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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

April 26, 2006

The Committee on Legal Services met on Wednesday, April 26, 2006, at 1:04 p.m. in HCR 0111. The following members were present:

Representative McGihon, Chair (left later for another meeting)
Representative Hefley
Representative King
Representative Marshall
Senator Groff
Senator Grossman, Vice-chair
Senator Veiga

Representative McGihon called the meeting to order. She said before the Committee today is Senate Bill 106. I'm going to ask Ms. Haskins to explain where we are in the process and a couple of issues that have come up.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, testified before the Committee. She said you are sitting as the House committee of reference on the rule review bill, Senate Bill 106. The bill was pending on 2nd reading in the House and it got referred back to the Committee. We're here to address a couple of things that have come up and then you'll need to pass the bill out again. We do have one clean-up amendment, L.010. We had three pieces of legislation go through this session that gave statutory authority to the departments with respect to different rules that were in the bill, so the rules are okay now because the agencies now have statutory authority. We are recommending that the Committee remove those rules from the bill so they will not expire on May 15. Those bills were House Bill 1340, which dealt with the explosives rules, Senate Bill 84, which dealt with the river outfitters issue, and Senate bill 118, which dealt with some

education rules on the on-line education program. Again, legislation was passed authorizing what the agencies had done in the rules, so we would recommend that the Committee remove those from the bill. That change is in amendment L.010.

Ms. Haskins said for the other issue that came up, we do have an amendment to address it and I think there will be some public testimony on it. It has to do with labor and employment rules on storage tank regulations. We had kind of an unusual situation happen on these particular rules. In the "State Administrative Procedure Act" (APA), there is a requirement in statute called incorporation by reference, and it allows an agency, when it's adopting rules, to refer to an outside publication, like the federal rules, something in the federal code, or the international plumbing code, without publishing all of that outside document if they meet the requirements in the APA for incorporation by reference. We had some rules from the department of labor and employment on storage tank regulations where they failed to meet the incorporation by reference requirements. There were 23 rules where we had this problem. The agency has adopted a new rule to address and fix the incorporation by reference problem and they did it with one single rule that's a catch-all that has all the magic language in it and if we were reviewing the rule we would say it's fine. The little glitch we have is a timing issue, in that they did not redo the rules that are currently listed in the bill to expire. If the rules remain in the bill and expire on May 15, we have another APA provision that comes into play and that says the agency cannot repromulgate rules that have been allowed to expire because of the rule review bill. We have sort of this juxtaposition of all these different requirements and it got fixed in a different way then we've ever seen it fixed at this point in time with the bill. That is one of the reasons the bill got referred back to Committee, rather than trying to explain all of this on the House floor.

Representative McGihon asked if the department had cooperated with the Office sooner in the rule review process, could some of this been avoided? Ms. Haskins said they might have been able to fix the rules prior to session, which probably would have been by emergency rule. I don't know. We haven't seen it fixed quite this way before.

Representative McGihon said her concern is the precedence-setting that may be occurring here. I know there are other members who have served on this Committee for some time who also have that concern.

Representative Marshall said you're saying they failed to abide by the process in statute that allows them to make reference to incorporate that external

document if they use certain language. How many rules are you talking about? Ms. Haskins said I believe there are 23 rules.

Representative Marshall asked if there were 23 rules that didn't have that language? Ms. Haskins said yes.

Representative Marshall said they would have to incorporate that language separately into all those rules. Ms. Haskins said yes. Their choice really would have been to amend all 23 rules with the same language, probably 2 sentences in each of the 23 rules, or do this catch-all, which is what they did. What's unusual is that we've never had that happen in the middle of having the rule review bill pass. That's what's different this time. We do see agencies promulgate rules and do a catch-all, one rule that includes all the magic language for incorporation by reference. We see that all the time and we actually encourage agencies to do that. It's just a timing thing with when they did it in terms of where the bill is in the process.

