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**SUMMARY OF MEETING**

**COMMITTEE ON LEGAL SERVICES**

**December 14, 2006**

The Committee on Legal Services met on Thursday, December 14, 2006, at 10:13 a.m. in HCR 0112. The following members were present:

Representative McGihon, Chair  
Representative Cerbo  
Representative Witwer  
Senator Groff (present at 10:21 a.m.)  
Senator Mitchell  
Senator Shaffer  
Senator Veiga, Vice-chair

Representative McGihon called the meeting to order. She said the Committee is comprised of an interesting number of members. Representative Cerbo has been appointed by the Speaker to replace Representative Marshall, who resigned from the Committee. Senator Dyer and Representative McCluskey have resigned from the general assembly, so they are no longer members of the Committee.

Ed DeCecco, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Tax Group, Taxpayer Service Division, Department of Revenue, the tax on the severance of molybdenum ore and the tax on the severance of coal, Regulations 39-29-104 and 39-29-106.1, 1 CCR 201-10.

Mr. DeCecco said there are two rules that are at issue. Regulation 39-29-104, which relates to molybdenum ore and regulation 39-29-106.1, which relates to coal. These rules were changed in February 2006, but not in response to any recent legislation. I should also mention that the department is not

contesting the recommendation of this Office that the rules in question should not be extended.

Mr. DeCecco said there are two main points that I want to talk to you about today about why these rules should not be extended. First is that there is a conflict between the tax group's rules and the statute, insofar as the rule applies an exemption to mining operation while the statute applies the exemption to each person. Secondly, I want to talk to you about how to look at this language of the mining exemption in contrast to another statute, the metallic mineral statute, which is a statute that does apply the exemption to a mining operation. I want to do that to highlight the conflict that is in the rule. I'm going to discuss this in the context only of the coal regulation, rule 39-29-106.1. The reason is that the rules and statutes are very similar, so to the extent there's a problem in one, there will be a problem in the other. Section 39-29-106 (1), C.R.S., establishes the severance tax on coal. The statute says that such tax shall be levied against every person engaged in the severance of coal. The exemption language can be found in paragraph (b) of subsection (2) of that section and it states that no tax provided for in subsection (1) shall be imposed on the first three hundred thousand tons of coal produced in each quarter of the taxable year. Since the tax is levied against the person engaged in the severance of the coal, the exemption is likewise applied to the same person. The severance tax statutes do not expressly define "person", but we can look to the general administration statutes in article 21 of title 39, C.R.S., which provides a definition for us in this context. Section 39-21-101, C.R.S., reads, in part, that a person includes any individual, firm, corporation, partnership, limited liability company, joint venture, estate, trust, or group or combination acting as a unit, in the plural as well as the singular number. That's our statutory framework. We have the tax exemption that applies to the person.

Mr. DeCecco said in contrast, we can look at the rules. Regulation 39-29-106.1 says a tax is levied upon the severance of coal, which is similar to the statute, but then it states that the exemption is allowed for each mining operation. The rule goes on to say that a mining operation is an area of land in which the recoverable coal reserves can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of recoverable coal reserves and other resources. All lands in a mining operation shall be under the effective control of a single operator/lessee and be able to be developed and operated as a single operation. Here's the problem: We have a statute that requires the tax to apply to a person and the rule applies it to a mining operation. These are not the same thing. The statute says it is basically an individual, a legal entity, or some combination of individuals or

legal entities, while the rule talks about a mining operation, which, rather than being an entity or type of group, is basically a certain type of land, albeit one that is developed as a unit. It's important to point out that the differences are important because they affect the application of the exemption. For example, if we have a corporate mining company that has three mining operations, and if we looked at the definition of "person", we would say that corporation is a person and therefore it gets one exemption. Even though they have three mining operations, they would get one 300,000 ton exemption. However, if we look at the mining operation as our person, or if we apply the exemption to that mining operation, that same person now gets three exemptions because there's three separate mining exemptions. The more exemptions we have, the less revenue would be ultimately collected by the state. I should mention that's the problem with coal and likewise it's the same issue with molybdenum ore. It has some very similar language, so the same issue arises with the molybdenum ore.

Mr. DeCecco said I think it's important to look at the metallic mineral statute, which shows that the general assembly, when it wants to, can make the tax exemption apply to a mining operation. The tax on the severance of metallic minerals was created in the same bill as the tax on molybdenum ore and coal, which was House Bill 1076 in 1977. The language was originally drafted to be identical, and that is the exemption on the taxes would apply to a person. The statute was changed by amendment so that now the tax is levied against every mining operation, not a person. Here we have an example where the general assembly, simultaneous with the enactment of the molybdenum ore and coal, has used mining operation, and so we have these statutes which treat coal and molybdenum ore differently from metallic minerals, yet the tax group, by its rule, is now treating them the same. Based on the fact that we have these other statutes, the Office feels we should honor the words used by the general assembly and apply the exemption, in this case, to a person. To summarize, the rules conflict with the relevant statutes because they apply the tax exemption to a mining operation instead of a person, as defined by statute, and because they treat minerals that are statutorily distinct as being the same. Based on these conflicts, the Office recommends the rules not be extended.

Senator Shaffer said I'm just curious. Over the life of this regulation, what did this cost the state? Mr. DeCecco said I don't have numbers. There's a representative from the department here, but I don't have any information about that.

Stuart Sanderson, President, Colorado Mining Association, testified before the Committee. He said we would respectively but strongly disagree with the

Office's recommendations here this morning. The Office's memorandum is premised on the fact that because the regulations define the entity that is entitled to claim the exemption as a mining operation, that somehow it is not a person, and that it only refers to an area of land. As we point out in our letter to the Committee, the regulations actually incorporate the term "logical mining unit", which is a term that has a well-established meaning under the federal mineral leasing act and under state law and that includes operations that may be developed in an efficient, economical, and orderly manner as a unit with due regard to the conservation of the recoverable reserves and other resources. It must be operated by a single operation and be capable of being developed by only a single operator. As much of the coal that's produced in Colorado is from federal mineral leases, before an operator can proceed, these reserves must be organized into logical mining units. The definitions actually refer to incorporated, both in the regulations as well as in reference to the federal leasing act section. From a standpoint of conformance with the statute, section 39-21-101 (3), C.R.S., which was referred to earlier, basically includes within the term "person" any corporation, combination, or individual acting as a unit. In light of that statutory language, we believe that the regulations conform to the statute because they define the term "person" as a mining operation, which refers specifically to the logical mining unit. These are very well-understood, very well-established meanings under federal mineral leasing law and under state law. Secondly, having established that there is a legal basis for upholding the rules, I would respectively take issue with the statement by Mr. DeCecco earlier that this would allow a mine to claim additional exemptions from tax. That is true if a mine owns more than one discreet operation in the state. We have actually seen situations where mines that were previously under separate ownership were able to claim the full exemption, but due to consolidation in the industry, there are fewer companies and there are fewer mines operating in the state. There are only 10 active coal mines in the state and only one molybdenum mine at the present time. We've had one situation arise in the past where a company acquired a second operation and the exemption disappeared. The company had to apportion the exemption between its operations. The problem there is that the company faces a competitive disadvantage if it is not entitled to claim the full exemption that is available to the other mining operations that do get the full exemption because they're not under common ownership. We're not trying to divide up operations in the state into separate units somehow that can claim the exemption, but what we're seeking to do here is to make sure the exemption is fairly applied. We think the department's rule-making accomplishes that. As we have indicated, the regulations do result in a more fair and consistent implementation of the severance tax statute. It also helps to harmonize the provisions because, as it was pointed out by the Office,

metallic minerals, regardless of whether they are under common ownership may claim the exemption for each mine in Colorado. Why should that not be the same for coal mines and molybdenum operators? I appreciate the Committee's time and attention and would be happy to answer any questions.

Representative Witwer said this question is for Mr. DeCecco. Mr. Sanderson raised the point about the definition of "person" containing corporation or combination acting as a unit. Can you tell me what your reaction to that is? Mr. DeCecco said I would argue that it doesn't really fit, in that if you look at the actual language of the rule and you look at the definition of "person", it doesn't necessarily work precisely the same. Yes, they both use the word "unit", but if you look at the actual statute, that definition of "person" lists all these individuals and entities and then includes "or group or combination acting as a unit". I think you can read that to mean if it includes a group or combination of the other types of persons, then we're going to consider them as a single person for administration of that particular statute. However, if you look at the rule, there's no requirement that there be more than one person. You can have a single corporation under this who now gets to claim it for multiple mining operations. I just don't think that the rule actually tracks that same language of the definition of "person".

Representative Witwer said I think this is really at the heart of the issue, so I'm just trying to flush this out a little more. Mr. Sanderson, could you respond? Mr. Sanderson said we would respectively disagree because the regulations clearly encompass the term "logical mining unit" and that squares with the statutory definition of "person" as a business combination or other entity acting as a unit. What this regulation has done in one instance is we had one company that acquired an underground coal mining operation in Colorado. The company subsidiary was already operating a completely separate surface mine within the state. It was a separate workforce, separate deposit, separate set of costs. Under the department regulations that had existed prior to that time, the company was required to basically apportion that exemption once the mines came under common ownership, even though the prior owner of that underground mine was able to take the full exemption.

