

COMMITTEE ON LEGAL SERVICES

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Sen. John Morse, Vice Chair
Rep. Bob Gardner
Rep. Daniel Kagan
Rep. Claire Levy
Rep. Ellen Roberts
Sen. Greg Brophy
Sen. Morgan Carroll
Sen. Shawn Mitchell
Sen. Gail Schwartz

**OFFICE OF LEGISLATIVE LEGAL SERVICES
COLORADO GENERAL ASSEMBLY**



STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045
FACSIMILE: 303-866-4157
E-MAIL: olls.ga@state.co.us

DIRECTOR
Charles W. Pike

DEPUTY DIRECTORS
Dan L. Cartin
Sharon L. Eubanks

REVISOR OF STATUTES
Jennifer G. Gilroy

SENIOR ATTORNEYS
Gregg W. Fraser
Deborah F. Haskins
Bart W. Miller
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SENIOR STAFF ATTORNEYS
Jeremiah B. Barry
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Esther van Mourik

SENIOR STAFF ATTORNEY FOR RULE REVIEW
Charles Brackney

SENIOR STAFF ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEYS
Troy Bratton
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Kate Meyer
Jane M. Ritter
Richard Sweetman

PUBLICATIONS COORDINATOR
Kathy Zambrano

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

January 20, 2010

The Committee on Legal Services met on Wednesday, January 20, 2010, at 8:07 a.m. in SCR 353. The following members were present:

- Representative Labuda, Chair
- Representative Gardner
- Representative Kagan (present at 8:09 a.m.)
- Representative Levy
- Representative Roberts
- Senator Brophy (present at 8:08 a.m.)
- Senator M. Carroll (present at 8:13 a.m.)
- Senator Morse, Vice-chair
- Senator Schwartz

Senator Morse called the meeting to order.

The Committee addressed agenda item 1 - Election of Chair and Vice-chair.

8:08 a.m.

Representative Labuda nominated Senator Morse to serve as Vice-chair of the Committee. The motion passed on a 7-0 vote, with Senator Brophy, Senator Morse, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

8:09 a.m.

Senator Morse nominated Representative Labuda to serve as Chair of the Committee. The motion passed on a 7-0 vote, with Senator Brophy, Senator Morse, Senator Schwartz, Representative Gardner, Representative Labuda,

Representative Levy, and Representative Roberts voting yes.

8:10 a.m. -- Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 2 - Update on OLLS Budget for FY 2010-11.

Ms. Eubanks said the Committee should have the budget narrative that summarizes the functions of the Office as well as the highlights of our budget for the fiscal year 2010-11, and both an organizational chart and the actual budget we are proposing for fiscal year 2010-11. Our budget request is \$5,426,958. That represents a 0.86% increase over our current year's budget. If you don't factor in the statutorily required PERA A.E.D. and S.A.E.D. increases, it represents a 0.22% increase from our 2009-10 budget. The bottom line is that our budget for 2010-11 is the same as our 2009-10 budget, meaning basically no growth or increase in funding except in two areas. Those areas are due to a small increase in personal services to reflect increased costs for health, dental, and life insurance, which is a 4.09% increase, and the scheduled statutory increases of PERA A.E.D. and S.A.E.D. The A.E.D. increase is a 20.34% increase and the S.A.E.D. is a 41.38% increase. Basically, we have no increase in funding from our current budget for 2010-11 for personal services other than insurance costs. There are no increases for merit or salary survey. There were no merit or salary survey increases in 2009-10. We have no increases for operating expenses. We have no increases for travel, and there are no increases in funding for the commission on uniform state laws even though the dues of the commission are increasing. I'm happy to answer any questions about the budget.

Representative Gardner said I noticed that the Office is authorized 56.1 FTE and you have a salary amount requested at 50.5 FTE. Are you carrying vacancies? Is that due to natural turnover and some vacancies in between? What's the difference? Ms. Eubanks said although we've been authorized those positions, the differential is actually they aren't funded in terms of salary. The difference between the FTE authorized and what we fund is that we are actually only funding at the 50.5. We do have one attorney vacancy at this point. We do have a little bit of vacancy savings due to people who have left the Office in the past and due to the changeover of the Director. In terms of what we're authorized for FTE, that's not what we're funded.

Representative Levy asked if other departments have a similar transit allowance in their budget? Ms. Eubanks said to my knowledge I don't think any of the other service agencies fund an Eco Pass. I may be wrong.

8:15 a.m. -- Charley Pike, Director, Office of Legislative Legal Services,

addressed the Committee. He said it's my understanding that Legislative Council has a transit allowance. Ms. Eubanks was referring to RTD passes. We do both. Council only has the transit allowance at a similar figure.

Representative Levy asked do you know what the utilization rate is on the Eco Passes versus transit allowance? Mr. Pike said the way that works is you have to purchase one for every employee or you can't participate, so we have to buy one for every employee. I think last year, there were very few that we didn't actually hand out, about seven or eight.