Representative Marshall said I guess my question is, with that number of rules, how did it get that far in the process, given the number of steps you have to go through? Ms. Haskins said incorporation by reference problems are a recurring issue. This Committee in fact has sent out two notices to all the state departments saying here are the incorporation by reference requirements, please follow them. It's something that for some reason, agencies have problems with. We try really hard to negotiate this with agencies so that you don't even have to see these as rule issues. A lot of them get quietly fixed. This one didn't get fixed until later.

Representative Hefley said what I would like to find out is did they perhaps decide it wasn't necessary or did they not understand? You asked them twice, in two letters, giving them a chance. Did they not realize they could not do it the way you normally encourage it? We don't want this to be a precedent, is my point. We do not want this to be a precedent. We certainly don't want somebody to have all their rules stripped if they're necessary. If we chose today not to accept this, they cannot promulgate these rules, they would go away. Is that correct? Ms. Haskins said the notice that was sent out was a notice to all agencies. It wasn't in reference to this particular rule issue. From our dealings with the department, we don't think this was intentional. I think it was just all of these different things that happened this way. Perhaps if they had consulted with us about how they wanted to fix it, we could have dealt with it and given them some advice. We are in a little bit of a box sometimes because we try not to tell the agencies how to write their rules. We are very careful about not crossing this line on separation of powers. We try to make

sure the agency knows what the problem is that led the Committee to take a vote on the rule issue, but we don't say write it exactly this way because we feel like that would be crossing our boundaries. We'll just try to keep working with the agencies in the future and hopefully this won't be a precedent.

Representative Hefley said I think what we're maybe saying is they were asked to do this by a date certain, in a timely fashion, and for some reason or other, this time it slipped through their cracks. You say it was unintentional, it was an accident. Most agencies did in a timely fashion get their information back to you. Is that correct? Ms. Haskins said rule review is an ongoing thing, we get rules all the time. We sort of deal with each one as they come.

Representative Hefley said the bill is going to be heard at a certain point and so it had to be before the bill is moved forward in order to cover them. That is why I asked that. The rest of the agencies got their rules in, I understand.

Representative Marshall said she's trying to remember what's the length of time from the time they initiate a rule change until the rule is finally promulgated? I know within that time there's a hearing as well. As I recall, it's almost a six-month period of time. An emergency rule would take 30-60 days. Is that correct? The rules are out there a long time for people to look at. Ms. Haskins said it depends on the department. Some agencies take longer than others to adopt rules. They all have to give due process notice of a hearing and there's a time frame in the APA for that notice and then they have the hearing. There's an opportunity for the public to comment at the hearing. Sometimes agencies take three months to adopt a rule and other agencies take six months. It can take a while. The attorney general's office does review all the rules.

Dick Piper, Division of Oil and Public Safety, Department of Labor and Employment, testified before the Committee. He said I'd be glad to answer any questions about how this process unfolded after we got notice of this last fall and what we've done since then.

Representative Marshall asked Mr. Piper to just let the Committee know what happened from his point of view and perspective. Mr. Piper said we received notice last fall and it caught us completely by surprise. I didn't even know what the notice was. It actually referred to when the department promulgated these rules in 1990. What had happened was we had recently rewritten part of our rules regarding the establishment of clean-up standards for MTBE. We were going through the review process on these MTBE rules. MTBE is a contaminant found in releases of petroleum storage tanks that means methyl

tertiary butyl ether. We had established a new statewide clean-up standard for releases of MTBE. It was during this regulatory process that we had sent this over to the Office for their review. What happened was the coordinator in the department didn't just send that provision of the rule. He sent the entire package of rules that had been in existence since 1990. When the Office looked at it, they didn't have a problem with the new rule being written, but then we got notice back of this improper incorporation of national standards that apparently had taken place in 1990. We didn't really understand what was going on here because it's the first time it happened to us. After that, we visited with our representatives from the attorney general's office and tried to understand what happens from here. We got their advice that we need to repromulgate these rules so you can do this proper incorporation of references of national standards, such as the national fire protection association, EPA federal rules, or standards like fuel tank institute. All of these have a part in the regulation of petroleum storage tanks and we just didn't have the right language in 1990. That's when we did start this process. We did make the decision not to follow the path of emergency rules. We wanted to do this from beginning to end. There was certainly no intention on our part to create any delay in the process. We just followed what we understood was the prescribed process with promulgating the rules and our understanding was once we did that, then this provision of this bill would be amended to delete that provision so we could continue with enforcing our rules. As was previously mentioned, without our authority to enforce the rules, it's very difficult to administer the petroleum storage tank program, anywhere from inspecting gas stations to requiring the clean-up of releases and to the administration of the petroleum storage tank fund, where we reimburse owners for the clean-up costs.