Mr. DeCecco said I just wanted to follow up about the definition and how it doesn't fit. Say you have two corporations acting as a unit, so you don't have the problem of it being overly broad in that it allows a single corporation to become more than one person. This regulation, while it seizes upon the federal language, also creates a geographical limitation that doesn't appear anywhere in the definition of "person". If you have two corporations that were acting as a unit with respect to two separate mining operations, those

corporations now under the rule can claim two exemptions, but under the actual language of the statute you would say you treat them as one person, they get a total of one exemption. I think it creates problems with the number of people who are going to be claiming exemptions from both sides. I also wanted to mention that Mr. Sanderson took issue with my saying this was going to cause the state to lose revenue. I just wanted to mention that I'm taking that from the department's own statement to their response to House Bill 05-1100, which was a bill that was introduced but PI'd in its first committee and that would have added language to especially permit a tax exemption for each single mine, which was then defined. In response to a request for information on a fiscal note, the department estimated that the annual revenue loss for this change was \$810,000. To the extent I was saying we're losing revenue generally, that's what I'm basing that upon. I couldn't respond to Senator Shaffer's question because I don't know the amount of revenue loss between February of 2006 and today, but in general, I think it's safe to assume, as well as just the general idea of more exemptions, more loss of revenue. We don't have dynamic modeling and I can't say what the downstream effects might be to the state with the enacting of that.

Senator Shaffer asked Mr. Sanderson what would prevent a company that was buying a second mine in the scenario you gave us from forming a second subsidiary company so it would be treated as two separate entities. Instead of one company holding two mines that have to split the exemption, but now having two companies holding the different mines separately in two separate entities. Is there something that is in the statutes that would prevent each of those entities from utilizing the exemption? Mr. Sanderson said the language of the regulation itself guards against any abuse and makes sure that an operation entitled to claim the exemption must be developed as a separate operation, as a single entity under a single operator. The regulations that were in effect prior to the adoption of this rule would've meant that if you had a coal mine, for example, in Routt county and another one in Moffat county that happened to be owned by the same company, those operations could not each claim the full exemption, despite the fact that they were developed with their own set of discreet costs, their own workforce, their own capital costs, and their own capital structure. The regulation would not allow a mine operating on one single reserve to try to claim more than one exemption. That's not the intention of the rule-making here. I'd like to address the revenue issue here just for a moment. I think it's important to recognize that reasonable tax policies regarding severance taxation affect the overall cost. They affect the decisions of operators to decide to locate mining operations in Colorado. What we have seen under the regulatory structure approved by the legislature in 1999 is actually an increase in production and an increase in overall tax

revenues coming to the state of Colorado. In fact, according to the calculations we have seen, the revenues are up if you include federal royalties, 50% of which come back to Colorado along with severance taxes and other revenues, and the overall revenues have actually increased by 33%. I think it's in the interests of the state to encourage coal mining because the more coal we produce, the more revenue is going to come back.

Representative McGihon said while we appreciate that, this Committee is charged with making determinations solely about whether or not the language of the regulation sits squarely within the language of the statute and is authorized by the statute. It's a committee where we try to not keep too much policy in, but really look at the language as reported by the staff. Mr. Sanderson said that's understood and I agree entirely with that statement. It must be upheld under the statute. I was just addressing some of the revenue questions.

Senator Mitchell said to Representative McGihon that's a worthwhile point to make. I think it's a point actually in Mr. Sanderson's favor because some people seem to want to question the regulation based on any possible cost and I think it's fair to point out that is not a consideration for this Committee, what the impact on revenues might result, only the legal adequacy of the regulation. If Committee members would adhere to that principle it would probably redound to Mr. Sanderson's benefit. Mr. DeCecco, I'm probably oversimplifying the discussion, but let me walk you up to a point of a question mark that I have. I hear Mr. Sanderson say that the statutory definition of "person" includes not only flesh and blood people, but legal organizations, associations, business entities, and logical mining units. I hear you say that it shouldn't be applied that way in this case for two reasons. Number one, the regulation doesn't require that sort of multiple entity organization. It could just be a single person and that application might be beyond the intent of the statute. Two, it might allow a single unit or entity to claim multiple exemptions and receive additional economic benefit. I believe Mr. Sanderson answered at least the latter point when he said that a mining operation or a combination would be eligible for additional exemptions only to the extent that they had independent grounds for claiming them that satisfied the law. If the law applies to make a particular operation eligible for one kind of consideration, as well as another kind of consideration, isn't that entirely proper and why should that bear on our reading of the definition of "person"? Mr. DeCecco said I guess I would say that the rule has created a new criteria for deciding when the exemption would apply and that is when if you have this particular piece of land that's being operated as "a unit", we're going to allow it. It doesn't talk about that. There's nothing in the statute that

talks about a logical mining unit. There's nothing that talks about a mining operation in the statute. It talks about a person. To me, the rule puts on these additional restrictions on who we can consider a person. You have to be a particular area, you have to be operated as a single operation. It doesn't necessarily fit the rest of the definition of "person". I can't get to the same place as Mr. Sanderson because I don't see it as being a person. The other reasons I would look at, besides the fact that I came up with examples of when it wouldn't work, is a lack of any information in the legislative record about applying this exemption to the logical mining unit. In fact, we have the opposite from the legislative history when House Bill 77-1076 was enacted. In that bill, when they didn't want it to apply to a person, they used the term "mining operation". From that context, I don't know that the general assembly intended for "person" to subsume the definition of "mining operation" when it used the two different terms for the two different statutes.

Senator Mitchell said I guess it would be nice to think that we're always so precise in the words we choose. In this case, I think the possible discrepancy shouldn't be applied to stick it to an industry.

Representative Cerbo said this rule was promulgated in February of 2006. Was it an extension of a previous rule or was it a brand new rule? Mr. DeCecco said we had an old rule that related to coal, but it was a new rule with respect to using mining operation for molybdenum ore and coal.

**10:43 a.m.**

Hearing no further discussion or testimony, Senator Veiga moved that rules 39-29-104 and 39-29-106.1 of the Taxpayer Service Division be extended and asked for a no vote. Senator Groff seconded the motion. Senator Veiga said I have a comment in light of Senator Mitchell's suggestion that any motion in this regard would be relative to a policy-related issue versus the purpose of this Committee, which would be to focus on whether there's statutory authorization for the rules. I just have to disagree with Senator Mitchell. When this statute was enacted, we used "person", but we explicitly in the context of metallic minerals chose to use "mining operations". I think that was intentional. I have to agree with Mr. DeCecco on that point. The fact that we have sought to do nothing to clarify that from 1999 to 2005 when House Bill 1100 was introduced to try to change the statute to codify the rule that we're now asked to review, which was quickly defeated, to me is again another indication of what the legislative intent was relative to our passage of the statute. I have to say it's not policy, it's not revenue loss. I would have to agree with Mr. Sanderson that it probably is unfair in terms of the treatment

of their industry, but I do not think the rule is supportive of the statutory language. The motion failed on a 2-5 vote, with Representative Witwer and Senator Mitchell voting yes and Representative Cerbo, Representative McGihon, Senator Groff, Senator Shaffer, and Senator Veiga voting no.

Mike Dohr, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the State Board of Health, Department of Public Health and Environment, concerning emergency medical services education and emergency medical technician certification, 6 CCR 1015-3.

Mr. Dohr said the rules in this case involve emergency medical technician (EMT) certification. As I'm sure many of you know, EMTs, like many other professions in the state, are required to go through a background check prior to being certified. Section 25-3.5-203 (4), C.R.S., requires a background check in the form of a fingerprint check. Section 25-3.5-203 (4) (b), C.R.S., states the applicant shall submit to a federal bureau of investigation fingerprint-based national criminal history record check for the purposes of determining eligibility for employment. For brevity sake in the memo, I only recreated paragraph (b), but the whole subsection (4) has been passed out to the Committee and you'll see that that language is also recreated in paragraphs (c), (d), and (e).

Mr. Dohr said in the totality of the statute, EMTs are required to undergo a fingerprint check for certification purposes. Rule 5.2.1 C) 2) d. in this case also requires the fingerprint check for certification; however, there's an exception to that rule. The rule states if, in accordance with subparagraphs (b) or (c) above, an applicant has twice submitted to a fingerprint-based criminal history record check and the FBI or CBI has been unable to classify the fingerprints, then the department may accept a CBI or FBI name-based criminal history report generated through the CBI. In this case, in this circumstance, the rule would allow a name check. As I'm sure most of you know, there's a big difference between a name check and a fingerprint check. Generally, name checks are not as reliable because it may not necessarily catch all the aliases somebody may be using as well as if you have a common name there is the potential for misidentification when you go through the name check process. In this situation, since the rule would permit a name check, we think the board has exceeded its authority in allowing the name check and we would ask that the rule not be extended.

