us.

Secondly, as it relates to those 16 sites -- similarly, the Attorney General, the Commissioner should make available to us all evaluations as it relates to those sites where they know that there was a discharge. We've given up our NRD rights on that site; and not to have done due diligence would be an abrogation of that duty, and we should be entitled to see those things.

The next point is, as it relates to now what I understand is a 2008 offer of \$150 million -- whatever that sum was that the

Assemblywoman had brought up -- that information wasn't provided to this Committee. I've asked for it specifically. It's not fair, or reasonable, or the way that we're conducting ourselves to allow one component of the Committee to have access, and the other component to say, "Oh, no. That would prejudice our rights." Let's see it; let's see what it is.

And that having been said, there were a number of very significant findings, post-2008, relative to retroactivity, relative to the liability phase; let alone to the \$9 billion of damages being put up on the board that occurred -- if that offer, in that way to settle, has ever been said.

And I just say, as an individual who is a litigator -- things change all the time. You know, today, when someone is in a personal injury case, doing well, and there's a certain offer made -- and then it turns out through the litigation process that a brain injury is manifest and there's not a way, from a defense perspective, to refute that -- well, then the price of business goes up. And similarly, it certainly goes up after you win the liability phase and then put all your damages up on the blackboard concerning something that happened -- or purportedly happened five, six, seven years prior to that.

Now, reference was made as it relates to the continuing process. We are in a public comment period and, regardless of whether we're elected officials now, we're the public. So to suggest it isn't appropriate for us to weigh in, if you will, during that statutorily proscribed period, I think is just not at all -- it doesn't hold any water; no pun intended. What's unclear about this comment period is whether or not the DEP Commissioner is even required to present it to Judge Hogan. The law is less than clear.

Now, the DEP Commissioner, through his aide, has indicated to us that he plans on doing so. But until that's confirmed in writing, then there may have to be an alternate way for us to allow the judge to know of our opinions, having gone through a continuing and thoughtful process.

I also do have concern relative to the public being heard, as several of my colleagues have noted. We did hear from the Mayor of Linden; the Mayor of Bayonne couldn't get here because of a scheduling conflict. And our Committees have been just kept, if you will, with invited guests. There will be at least one public hearing that will be open to the general public. We'll conduct it probably in Linden and allow stakeholders, individuals, and whoever wants to be heard regarding this settlement to do so on the public record. And that will happen, again, prior to June 6.

And relative to our weighing in on our opinions -- whether that happens through us providing public comment to the Commissioner once assured it gets to the judge; whether it's done through an impleader to the court to allow us to be heard -- we can't make that final decision yet, and we'll continue to give that our thoughtful consideration.

And, I guess, just my last point on all of this -- and it's a profound sadness, and maybe why I've taken this so seriously and tried to get so specific into the details, to have some wisdom and to be a part of a process that's ongoing. And that's: What's going to happen here? You know, back in the day, people thought of wetlands to the extent of the biology, if you will, that was there; the ecosystem -- the critters, for a lack of a great term. But as we've learned, wetlands mean a lot more. They are a major protector of storm surge. And, boy, we learned the hard way, in the Hudson-Raritan Estuary when Hurricane Sandy hit, that that estuary that's

been destroyed led to an awful lot of suffering relative to people who live in Bayonne, and Linden, and Elizabeth, and Staten Island. And although that property is going to eventually be cleaned up -- God knows when, with the Morses Creek component that's in this settlement -- but it's never going to be what it was. It will be capped, and will no longer be a barrier to storm surge, but maybe more of a sieve the next time that happens.

And if this \$225 million goes through, \$50 million of that, give or take, is going to be off to attorneys' fees; and leaving about \$160 million or \$170 million. Under the current law, \$100 million is going to go into the General Fund and not have anything to do with dealing with this very significant loss that each and every one of us has suffered. And so there will be \$50 million there -- which is money, and will be used for good environmental purpose, but a drop in the bucket relative to what we've lost.

So this is my sadness and my colloquy. And this Committee, and I, and all of us will continue to work in a deliberative fashion on the most significant environmental site -- contaminated site in New Jersey.

Thank you. We stand adjourned.

**(MEETING CONCLUDED)**