Representative King said I guess you just basically fixed the problem to conform to what the rule review bill was going to be. Mr. Piper said that's exactly what we think.

Eric Rothaus, Attorney General's office, representing the department and the division, testified before the Committee. He said he'd be happy to answer any questions or if the Committee needs any further explanation he'd be happy to offer that. There were no questions for Mr. Rothaus.

Senator Grossman said Senate Bill 106 is on the table for action. There are two amendments that have been distributed.

1:24 p.m.

Hearing no further discussion or testimony, Senator Veiga moved Senate Bill 106 back to the House and moved amendment L.010. Senator Grossman asked Ms. Haskins to remind the Committee about amendment L.010. Ms. Haskins said this is a housekeeping amendment that strikes from the bill three sets of rules because legislation was passed authorizing those rules. Those bills were House Bill 1340, Senate Bill 84, and Senate Bill 118. Staff recommends that the Committee take their expiration out of the rule review bill. Representative King asked which of these lines is the one on the education bill? Ms. Haskins said it's page 2, lines 25 and 26 and page 3, lines 1 and 2. I can explain more thoroughly what happened in that bill, if you'd like. Representative King asked if this is the school finance act bill? Ms. Haskins said I don't believe Senate Bill 118 was the school finance bill. The reason why we brought this to Committee was because we had some statutes on on-line programs that said that the board had to have rules specifying all these requirements for the on-line program. The rules, in two instances, didn't specify that. Senate Bill 118 deleted the requirement that they have rules specifying these requirements, so the statute no longer requires them to have rules. That's why we recommend you take them out of the bill. Senator Grossman said these rules don't have anything to do with excess costs. Ms. Haskins said no, this isn't the excess costs issue. There was no objection to the amendment and it passed unanimously.

1:26 p.m.

Senator Veiga moved amendment L.009. Ms. Haskins said this is the issue we were talking about a moment ago that you took testimony on. It would remove from the bill the storage tank regulations that had problems with incorporation by reference. Those rules will not expire if they are removed from the bill. Our recommendation would be to pass this amendment and take the rules out of the bill so they will continue in effect. Senator Grossman asked if there is any precedent for doing this where we are in the process? As long as I've been on the Committee I don't remember doing this. Ms. Haskins said this is a case of first impression. We haven't had it happen exactly in the same way. Usually when agencies repromulgate rules and fix them, when we send the letter to the secretary of state's office, we can say these rules were repromulgated and don't pull them out of the CCRs because they were fixed by the agency. That didn't really fit in this circumstance, so that's why we're recommending that you address this by an amendment to take the rules out of the bill. Yes, they didn't fix this in exactly the way we normally see it fixed at this point in the process for the bill. What they did in the rule is fine. It's a timing issue. Representative King said it's a timing issue and it's a little different process from normal, but the end result that has been accomplished

is what should have been accomplished. Representative Hefley said I feel like we've discussed this thoroughly. I hope other agencies will hear about this and do their best, even if they don't understand it early on if there's something that's a surprise about it, and find out through the right connection to make this happen in a timely fashion so that we will not have to go through this time after time. I definitely don't want their rules to fail and I don't want them to have a deficit or hole here, so I'm going to support this. There was no objection to the amendment and it passed unanimously.

Senator Grossman said Senator Veiga's motion is to refer Senate Bill 106 to the House committee of the whole with a favorable recommendation. The motion passed on a 6-0 vote, with Representative Hefley, Representative King, Representative Marshall, Senator Groff, Senator Grossman, and Senator Veiga voting yes.

1:29 p.m.

The Committee adjourned.