Ann Hause, Director of Legal and Regulatory Affairs, Department of Public Health and Environment, testified before the Committee. She said I respectively disagree with Mr. Dohr's representation of the language of the

statute. I would refer you to subsection (4)(a) of the statute. The statute speaks about two different obligations. One is the department's obligation to certify EMTs in paragraph (4)(a). The language in paragraph (4)(a) states that the department may, with reasonable cause, acquire a fingerprint-based criminal history record check. It is a discretionary, permissive statement that the department may do so. We do in fact do fingerprint-based criminal history background checks, but the statute is permissive and that is a choice the department has made. In contrast, paragraph (4)(b) speaks about the role of an employing agency, which could be a government or nongovernmental agency. That employer, under paragraph (b), is required to have the applicant for employment submit to a fingerprint-based criminal background check. That is not an obligation of the department. The rules that are before you today discuss the initial certification requirement the department requires of applicants for EMT certification. It does not speak to the requirements of an employing entity and what they must do. This paragraph is two-fold. It talks about the obligations of those in the department and the employing entity. I would submit that those are differing obligations for different parties and that's why there are two distinct paragraphs here. The department does not believe that there is a mandate that a fingerprint-based background check be performed for all applicants for EMT certification. I will, however, address the point being made that a name-based check in this instance, assuming there is a mandate to the department, does not suffice. I have with me a letter from the department of public safety in support of the department's position on this. The rule that we're reviewing only allows for a name-based check to be conducted after an applicant for EMT certification has twice submitted fingerprints for classification through either the CBI or FBI and twice the department has not been able to classify those fingerprints. I believe the department meets, even though we're not required to under paragraph (b), the intent of the statute because we have indeed required the applicant to submit to a fingerprint-based criminal background check. The problem is if the applicant has twice failed to have fingerprints classified, there is no other recourse for that individual to have a background check conducted. At that point, after two failures, we would allow for a name-based check to be conducted for certification, again under the authority of paragraph (4)(a). The letter in front of you is from the department of public safety with whom our department has worked hand-in-hand to come up with this policy that now is before you in rule to allow for the name-based check. It has been their practice, in other cases, to do this. They, I believe, were the agency that suggested to us this practice that if they were unable to classify the prints, this is the next best solution that they have. We believe that is a reasonable policy.

Representative McGihon said I noticed in the letter it says rejected fingerprint

card submissions due to the poor quality of fingerprints. The next paragraph references unable to obtain good-quality fingerprints. I presume unable to classify the fingerprints as stated in the rule meant that someone didn't have a record. Can you explain why the letter references poor quality of fingerprints and the rule does not? Ms. Hause said I'm not sure I understand your question.

Representative McGihon said in the letter it says the CBI and FBI both support the policy that after two rejected fingerprint card submissions due to the poor quality of fingerprints, a name-based check will be conducted. It seems to me that the department of public safety is referencing the fact that fingerprints are unable to be classified because of the poor quality of the fingerprints. Why don't we simply get a better set of fingerprints? Ms. Hause said I believe literally the applicant's fingerprints cannot be lifted in such a way to reflect the fingerprint.

Senator Mitchell asked Ms. Hause if she agrees with Mr. Dohr's position that at least so far as it extends to employing an EMT that any government agency that would employ an EMT is required to obtain and process a fingerprint check? Ms. Hause said yes, I do.

Senator Mitchell asked Mr. Dohr if Ms. Hause makes a pretty good point that the mandate you're relying on applies to government agencies that employ EMTs, not that are in the act of licensing EMTs and the language that applies to licensing EMTs is permissive, not mandatory? Mr. Dohr said my opinion is that the totality of subsection (4) requires a fingerprint check. I do agree that there is a difference between (b) and (c), and (d) and (e). Paragraphs (b) and (c) go to a government entity that employs. If you take a look at (d) and (e), it says the department shall require the applicant to submit. In (d) and (e), you're talking about a point where the person is not yet employed, so it's kind of the department's job to go through that process because there is no employing entity out there. In my opinion, you also look to the language in (c) and (d) at the end that talks about the fingerprint check is going to be sent to the department for their use in the certification process. To me, the totality of (4) says that you need a fingerprint check and that is the policy of the general assembly. If you don't agree with me on (b) and (c), I think there's at least a clear conflict with (d) and (e) where it says the department shall require the applicant to submit to a fingerprint-based criminal history record check.

Senator Mitchell said it's not clear to me in (d) and (e) whether applicant means an applicant for a license or applicant for employment. Is there anything you can do to help me with that? Mr. Dohr said I assume that we're

talking about an applicant for certification purposes because that's what the statute is talking about. I don't know that it's abundantly clear and I also, in reference to your first question, can't actually give you a good answer for what the meaning of (4)(a) is either. In terms of that, there seems to be an internal conflict with the statute as well.

Senator Mitchell said if there is at least ambiguity and part of the statute appears to make it permissive for the department to require licensing applicants, then wouldn't it be within traditional executive branch discretion in the way it applies and implements the statute, especially one with an ambiguity, to exercise judgment and make their best call? Mr. Dohr said the short answer would be yes. One of the reasons why we thought it was important to bring this issue before the Committee was that, as this letter from the department of public safety has identified, this is probably a problem that other boards or departments have and so we wanted to make sure that there was a determination by the general assembly that set the policy in the first place as opposed to making a determination at the staff level.

**10:59 a.m.**

Hearing no further discussion or testimony, Senator Shaffer moved that rule 5.2.1 C) 2) d. of the State Board of Health be extended and asked for a no vote. Senator Groff seconded the motion. The motion failed on a 2-5 vote, with Representative Witwer and Senator Mitchell voting yes and Representative Cerbo, Representative McGihon, Senator Groff, Senator Shaffer, and Senator Veiga voting no.

Jerry Barry, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Board of Human Services, Department of Human Services, concerning background screening fees, 12 CCR 2509-1.

Mr. Barry said the issue today is who is the proper entity for setting the amount of these fees for the screenings. The screenings relate to query reports of child abuse and neglect. Under section 19-1-307 (2), C.R.S., only specified persons are to have access to reports of child abuse and neglect. Pursuant to that section, the department may have access to such reports when it is requested by certain other agencies and entities who are conducting background screening checks on a person who may come into contact with children. Pursuant to subsection (2.5) of that section, the party requesting the information shall be assessed a fee which shall be established and collected pursuant to rule established by the state board. However, under rule 7.000.73

B., the amount of the fee is to be established by the department, not the state board. Under the previous rule, the state board had established the amount of fee for these screenings at \$10, but this new rule allows the department to set the amount of the fee.

Mr. Barry said we believe that the general assembly directed the state board, not the department, to set the amount of the fee. If the general assembly wanted the department to set the fee, it could have done so. In fact, in other instances, the general assembly has done so. Specifically in section 26-6-105 (1) (a), C.R.S., the general assembly said the state board can set these fees and under paragraph (b) of that subsection it says the department sets these fees. That's not what they did in this instance. In this instance, they directed the state board to set the fee. Thus, we believe that rules 7.000.73 B. through G. conflict with section 19-1-307 (2.5), C.R.S., and should not be extended.

Margery Bornstein, Department of Human Services, testified before the Committee. She said I'm one of the supervisors of the programs involved in the records and reports programs for the department and I am involved in writing this rule. I appreciate being able to give you some background on the rule. The rule sets forth specific parameters that the state board did establish as reasonable parameters for the department to charge a background screening fee against the child abuse database. It is the only substantive rule in our rules that deals with the child abuse background screening fee. Whether you're trying to be an applicant to work in daycare, you're trying to do foster placement, you're trying to do adoption services, you work with CASA, or you're trying to be an employee in a childcare licensing situation, it is the only substantive rule that deals with this. We would submit that it's not only section 19-1-307, C.R.S., that's affected by this rule, but also section 26-6-105, C.R.S., which was referred to. What the rule does is mandate the department to take into consideration very specific factors in determining the fee: The appropriation level for these programs that are obviously set by the legislature, the funds that have been collected in response to a request to do a background fee, and the fund balance that is in the records and reports cash fund that goes year to year. Basically, the fee is set by dividing the appropriation level by the number of requests and factoring in what the reserve is. There's very, very limited discretion by the department. The fee had been \$35 and it is now \$10. The rationale behind the rule is to provide a more timely process for changing the fee to respond to fluctuations in those two factors. We have situations where we go before the legislature and if the appropriation level has increased, it takes us three months to be able to have the fee changed. Additionally, we are now at a point where there are 27,000 background screenings each year. If that number fluctuates, to be able to

more quickly respond back would be extremely helpful and the board decided it was reasonable for the department to be able to respond to those kinds of fluctuations. After reviewing the rule, speaking with constituents, and reviewing the rule with the attorney general's office, I presented the rule to the board in June of this year. They reviewed the rule in June and July and they considered that the authority given to the department through the very limited parameters that were in the rule was sufficient to make this rule come within their statutory authority. There are notice provisions in the rule, the department may only assess a fee up to \$35 without getting specific authority from the board, and they're mandated to take into consideration those factors in terms of the appropriation level and the number of screenings. It's our position that by establishing this rule, the board did in fact establish what the rate should be.

Representative McGihon said you say there are notice provisions in the rule. In section F., the notice provisions say shall notify interested persons 30 days in advance, if practicable. How does that satisfy notice provisions if it's "if practicable"? Ms. Bornstein said I think the issue is I'm not sure when it wouldn't be practicable. I think the issue is that we'll probably have 30 days notice if we track all of these different factors to be able to say to people that this is what's coming.

Representative McGihon said so it applies to the 30 days, not the notice? Ms. Bornstein said yes.

Representative McGihon said I understand that the department thinks they're doing this within the confines of board supervision, but my question is, does the department not distinguish between the department and the board itself? Ms. Bornstein said I think the department sees a distinction between the department and the board, yes.

YouLon Savage, Chair, State Board of Human Services, testified before the Committee. He said I believe the authority of the board to promote rules on this matter has been established. The rule-making procedure involves 15 steps and I'd be happy to review those if you'd like me to. I simply wanted to state that we take our responsibilities very seriously and we stand behind the rule as promulgated and I will retire to allow people with more familiarity with the details to present to you.