Ms. Eubanks said Matt Dawkins just indicated to me that of the new passes that came out in January, of the 49 purchased, 40 of our employees have gotten the passes and put them on their IDs. I think some people use them on a daily basis and some people use them on a more episodic basis, but at least 40 have come in and gotten them so they have it.

Mr. Pike said the use changes between the session period and the interim. During the interim, it's much higher. It's probably a little lower during the session because our time is driven in different ways and folks figure they can't rely on taking transit during the legislative session so they're more inclined to drive.

Representative Roberts said you list the activities and functions of the Office. Is there a pie chart or some sort of percentage in terms of how much of your time is spent on the activities, such as drafting versus the ballot initiatives tasks? Ms. Eubanks said I know in the past, we have done some summaries of, for example, the workload of the initiative process on our Office, but in terms of putting it all together with our other functions, I'm not aware if we've done that. We're happy to try to put something together for the Committee.

Mr. Pike said part of the difficulty with that is when folks have small pieces of time when they're not drafting, they might turn to annotations, for example, or begin to review some of the rules. It's hard to allocate how much time they're spending on things like that, unless we start doing some desk auditing or have folks give us some estimates. We simply haven't tried to lay it out that finely.

Representative Roberts said I didn't mean estimate down to the minute, but if there was a general sense in your Office that you spend X amount of time on something, it would be great to have that. Mr. Pike said we can give that a shot.

Representative Gardner asked can you tell me how long have you been doing the transit allowance and Eco Pass? I think it's great, but frankly, in some sense we're paying for people to come to work. Mr. Pike said I think the transit allowance was initiated when we had the first fiscal crisis. The directive that we got was basically no salary increases for a couple years and then it was suggested that we might be able to provide a transit allowance in lieu of salary increases during one year. That's when it started. Like many other things, once you start something like that, it's difficult to back away from it. I do think it's a benefit now that folks rely on, especially the employees at the lower salary level. It is a benefit tied together with the RTD passes that is above what I think some other agencies have been able to do.

Representative Gardner asked does Legislative Council do similarly? What are other agencies doing throughout the capitol? Mr. Pike said Legislative Council does the transit allowance very similar to what we do. I don't think they have the funds in their budget to provide the RTD passes or have been disinclined to do it. I'm not aware of any other agencies that are doing the RTD passes. I know that Representative Weissmann explored that a year or so ago as a possibility for everyone in the legislative environment, including members, and wasn't able to put it together I think because of the declining revenue. I think, frankly, if we get to the point where you all directed we reduce our budget, that's one of the first things that we'd have to consider.

Representative Labuda asked if the Committee needs to take a vote on the budget? Ms. Eubanks said yes. The next step is for us to take the approved budget to the Executive Committee.

8:22 a.m.

Hearing no further discussion or testimony, Senator Carroll moved to approve the proposed budget for the Office. Representative Kagan seconded the motion. The motion passed on a 9-0 vote, with Senator Brophy, Senator Carroll, Senator Morse, Senator Schwartz, Representative Gardner, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting yes.

8:23 a.m. -- Chuck Brackney, Senior Staff Attorney for Rule Review, Office of Legislative Legal Services, addressed agenda item 3 - Follow-up Discussion and Approval and Sponsorship of Bills to Amend the "State Administrative Procedure Act".

Mr. Backney said what was once one bill is now two. You may recall from

the last meeting, one of the items in the bill was an inclusion of nonrule-making notices in the on-line publications of the secretary of state, and the Committee was worried it wouldn't fit under a bill title that included the word "rule-making", so we made that a separate bill. There's no additional language and no additional substantive provisions in that draft. Two of the things I wanted to show you are in LLS No. 10-0522, the bill dealing with mostly the emergency rules, but also the incorporation by reference provisions. I'd like to draw your attention to page 3. That's the procedures for adoption of emergency rules and how long those are good for and what an agency has to do to extend the effective period for those. It changes the current three months to 120 days and then it also goes into some additional wrinkles where the secretary of state can become involved if an agency wants those emergency rules to be effective longer and it also includes this Committee so that if that time period is not enough, an agency could petition this Committee to seek approval for an extension of that time period for the effective date of the emergency rule. At the top of page 4 is a question about adopting a second set of emergency rules. One could easily see how it would be easier for an agency to adopt a second set of emergency rules rather than go through the hoops involved in visiting the secretary of state's office much less this Committee. It wouldn't be hard to imagine an agency wanting to adopt a second set of emergency rules. The question on page 4 is does the Committee want to cut off that possibility. The adoption of a second set of emergency rules has always been allowed, although frowned on informally, but never actually prohibited. That would be something new if the Committee wanted to do that. My second question is the age-old question on the last page about do you want a safety clause. Also, there are people from the secretary of state's office to report on the things the Committee directed them to find out at the last meeting with regard to this whole topic.