Alicia Calderón, Assistant Attorney General, Attorney General's Office, testified before the Committee. She said as stated, the office of the attorney general did review this rule and is of the opinion that the language of the rule

is consistent with both statutes and the intent of both statutes. Section 19-1-307, C.R.S., states that the fee shall be assessed, established, and collected pursuant to the rule and the rule does exactly that. It sets the maximum fee, it sets the method of determining the fee, and it provides a notification method and an annual review. Section 26-6-105 (1)(b)(IV), C.R.S., states that the department may establish fees pursuant to rules and it's not inconsistent nor in conflict with section 19-1-307, C.R.S. The two statutes allow the board to establish such a rule and the fee will not be fluctuating or arbitrary. It will certainly be consistent and uniform and reviewed annually.

Senator Shaffer said section 19-1-307 (2.5), C.R.S., says subsection (2) of this section and any child placement agency shall be assessed a fee which shall be established and collected pursuant to rule established by the state board. As I understand the conversation, the state board delegated that rule-making authority. Is that what's going on here? Ms. Calderón said no, the state board has not delegated the authority to establish the rules. The state board set up a rule that allows the department more flexibility in determining the actual fees. The setting of the rule sets the method of establishing that fee and the maximum amount for that fee. The rule itself is established for how the fee is to be determined.

Senator Shaffer said the statute says any child placement agency shall be assessed a fee which shall be established. It doesn't say that a rule shall be established that somebody else will set the fee. They will establish the fee. Is it semantics or is there just one step removed and one interpretation is that the one step removed is acceptable and another interpretation says it's unacceptable? Ms. Calderón said I don't think it's just an issue of semantics. It's about whether you read that the fee, which will be established and collected pursuant to rule, will be established by the board. The board looked at that in its entirety and established a method, rather than, as in the past, setting a specific fee.

Senator Shaffer said I don't think the statute says to establish a method. The statute says to establish a fee. Is that where the conflict is? Ms. Calderón said I think that the perceived conflict is that it is being read as saying that the state board shall establish a fee, but it actually says the fee shall be established and collected pursuant to a rule, not that the rule shall set the fee.

Representative McGihon said Senator Shaffer has hit the crux of the issue as to the interpretation of how the statute is read and that is why we're here today.

Senator Mitchell said just to underscore the precise language of the statute,

rather than the way it might be characterized by one side or the other, the precise language of the statute says the fee shall be established and collected pursuant to rule established by the state board of human services. I think that's a situation of ambiguity, whether that means the rule has to set the fee or set the means by which the fee is set. Once again, it seems that there is a certain discretion delegated to executive branch agencies that I'm not sure why we need to muck with them doing their jobs.

Alletta Bode, Vice President, Child Placement Agency Network, testified before the Committee. She said the placement agencies are private foster care agencies that contract with counties to provide foster care services. I testified in agreement with this rule at the state board hearing as a stakeholder this past summer. The child placement agencies feel that by setting the fees in rules it allows flexibility for changes in the fees in a more timely manner. The background checks are expensive for us and we appreciate the department's consideration of setting fees in this manner. For all the reasons stated previously, the network asks that you keep the rule as it stands.

Representative McGihon said Ms. Bode raises a point. I don't know who would like to address this. The prior rule did establish the fee itself under the board's rules. Is that correct? Mr. Barry said that is correct.

Representative McGihon said now it would seem that the board has taken a new reading of the same statute by establishing a rule that allows the department to change the fee, rather than the board. Mr. Barry said I believe that is correct, yes.

Ms. Bornstein said the department and the board came together in terms of this rule-making process, because we had a situation where one day the fee was \$35 and the next day the fee was \$10 because of how we had to adjust the fee to be able to make costs and not overcharge people. We all felt that this was an untenable situation to deal with some people having to pay that inflated amount and we really wanted to get back to the point where we were charging what the program really cost. That was in response to our best efforts at trying to project what was really going to happen with supplementals and other appropriations.

Representative McGihon said the crux of my question really was that the prior rule read as Mr. Barry had suggested it should be interpreted in that the fee was contained within the board's rules. What you're explaining to us then is because of circumstances, you would like to be able to adjust this, so now we have a new reading of the same statute in order for you to have flexibility in

adjusting the fee. Ms. Bornstein said this is a new program. The old central registry was repealed in 2004. Some of this language is different in terms of the statute. In terms of being able to be flexible to respond to these situations, that's different also. There have been a number of different circumstances that have come together. It is a program that is still in transition. The rules were still in transition. In terms of being able to respond quickly in these circumstances, the board felt that this was a reasonable approach to take. I don't know that it was backing away from their feeling that they were losing authority. I don't believe they felt that at all. I think this is a pretty tight set of parameters. We don't have a lot of flexibility, but in order to not have to go through a three-month process, the board read the statute as allowing them to do this. You can make the argument that in the old days when this was historically where the daycare licensing background fee was set, then they didn't have the authority to do it that way. There's some overlap here, there's new programs coming in. I think that's probably the best answer in that we're trying to be as fair and as in accordance with laws that have been changing as we can be.

Representative McGihon asked Mr. Barry to come back and respond to the testimony. Mr. Barry said I think the Committee has focused in on what the issue is, particularly Senators Shaffer and Mitchell about what does it mean to establish the fee. I would only point out that there are probably numerous references to establishing a fee throughout the statutes, and I think this is the first instance where we have seen a board go to the extent of establishing parameters and allowing the department to set the fee rather setting the fee itself. That is again shown by the fact that the board itself has set the fee in the past.

Senator Mitchell said the statutory language does not direct the department to establish the fee, so the question is, what is its obligation in establishing the rule that establishes the fee? You put the laser beam on establish the fee, but the direct mandate to the department puts the laser beam on establish the rule.

Senator Shaffer said it seems that the language of the statute actually has two directives. One is to establish a fee. The other is to establish a rule. To suggest that Mr. Barry's interpretation is not correct is, I think, a false interpretation. It does say it shall be assessed a fee which shall be established, and then collected pursuant to rule established. There's established twice. The rule is established and the fee is established, both by the state board. I don't really care, but I'm looking at it and I think Mr. Barry raises a good point and for that reason I'll be voting not to extend this rule.

Representative McGihon said I think this is one of the more close rules. To elaborate on what Senator Mitchell said, the sentence that follows the "established and collected pursuant to rule established by the state board of human services " sentence says the fee established shall not exceed the direct and indirect costs, which would suggest that the fee is to be established by the state board, rather than the department. I think everyone here would wish to allow the department some flexibility and perhaps what needs to be fixed is the statute rather than the rule. For that reason, I'll also be voting not to extend the rules.

**11:25 a.m.**

Hearing no further discussion or testimony, Senator Groff moved that rules 7.000.73 B. through G. of the State Board of Human Services be extended and asked for a no vote. Senator Veiga seconded the motion. The motion failed on a 2-5 vote, with Representative Witwer and Senator Mitchell voting yes and Representative Cerbo, Representative McGihon, Senator Groff, Senator Shaffer, and Senator Veiga voting no.

Representative McGihon said the Committee would proceed out of order to agenda item 1e, since there are people in the room for that issue.

Thomas Morris, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1e - Rules of the Chief Engineer, Department of Transportation, concerning the Motorcycle Operator Safety Training Program (MOST), 2 CCR 602-3.

Mr. Morris said there are two issues with the rules in 2 CCR 602-3, sections I. through XVI. The second one relates to an advisory committee that is in the rule that we think is unauthorized. More importantly, the first issue is we believe the wrong entity adopted this rule, somewhat similar to the issue that you just heard. The general assembly created the office of transportation safety. Section 24-42-101 (1), C.R.S., states there is hereby created within the office of the executive director of the department of transportation an office of transportation safety. Then the general assembly created the MOST program and directed the office to adopt the rules. That statute is section 43-5-502 (1) (d), C.R.S., which states the office shall adopt such rules to carry out the provisions of the program.

Mr. Morris said however, the MOST Program rules were actually adopted by the Chief Engineer. The Chief Engineer is a statutory office created by section 43-1-109, C.R.S. The chief engineer and the office are separate

entities. In fact, the chief engineer is the director of two separate divisions within the department. As I think everyone probably has some familiarity, the divisions don't exist within the office of the executive director. The office does exist within the office of the executive director. It's clear when you look at the statutes that the general assembly intended the office to adopt these rules, but in fact, it was the chief engineer that did so and we believe therefore that the wrong entity adopted these rules and they should therefore not be extended.

Mr. Morris said stepping down a level, if this Committee adopts that recommendation and does not extend these rules, and the department goes forward with having the office or the executive director adopt these rules, we believe there is secondarily a problem within these rules with regard to the creation of an advisory committee. Rule XVI creates an advisory committee. It says the committee is subject to the review and repeal provisions contained in section 2-3-1203, C.R.S. Formerly, the MOST program did have a statutory advisory committee. However, the general assembly allowed that advisory committee to repeal on July 1, 1996, pursuant to the provisions of the sunset review of advisory committees in section 2-3-1203, C.R.S. The big picture is that the general assembly considers advisory committees to be something that requires legislative oversight, both the creation and the review, and in certain instances the repeal of such advisory committees. Section 2-3-1203 (1), C.R.S., indicates that the general assembly believes that there ought to be legislative supervision for the systematic review of advisory committees. There's a definition of "advisory committee" in section 2-3-1203 (1)(b), C.R.S., which means any advisory body. It's clear that the advisory committee created in the rule is an advisory committee and in fact the rule purports to subject the advisory committee to the sunset review. However, the department of transportation can't tell the department of regulatory agencies to conduct a review and certainly can't tell a legislative committee of reference to consider the report of the department of regulatory agencies on whether the committee should be extended or not. Only the legislature can do those things. They can do that only through the statutes. We created this advisory committee through the statutes, we allowed it to repeal, and there is no legislative authority for the department or the chief engineer to create a rule that creates an advisory committee. It is a legislative function. Therefore, if and when the department repromulgates a MOST program rule through the office or the executive director, it should not include an advisory committee and therefore we specifically request that portion of the rule not be extended.

Representative Witwer said section 43-5-502, C.R.S., says the office shall adopt such rules and regulations. Is there anything outside the context of the

two statutes in the memo that would tell you if that is in reference to the office of the executive director or the office of transportation safety because the word "office" is used twice in section 24-42-101, C.R.S.? Mr. Morris said "office" is a defined term in the MOST program article, so it's clear that it is the office of transportation safety that is intended in that delegation of rule-making authority.

Representative Witwer asked if Mr. Morris had a statutory cite? Mr Morris said it's probably section 43-5-501, C.R.S., and whatever the subsection is alphabetically that defines office. My understanding is that the office is not contesting this.

Herman Stockinger, Legislative Liaison, Department of Transportation, testified before the Committee. He said I just want to make myself available in case there are any questions from the Committee. We do agree with Mr. Morris.

Representative McGihon asked if the department intends to adopt the rules in the executive director's office rather than the chief engineer? Mr. Stock said that's correct and we've already started that process so we won't have any lapse in that program once the current rule expires.

**11:35 a.m.**

Hearing no further discussion or testimony, Representative Cerbo moved that rules of the Chief Engineer, 2 CCR 602-3, sections I. through XVI., be extended and asked for a no vote. Senator Shaffer seconded the motion. Representative Cerbo asked if he needed to make two motions? Mr. Morris said that's an interesting question. We went back and forth a little bit to the extent the motion specifically references rule XVI. and the record reflects the Committee's intention specifically with regard to the advisory committee, I think that's probably sufficient. Representative McGihon said I did hear the motion as including rule XVI. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Representative McGihon said we will go back to calling rules in order.

Julie Pelegrin, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1d - Rules of the State Board of Education, Department of Education, concerning Administration of the Educator

Licensing Act of 1991, 1 CCR 301-37.

Ms. Pelegrin said I'm bringing three rules about educator licensure. The first two pertain to the alternative teacher programs. As you may recall, the traditional route to get a teacher license is to go to college and go through a teacher preparation program. However, there are a lot of folks who come out of another career, so they can go through an alternative teacher program. Those are designated in sections 22-60.5-102 (4) and (5) and 22-60.5-201 (1)(a) and (1)(a) (IV) and are designed to be a one-year program. Rule 2260.5-R-2.01 (5) and (6), however, refer to the alternative teacher contract or an alternative teacher program being extended for one year, which would make it a two-year program. The statute is very clear that both the contract and the program would be a one-year program.

Ms. Pelegrin said section 22-60.5-114 (3), C.R.S., authorizes the state board to waive statutory requirements that apply to alternative teacher programs, induction programs, and to waive the requirements that an applicant for an initial educator license demonstrate professional competencies. The introductory portion to rule 2260.5-R-23.00 first talks about waiving rules, not waiving statute. The difficulty with that is even if they go through their procedures and waive all their rules, somebody is still subject to the statute. The statute is supposed to be waived and that's what their rule should pertain to. The second issue is that they don't have any rules that are procedure for waiving the demonstration of professional competencies. It's a commission and omission, so we would recommend that rule not be extended.

**11:38 a.m.**

Hearing no further discussion or testimony, Representative Witwer moved that rule 2260.5-R-2.01 (5), rule 2260.5-R-2.01 (6), and the introductory portion of rule 2260.5-R-23.00 of the State Board of Education be extended and asked for a no vote. Senator Shaffer seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Thomas Morris addressed agenda item 1f - Rules of the Director of the Office of Economic Development and International Trade, Office of the Governor, concerning certified capital companies' program, 8 CCR 1501-2.

Mr. Morris said this is the certified capital company program (CAPCO). It's a venture capital program that creates economic development opportunities in

the state. It's ultimately based on state tax credits. There's quite a bit of oversight over these companies and consequently, section 10-3.5-107 (7)(c), C.R.S., requires each year each certified capital company to provide to the office of economic development an audited financial statement that includes the opinion of an independent certified public accountant (CPA). The issue in this rule is what does the statute mean by a CPA? The statute does not define the term CPA; however, CPAs are certified for a reason. Under title 12, C.R.S., there is extensive regulation of CPAs. In order to be certified, you have to jump through some hoops. Section 12-2-115, C.R.S., requires CPAs to receive from the board of accountants a certificate. The Office's take on this is section 10-3.5-107, C.R.S., more or less incorporates the provisions of title 12. When they used the term "CPA", but didn't define it, it was relying on the definition in title 12 for what is meant by CPA. However, the rule takes a different approach. The rule says the CPA shall be a member in good standing of the American institute of certified public accountants. There is nothing in our statute about that. Section 12-2-108 (1), C.R.S., says a certificate shall be granted when you've passed an examination or you have reciprocity from another states. There is nothing in there about being a member of the institute. It is a provision in the rule that is simply not authorized by statute. Furthermore, there's another provision in the rule that allows CPAs who are certified in other states, but not in Colorado, to perform this function. As you can see, we do have a reciprocity provision, in section 12-2-113, C.R.S., that says if you're certified in another state, all you have to do is submit your certification here and then you're certified here in Colorado. The rule doesn't follow that. It says if requested by the office, a copy of the independent CPA's license in the U.S. state where he or she practices shall be submitted. That impliedly authorizes those people who have not jumped through the hoops to get their reciprocal certification in Colorado to do this audit. For that reason, we believe this portion of the rule is unauthorized and shouldn't be extended.

**11:43 a.m.**

Hearing no further discussion or testimony, Senator Mitchell moved that the portion of the rule relating to the "Annual Audit by an Independent Certified Public Accountant" of the director of the Office of Economic Development and International Trade be extended and asked for a no vote. Representative Witwer seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Thomas Morris addressed agenda item 1g - Rules of the Commissioner of Insurance, Department of Regulatory Agencies, concerning surplus lines insurance issued by nonadmitted insurers, 3 CCR 702-2.

Mr. Morris said there has been a new development. The assistant attorney general has submitted what's called a scrivener's correction to the secretary of state saying that it was a mistake, that they did not quote the statutory notice that should have been included in the rule. They misquoted the statute. They submitted this to the secretary of state saying they did it wrong and here's the corrected version. The secretary of state corrected it. We believe, therefore, that there's no need to make a motion on the rule.

Representative McGihon said the rule has been corrected and that lies within the secretary of state's office and the Committee need not consider whether to extend the rule or not. Mr. Morris said that is our Office's recommendation at this point.

John Hershey, Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1h - Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1.

Mr. Hershey said the secretary of state repromulgated several election rules this past June and in our review of those rules we identified a couple of minor points where we thought the rules were in conflict with the statute. The first one has to do with emergency voter registration. As you know, most government agencies in our state are designated by statute as voter registration agencies. These are government offices of various types that provide services, military recruiting offices, etc. If a person attempts to register at one of these offices, and then shows up at the polls on election day and for whatever reason their registration wasn't processed, and the person's name is not on the voter registration book, that person is allowed under the statutes to do emergency voter registration at the office of the county clerk. When you complete this emergency registration process, you're given a regular ballot and you vote the normal ballot. You have to do three things at the county clerk's office in order to do that in this situation. You present identification, you declare under oath that you tried to register at one of these voter registration agencies, and you give the name and location of the agency and the approximate date on which you tried to register. That's in section 1-2-217.5, C.R.S. Rule 26.2.2 attempts to implement the statute, but it establishes different requirements for emergency registration. The rule says you have to state, rather than declare under oath, that you tried to register at a voter registration agency and rather than stating the name and location of the agency

and the date of registration, you're required under the rule to produce a receipt from the voter registration agency proving that you actually did try to register there. It's not even clear and not even required under the statute that these voter registration agencies issue receipts to people who register to vote there, so we have a conflict between the requirements of the rule and the requirements of the statute for emergency registration. Therefore, we recommend that Rule 26.2.2 not be extended.

Mr. Hershey said the second issue we found in these rules relates to vote centers. As you know, vote centers currently report all the election results from each vote center in total, which is how many people voted for "Candidate X" and "Candidate Y" at this vote center. Under section 1-5-102.7, C.R.S., beginning in elections held after January 1, 2008, vote centers will have to report this data by precinct. They'll take everyone who voted at a particular vote center and break that data down by precinct. Rules 38.10 and 38.12 says this has to happen in elections held before January 1, 2006. That was the former statutory requirement but in the past legislative session, that deadline was extended by two years by Senate Bill 06-170. The rules were not updated to reflect that change, therefore those rules as well conflict with the statute and we recommend they also not be extended.

**11:49 a.m.**

Hearing no further discussion or testimony, Senator Veiga moved that rules 26.2.2, 38.10, and 38.12 of the Secretary of State be extended and asked for a no vote. Senator Shaffer seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Steve Miller, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1i - Rules of the Liquor Enforcement Division, Department of Revenue, concerning removal of alcohol beverages from premises, 1 CCR 203-2.

Mr. Miller said the general assembly in 2005 passed two different laws, one was to expand the reseal and remove provisions for hotel restaurant licensees to permit customers to take partially consumed bottles of vinous liquor, which is wine, off the premises as long as they were resealed. That had formerly applied to that particular alcohol beverage licensee. That bill, which passed, expanded that to other licensees, so customers of those vendors could purchase a bottle of wine on the premises, partially consume it, and have it

resealed. That bill stopped short of what happens outside the premises, especially if it was carried in an automobile. The other bill that passed that has to do with this rule was the open container law. That law was codified at section 42-4-1305, C.R.S. It mirrored many local open container laws and prohibited the drinking of alcohol or the possession of an open alcoholic beverage container in the passenger area of a motor vehicle. The significant part of the statute is that it listed several exceptions to that prohibition. The rule which we are dealing with, however, is geared toward the vinous liquor reseal bottles, which would come under the open container definition. Rule 47-918 C. prohibits, without exception, the placement of an open container in the passenger area. The bottom line is that the open container statute prohibits open containers in the passenger area, with some exceptions, and the rule prohibits the same without any exceptions. It's my understanding that this rule is uncontested.

**11:53 a.m.**

Hearing no further discussion or testimony, Senator Groff moved that regulation 47-918.C. of the Division of Liquor Enforcement be extended and asked for a no vote. Senator Veiga seconded the motion. Representative Witwer said pursuant to rule 21 c may I be excused from voting? Representative McGihon excused Representative Witwer. The motion failed on a 0-6 vote, with Representative Cerbo, Representative McGihon, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no. Witwer took a 21 c.

Chuck Brackney, Senior Staff Attorney for Rule Review addressed agenda item 1j - Rules of the Division of Oil and Public Safety, Department of Labor and Employment, concerning boilers and pressure vessels, 7 CCR 1101-14.

Mr. Brackney said there are three issues with regard to this agenda item. The first has to do with inspections of boilers. There are two categories of inspectors allowed by state law, they are state boiler inspectors and special boiler inspectors employed by insurance companies. However, rule 5-1 of the division adds a whole new category, which is the owner-user inspection category. There is no authority for this to allow people who own the boilers to inspect them themselves or to not issue certificates of inspection, therefore the division lacks statutory authority to create this and the rule should not be extended.

Mr. Brackney said the second has to do with exemptions from the boiler regulations. In section 9-4-104, C.R.S., a number of exemptions are created

in statute. However, the division, in section 1-9 of its rules says that in addition to the exemptions listed by statute, the following are exempt. Once again, there is no authority for this. The only exemptions allowed are created by the general assembly in statute and the rule should not be extended.

Mr. Brackney said the last is a definitional question, having to do with "miniature boilers". Found in section 9-4-101 (11), C.R.S., the statutory definition contains three limitations. Rule 1-7-1 contains an additional limitation and therefore it is conceivably possible that your boiler would not meet the statutory requirements but meet the rule's requirements. For that reason it should not be extended.

**11:56 a.m.**

Hearing no further discussion or testimony, Senator Mitchell moved that sections 5-1, 1-9, and 1-7-1(b) of the Division of Oil and Public Safety be extended and asked for a no vote. Representative Witwer seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Chuck Brackney addressed agenda item 1k - Rules of the Division of Veterans Affairs, Department of Military and Veterans Affairs, concerning the Veterans Memorial Cemetery of Western Colorado, 8 CCR 1509-1.

Mr. Brackney said there are two issues, both with regard to the fees charged for the cemetery. Section 28-5-708 (2) (a), C.R.S., says a fee may be charged for the interment and burial of nonresident Colorado veterans, as well as their dependents and families, but not for Colorado resident veterans. The chart in rule 8 CCR 1509.3 and in A. (1) includes a fee for re-interments, where someone may have been buried somewhere else first and is now being interred in this particular cemetery. The statute, however, does not make any distinction like this and therefore to charge a burial fee for nonresident veterans and their families is contrary to statute.

Mr. Brackney said the second issue is rule 1509.5 where the cemetery charges a fee for memorial services, remembrance services, and things like that. Again, there is no statutory authority for this particular fee. If you were to look at section 28-5-708 (5), C.R.S., you'd see where the money comes from to operate the cemetery. It mentions the fund and those funds appropriated by the general assembly, and gifts, grants, contributions from the tax checkoff. Again, there is no statutory authority for either of these fees and we ask that

these rules not be extended.

William Robinson, Deputy Director, Department of Military and Veterans Affairs, testified before the Committee. He said General Whitney asked me to be here to represent him and be available for questions and to bring one point to the Committee's attention, the thought being you may want to address this in other legislation, specifically with regard to the cemetery that's about a \$260,000 a year operation that's funded with \$120,000 of general fund. The math doesn't work real well there. One of the things they have done is make the committal shelter and the visitor's room available for any ceremony. They get requests for people to do other things in those areas. It takes an hour to set up the committal shelter and an hour to take it down. Their issue is that the first time you bury someone, that seems appropriate, but the second or third time or nonmemorial type groups maybe they set some limit on it because it's time they can't spend maintaining the cemetery and burying people, so they wrote that into the rule. Interestingly enough, I don't disagree at all that the particular statutory cite doesn't establish the authority to do that, but we presumed any executive director could restrict or at least put some restrictions on the use of state buildings because if you extend this, any building that we or another agency owns could be used by the public at no cost at any time, and we're not funded for that. It may be that someone on the Committee or in the general assembly would like to consider establishing some authority for executive directors of departments to impose a reasonable fee because there are marginal costs you incur over and above your normal operational costs that you're not adequately funded to pay for.

**12:02 p.m.**

Hearing no further discussion or testimony, Representative Cerbo moved that rule 8 CCR 1509.3 A. (1) and the table accompanying 8 CCR 1509.3, which includes a fee schedule, and rule 1509.5 of the Adjutant General of the Division of Veteran Affairs be extended and asked for a no vote. Senator Veiga seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Chuck Brackney addressed agenda item 11 - Rules of the State Board of Stock Inspection Commissioners, Department of Agriculture, concerning stock inspection fees, 8 CCR 1205-6.

Mr. Brackney said these rules have to do with brand registration fees. You

can have your livestock brand registered and protected. The statute that governs this is section 35-43-115 (1)(a), C.R.S., which gives the board authority to assess the amount of the fees. Rule 4 establishes a fee of \$225 and there's a prorated fee. The problem is that rules 4.3 and 4.4, establish late fees. There is no statutory authority for late fees. Elsewhere in title 35, C.R.S., regarding the department of agriculture, there are a number of places that point out these late fees authority, however there is none existing here. We have to go to the general statute regarding late fees for the department. Section 35-1-104 (3), C.R.S., says you can charge a fee up to \$25. However, rules 4.3.2, 4.3.3, 4.3.4, and 4.4 exceed \$25 dollars and therefor conflict with the statute and should not be extended.

**12:03 p.m.**

Hearing no further discussion or testimony, Senator Shaffer moved that rules 4.3.2, 4.3.3, 4.3.4, and 4.4 of the State Board of Stock Inspection Commissioners be extended and asked for a no vote. Senator Veiga seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Chuck Brackney addressed agenda item 1m - Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning home and community based services for the elderly, blind and disabled, 10 CCR 2505-10.

Mr. Brackney said this rule concerns the program whereby people in this category are allowed to stay home both to stay out of an institution and to save state taxpayers money. One of the provisions of this program allows for the reimbursement of caregivers to go into the home and specifically for family members to be caregivers. Section 25.5-6-310, C.R.S., allows an unlimited number of family members to receive this reimbursement. The total amount of the reimbursement can be 444 hours per year. Rule 8.518.14.B. 3., rule in question, aggregates this among all the family members, which is in conflict with the statute, which allows any number of family members theoretically to get this reimbursement. We ask that it not be extended.

**12:06 p.m.**

Hearing no further discussion or testimony, Senator Shaffer moved that rule 8.518.14.B. 3. of the Medical Services Board be extended and asked for a no vote. Senator Veiga and Representative Cerbo seconded the motion. The

motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

Chuck Brackney addressed agenda item 1n - Rules of the State Banking Board, Department of Regulatory Agencies, concerning trust companies, 3 CCR 701-6.

Mr. Brackney said the problem with rule TC 5 is a failure to meet the incorporation by reference requirements in the "State Administrative Procedure Act" (APA), specifically the inclusion of a statement indicating that any material that has been incorporated by reference in the rule may be examined at any state publications depository library. Rule TC 5 fails to include the statement, conflicts with the statute, and should not be extended.

**12:07 p.m.**

Hearing no further discussion or testimony, Senator Shaffer moved that rule TC 5 of the State Banking Board be extended and asked for a no vote. Senator Veiga seconded the motion. The motion failed on a 0-7 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting no.

**12:08 p.m.**

The Committee recessed.

**12:15 p.m.**

The Committee returned from recess.

Representative McGihon addressed agenda item 3 - Executive Session. She said the Committee has reconvened for the purpose of an executive session. She asked Mr. Pike to explain the executive session.

Mr. Pike said we need to discuss a matter that will require the Committee's consideration of the possibility of retaining counsel to represent several members of the general assembly. The first thing I would like to ask is that the Committee take a vote to go into executive session and at that point I will explain further what the matter relates to.

Representative McGihon said in order to comply with the statutory requirements, this will have to prevail by a two-thirds vote.

**12:15 p.m.**

Hearing no further discussion or testimony, Senator Veiga moved that the Committee go into executive session to consider counsel for members of the general assembly. Senator Groff seconded the motion. The motion passed on a 7-0 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting yes. Representative McGihon said the Committee will conduct an executive session in accordance with section 24-6-402 (3)(a)(III), C.R.S., to receive confidential attorney-client communications with Mr. Pike. At this point the Committee will comply with the statutory requirements of an internal recording. The Committee went into executive session.

**12:35 a.m.**

The Committee returned from executive session. Representative McGihon said the Committee is back on the internet. The executive session is completed and the system has been turned back on. *(See attachments at the end of these minutes for the signed attestations of Representative McGihon and Mr. Pike regarding the executive session.)* She said the Committee will complete the agenda items.

**12:35 p.m.**

Hearing no further discussion or testimony, Senator Veiga moved that the general assembly retain outside counsel from McKenna Long & Aldridge to represent the three members of the general assembly and one member-elect in the election contest. Senator Shaffer seconded the motion. Senator Veiga said her motion only covered the three members and one member-elect and did not include anyone else brought in to the lawsuit. I didn't extend it to anybody else brought in because it strikes me that if we start including everyone in the general assembly, then there seems to be no reason why the Office could not represent everybody. Mr. Pike said we might still have the same question. I'm on the horns of a dilemma here. Representative McGihon asked if the Committee needs to return to executive session? Is there an issue you need to discuss that would be an attorney-client confidential discussion? Mr. Pike said let me think about that for a moment. Senator Veiga asked if it's staff recommendation to amend my motion? Mr. Pike said my recommendation would be that you do amend the motion because of the issues

we discussed. Senator Veiga moved to amend her motion to add any new members or members-elect of the general assembly to be included in representation by outside counsel that we are voting to retain. Senator Shaffer seconded the amended motion. The motion passed on a 7-0 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting yes.

Representative McGihon said the Committee will return to the two items remaining on the agenda.

Debbie Haskins, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2 - Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill and Other Committee on Legal Services Bills: Revisors' Bill and the Bill to Enact C.R.S.

Ms. Haskins said the Committee was given the first draft of the rule review bill, which only has two issues on it from your last meeting in September. We will redraft the bill to include and reflect all of your votes today, and that will be the bill we will introduce. We need the approval of the Committee to introduce the bill with the addition of the rules that you voted on today. Recent Committee practice has been that the chair and vice-chair are the sponsors of the bill, so that's listed on the bill. We need approval of the bill with the amendments and to introduce it, and then we need to know if people want to be co-sponsors on the bill.

Representative McGihon asked if it is the usual practice that members of the Committee are co-sponsors of the bill? Ms. Haskins said if they wish. We try to check with everybody.

Representative McGihon asked if the Committee would have a January meeting prior to the deadlines for filing, which will amend the bill further possibly? Ms. Haskins said no. By statute, the Committee needs to have an organizational meeting to elect a chair and vice-chair and we can't do that until we have our new members appointed, which is done on the floor in a motion and then the body approves them. I think the statute says we have to have the organizational meeting within 10 days after the session starts. We probably will not be ready to hear the bill at that time. The Committee does sit as the committee of reference twice on the bill and it's starting in the House. Usually our organizational meeting is quite short and then the bill needs to be introduced, at the latest, on January 31.

**12:41 p.m.**

Hearing no further discussion or testimony, Representative Witwer moved to approve the rule review bill with the amendments discussed. Senator Veiga seconded the motion. Ms. Haskins asked if the Committee members here want to be co-sponsors? Representative Witwer moved to amend his motion to approve the bill with the amendments discussed, with all members of the Committee being co-sponsors. Senator Veiga seconded the amended motion. Representative McGihon asked if anyone does not want to be a co-sponsor? No one objected. The motion passed on a 7-0 vote, with Representative Cerbo, Representative McGihon, Representative Witwer, Senator Groff, Senator Mitchell, Senator Shaffer, and Senator Veiga voting yes.

Ms. Haskins said the other two bills the Committee sponsors are the revisor's bill and the bill to enact the C.R.S. We don't need to approve those, we just need to determine who would like to be the sponsors of those bills. It doesn't matter which house or who the sponsors are, we just need sponsors. Representative Witwer and Senator Shaffer said they would sponsor the revisor's bill. Representative Cerbo and Senator Groff said they would sponsor the bill to enact the C.R.S.

Representative McGihon said she has one other bill for the Committee's consideration, which is not a normal bill of the Committee, that I've discussed with Mr. Pike. Perhaps Mr. Pike can talk about the scope of the Committee. I had some concern about the emergency rule-making that has occurred and is outside this Committee's purview in terms of being able to determine whether or not the emergency rule-makings falls within the statutory authority of the agency. That's been in several agencies that this has occurred. In fact, I think one of the rules that we put in the rule review bill today started out as a temporary rule. Actually, it's one of the rules that's in the other category on the agenda. Mr. Pike, can you speak to that?

Mr. Pike said in our discussion, Representative McGihon had expressed some concern about the ability of the Committee to address emergency rules in circumstances where it appeared the agency might have exceeded their statutory authorization. The more we discussed it, the more it appeared as though there wasn't any easy answer to that, in the context of the usual rule review process, since the rules were still in the APA process at that point. You'd have to have an expedited procedure and you're not often geared up to do that kind of thing. During session you might be, but during the interim you're not. It was very difficult to figure out whether or not there might be some way to address that. Our conversation kind of led to a discussion about

whether or not doing something like giving people who are adversely affected by an emergency rule an expedited court review and/or having the addition of the possibility of obtaining attorney fees if the people were successful. On first blush, my reaction to that was that it really kind of deals with the APA process, rather than directly with the legal services' process of reviewing rules. That was the nature of our discussion, and whether or not that's a matter that this Committee might want to recommend to the general assembly to address is a judgment call you all have to make about whether or not that kind of legislation fits within the general parameters of legal services.

Representative McGihon said she is concerned about rule-making that occurs particularly when we are out of session. It's happened at the department of personnel, it's happened with the secretary of state, it's happened here with the dental board, it happens across agencies. There is no way for the general assembly to carry out our process and our obligation to make sure that the rules that are promulgated, particularly these emergency rules, fall within the statutory authority of the agencies. They affect the citizens of Colorado. I'm wondering if any other members of the Committee are concerned about that.

Senator Mitchell said I'm concerned, as are you, and I'm a little uncertain of the specific issues. I was approached by a lobbyist representing a professional group and they were concerned about rules adopted by an agency. Representative McGihon said the Committee is going to talk about that in the other category.

Senator Mitchell said the concern he heard was that the board that promulgated the rules did not follow proper process, declared a meeting closed, and then had a vote after everyone went home and they turned the cameras off. The first question that arises is whether that kind of procedural irregularity is something that this Committee has the authority to consider in determining whether or not a rule is within an agency's statutory authority. That's the issue I thought was being presented to this Committee today. As I heard Mr. Pike talk, it seems the issue that's being presented is a time line for us to jump in and intervene in the process. Let me just ask about the rule review process. In addition to judging whether or not the substance of a rule or regulation is authorized by statute, is there anything that would allow or disallow us from considering whether the process in which the rule or regulation was promulgated follows statute?

Mr. Pike said, off the top of my head, my reaction is the charge to the Committee is to ascertain whether or not a particular rule is within the delegation of authority to the agency to promulgate that, or whether it

conflicts with any constitutional provision or statutory provisions in terms of the content. The APA process itself was something that had mechanisms in it that provided for ways to challenge violations of open meetings law or the APA itself. That was kind of without benefit of specifics as to this particular issue. That was a general response.

Senator Mitchell said let me engage you on two points in reverse order. The second point you made was that the APA gives private standing to challenge procedural issues. There's probably also standing of private parties to challenge the rule or regulation substantively. There is already private means for a litigant to say this rule or regulation isn't authorized by statute. The fact that there might be some other private remedy doesn't speak to whether or not this falls within this Committee's authority. Now, on the first thing you said, which is that the traditional analysis is to ask does something fall within the delegation of authority. The way it was characterized was does it fall within an agency's statutory grant of authority. That's completely ambiguous as to whether the statutory grant of authority refers to the substantive policy the agency is enforcing or the statutory grant of authority to make rules and regulations, which would implicate the procedure that the agency follows. If we're considering whether or not an agency followed a statutorily-prescribed procedure, then that would be this Committee looking at whether or not an agency has acted within the statutory authority granted to it.

Mr. Pike said I'd like to think about it. Like I said, my general, off the top of my head reaction was the Committee has not, in the past, looked at procedural defects in the APA as being part of the Committee's charge with regard to the review of the compliance by the agency with the authorization granted by statute. I have to confess I haven't read the statute recently. Assume for the moment that I've said that's my view of the statute, I think the Committee is the one charged with the responsibility here and that's a judgment call the Committee ought to make with regard to an interpretation of your authority.

Senator Mitchell said obviously we make that call in light of the statutory language that creates and authorizes this Committee and decide what the language means, but if all it says is we're supposed to see whether or not an agency has acted within its delegated authority, I think that's wide open as to whether that means the substantive authority or the procedural grant of authority for the rule or regulation. Mr. Pike said one other point that occurs to me as we're discussing this is this focus on perhaps the process by which a rule was adopted and the substance of the rule may or may not help you with regard to emergency rule question, which is perhaps a separate timing issue.

Senator Mitchell said I was even a little puzzled by the Chair's concern about an emergency rule because it seems to me that any rule adopted by an agency is in force until it lapses and we don't continue it. Whether it's a regularly promulgated rule or an emergency rule, it still hits the public until we renew it or kill it.

Representative McGihon said the difference between emergency rules or temporary rules and the rules that we review for the process is we may never review an emergency or temporary rule.

Senator Mitchell asked if it comes up early in that review? Ms. Haskins said our Office reviews emergency rules all the time. A lot of times what happens is they get replaced as permanent rules. The general practice is that our staff doesn't bring emergency rules to you because we have an ineffective remedy for dealing with an emergency rule. By the time we would take the rule to the Committee, have you take a vote, get it in the rule review bill, and have the rule review pass, the rule will have already expired. That's why we generally do not bring emergency rules to the Committee. Many years ago we had a couple instances where agencies kept repromulgating emergency rule after emergency rule after emergency rule. We brought that to the Committee and said we think this is a problem, and the Committee at that time, was not concerned about that. Part of the thing is you have a one-year cycle with your rule review bill and so it doesn't lend itself well to dealing with emergency rules. We do review emergency rules and if we find problems with them we contact the agency and try to work with them so that when they promulgate it as a permanent rule, hopefully those issues are addressed. The other thing I wanted to comment on is on this issue about the Committee addressing procedural problems with the adoption of the rule. Our Office's long-standing view of the APA and the Committee's role is that from a separation of powers standpoint, it's not appropriate for this Committee to challenge the rules prior to their submittal to the Office. We don't look at proposed rules and we don't opine on them because we feel that would be crossing the separation of powers between the executive branch and the legislative branch and our oversight. I think that we've always interpreted that as also going to glitches or lapses in how they adopt the rules before they are actually submitted to us.

Senator Mitchell said I was tracking Ms. Haskins until the last line. I think Ms. Haskins raised one issue and then answered a slightly different issue. If a rule isn't fully promulgated yet, obviously we don't render advisory votes on whether or not it complies with the statute. Once the rule is fully promulgated, recognized by an agency, enforced against the public, and complained about to this Committee, we are looking at a binding legal policy

offered by the state of Colorado and there's no advisory opinion problem. There's not really a comparison between deciding if they all took a vote in the dark with no one paying attention, which is one set of circumstances, and issuing a premature opinion on a rule that hasn't hit the light of day yet, which would be a different set of circumstances. Because we don't do the latter doesn't address whether or not we should do the former. Ms. Haskins said I agree that there are distinctions between those two scenarios that we're talking about. The long-standing interpretation of the Office and this Committee does not address problems with how executive branch agencies have actually carried out their rules.

Senator Veiga asked if we don't, and obviously we have not, then what avenue is there for someone if they believe the APA was not followed in the adoption of the rules? Is it a court challenge? Ms. Haskins said yes, I think that remedy is out there. There's also some language in the APA that was added four or five years ago that talks about a 30-day period of time to challenge noncompliance with the rules. I believe that change to the APA was put in there and sort of closed the door for challenges for noncompliance. I know there is a process, but there's a very short window of time and I believe it's 30 days.

Representative McGihon said this Committee has no authority under the APA to have a hearing even on a temporary or emergency rule. Is that right? Ms. Haskins said I think this Committee does have the authority to have a hearing and address rule issues on temporary rules. We have brought, in the past, temporary rules to the Committee. The problem is, you take a vote, you vote to extend and urge a no vote, and by the time it's effective through the rule review bill, the emergency rule has expired. The remedy is thwarting what you want to do.

Representative McGihon said I understand that, but one of our obligations as legislators, as the legislative branch, is exactly as you suggested with the separation of powers. One of my concerns is that this Committee has some ability to at least suggest to the executive branch, when we believe they've exceeded their statutory authority in rule-making. I'm concerned that the Committee at least have the ability to have a hearing on such a rule, whether or not we talk about a bill or extending it, but we should at least be able to call the agency in and suggest to them that they're out of line.

Mr. Pike said I think that's consistent with what Ms. Haskins has indicated. I think the reluctance of the Committee previously has been, you go through that process and you don't have the usual remedy of the expiration of the rule

in the bill to assure that whatever view you take is accomplished by the entity. You're exactly right, however, if you conducted a hearing and said we think that you all didn't have authority to promulgate that rule, you'd have their attention and you'd be on record as having made a determination on that particular emergency rule. That may not have any immediate effect on the vitality of the rule, such that folks wouldn't still have to comply with it. They may have received notice that there is some concern about the validity of the rule that may generate other things that may happen with regard to the rule, but you wouldn't have the hammer to assure that the rule was in fact declared invalid the way you do with the regular rule.

Senator Mitchell asked why we don't have exactly the same kind of remedy? If we vote that a rule was adopted by a process that violated statute, why can't we terminate its renewal in exactly the same way we terminate the other rules. Representative McGihon clarified she was not talking about a process but a rule that fell outside the statutory authority of the agency.

Mr. Pike said I think what we're saying is that by statute, the regularly adopted rules expire at a particular time and your remedy is to extend or not extend them, the process that you're going through. There is nothing that says an emergency rule expires at the end of that period. Even if you put it in the bill, the bill isn't enacted until later on in the session. Let's assume for a moment that you've got an emergency rule that's promulgated in June and the Committee says it's invalid, there's no mechanism to invalidate it until you get into the next legislative session and you adopt the bill.

Senator Mitchell said on Mr. Pike's comment that it applies only to emergency rules and not to regularly promulgated rules we believe were adopted by the right process, you get into that problem by simply amending the statute governing rule review and include emergency rules in a similar time line.

Representative McGihon said one of my questions to the Committee is do we want to consider legislation regarding emergency and temporary rules or simply stay within our purview of being able to have hearings without being able to put them in a rule review bill?

Mr. Pike said the other thing we'd be concerned about in the context of drafting that is once again walking that line between where we get into the executive prerogative. It may very well be possible to come up with something that we think does appropriately balance that, but that's our concern.

Senator Mitchell said if our mutual respect for separation of powers nevertheless allows us to whack formerly promulgated rules, why should there be eternal life granted to emergency promulgated rules? Mr. Pike said it may be possible to do it.

Representative McGihon said I just put that out there for the Committee's consideration as we move forward this year. She asked Mr. Pike if he had anything else to add to this discussion? Mr. Pike said the statute says the rules adopted in the regular process shall first be reviewed by staff of the Committee to determine whether said rules and amendments are within the agency's rule-making authority. Later, it says the criteria developed by the committee shall provide that every rule shall be reviewed as to form and compliance with filing procedures. I think that's kind of going the direction Senator Mitchell was suggesting. Just sitting here this afternoon, reading those two provisions, I'm definitely of two minds as to the grant of authority to the Committee. In that one sentence it appears to relate more directly to the authority, but later on the references as to form and compliance with filing procedures. It's something we would definitely have to take a long look at if that's the way the Committee wants to go.

Ms. Haskins said I'm sorry to contradict my director, but the second sentence he just highlighted has to do with a graduated expedited review that we do of rules, which was a change to the APA the Committee authorized, which allows our Office to just look at whether the rules the agency adopted had statutory authority. We do a really quick, 15 minute review on it. We have criteria for doing that. We screen the rules and it's based on things that we know over 25 years of doing rule review we haven't had problems with them and that they have the authority to do that. An example is the wildlife commission has authority to set bag limits for animals to be taken. It's clear authority and we get lots and lots of rules, and pages and pages of that, and that's all there is. There aren't problems with it and they have the authority to adopt the rules. That's one we do the expedited review on. We're just making sure that they met the filing deadline in terms of it was submitted within 20 days after the attorney general's opinion and things like that and that they have the authority. I'm not sure that's the language I would pull out from the APA. But, sitting here listening to the conversation, I think you might be able to develop some process short of a rule review bill, where you have the staff look at emergency rules, we have a hearing on it, you send a letter from the Committee saying you think there are problems with the authority of this rule that's been adopted as an emergency rule. I think you would get the attention of the agency. They really don't like to come here in front of you with rule issues, which is why a lot of them are uncontested because they really don't

want a lot of questions asked. I think you would get their attention and it might be something short of the bill, which has some problems in terms of dealing with the temporary nature of the rules.

Senator Mitchell asked why is short-circuiting the lifespan of a newly promulgated rule any friendlier to separation of powers than short-circuiting the lifespan of an emergency promulgated rule? Why are we so allergic to broaching separation of powers when we're talking about adopting a structure that would affect emergency rules when we already have a structure that affects full-blown, beautifully formed, 10 fingers and 10 toes rules?

Senator Veiga asked am I missing something? Any process we develop still has to take into consideration that we're only in session January through May. We can't call ourselves back for that purpose.

Senator Mitchell said what we can do is channel emergency rules into the same pipeline as regular rules so that they have only a certain term of months and then they expire unless renewed. Senator Veiga said we're talking a legislative change. Senator Mitchell said yes and I heard Mr. Pike say there might be a separation powers problem, but why?

Representative McGihon said she would like to ask the staff, based on this conversation, to consider what might be appropriate for this Committee to bring forward either in terms of changes to the APA or changes to the Committee's procedures for us to consider. In consideration of the time, we've moved into the last issue. I believe we've all been contacted about a rule that affects dental advertising. It is not on the agenda today, so the rule itself cannot be considered, but I wanted to get a sense from the Committee on whether or not the Committee wishes to ask staff to examine the rule in light of the Committee's authority to do so.

Senator Mitchell said I'm concerned about the substance of the rule and the process by which it was reportedly promulgated, so I support asking staff to look at that situation and bring it back before us. Representative McGihon said it would be rule 26 under the dental rules. In light of the request from the constituents, why don't we put that on the Committee's next agenda, ask staff to review the rules, and make a determination for us under your normal procedures.

Mr. Pike said we'd be happy to do that.

**1:12 a.m.**

The Committee adjourned.