Representative Labuda said I have a question about emergency rules. When we're not in session, which is the majority of the year, do you have any idea how many emergency rules come up for renewal at that time? Mr. Brackney said I don't, but I'm trying to think back to those numbers I gave you at the last meeting about how many emergency rules are adopted. If I recall, that was 15-20% of the total are emergency rules, and I suppose some subset of those would be ones that are adopted for a second time. I believe Candy Herring from the secretary of state's office, who was here last time, told you that there are agencies that will do that. They don't get the permanent rules done by the time the first set of emergency rules are out and they adopt a second set of emergency rules. I don't have the numbers on that, though.

Representative Gardner said in the draft, we've used the standard of a written

finding of good cause for extension of a rule. Do you have any sense of what kind of legal standard that is? Is it any legal standard at all? For the Committee, do we need to give some definition to what good cause is because frankly, good cause may be I didn't get it done and it's really important. That doesn't seem appropriate to me. Mr. Brackney said I think there is a standard there. I'm not sure it's really high, but I think there is a standard. You may recall back to the last meeting when I gave you some examples of some of the actual findings that I dug out from 2009. Some of those were fairly detailed with a good explanation about why they're doing it, some of them were one sentence and it was really hard to tell exactly what they were basing it on, and some of them were in between. The standard is there, I just don't know that it's very high and certainly we could put something more into statute.

Senator Carroll said I'm not sure if this is exactly directed to Mr. Brackney, but I think what we're doing here is terribly important and there is one piece of the bill, as much as I love this Committee, I'm really worried about, given the frequency of how often we meet. We're on the outside of where we're looking at where maybe we think some of this might be stretched, but in some legitimate cases where there really is a high, emergent need and it's very important to have something in place, I'm just worried about how agile we are in pulling ourselves together year round in order to sufficiently be step four in the process. I want the checks and balances, I respect where that's going, I'm just worried about how many layers we're adding in here. I know the goal is to get people to implement the rules in the normal timeline. I think what we're doing here is really important and that's the only piece of it that I'm not totally comfortable with. I'm just not sure how quickly we convene and we may put ourselves in new deadline gaps when we're in the process of trying to fix old ones.

Representative Gardner said in response to that, I think our discussion last time, and even the genesis of this bill, was the request for 180 days and only 180 days. The suggestion, I think it came from Senator Morse, that this Committee be involved if necessary, seemed to be far more the exception than the rule. In some sense, given the request that originally came to us, we could get rid of anything beyond 180 days. It just seemed to me, and I don't know what the sense of the Committee is, there might be that chance that 180 days is not adequate, and if somebody really feels strongly enough about it, this is not an agile committee, they could come to this Committee. Senator Carroll's point is well-taken. Mr. Brackney and I had a discussion after the last meeting concerning a separation of powers issue. Do you have any sense of whether the involvement of this legislative committee in the executive branch's adoption of rules poses a separation of powers issue? Mr. Brackney said I

can't tell you absolutely whether it does or doesn't, but I can tell you for sure it raises that question. The legislative branch further putting its nose in the executive branch's business is always a concern. The way we thought about this when we were drafting it was that as long as the Committee wasn't actually getting involved in the language that was in the rule or anything like that, it would probably be okay. Again, I can't guarantee that. Certainly, that is something that comes up and that is a concern. There's no case law or anything like that on this that I can point to you and tell you with certainty I don't think that's the case.

Representative Gardner said I guess as I thought about this off and on, I wonder if this is functionally any different than the role this Committee plays with rules generally. Any thought about that because you mentioned the language? It doesn't seem we're involved in the language at all, but whether or not the rule is extended. Mr. Brackney said that might be what would save it, since there's no messing around with the language. Like in Committee, there's a just a finding that the rules originally adopted by the executive branch are in effect. That might be what saves it in the same way the Committee never amends the language of the rule, but rather just allows the rule to expire or not.

Representative Levy said maybe we need to hear from the secretary of state's office on this, but I'm not comfortable with this entire approach here. I recognize the concern about emergency rules, but I think they're allowed for a purpose and there is a time limit duration on them. What I'm uncomfortable with is the notion that, with regard to the secretary of state, some other agency of state government is going to have any more wisdom about the need for an emergency rule or the efficacy of extending that rule than the agency is. We're sort of setting up a hierarchy here that doesn't exist on the organizational chart, so I would be very cautious about doing that and, in fact, I'm not comfortable doing that. The same is the case for our potential role in determining whether to allow an emergency rule to be in effect for more than 180 days. The bill says our decision is to be based solely on the need for additional time for the agency to adopt the permanent rule. What gives us the wisdom to know whether they need that time? I think we're searching for some parameters on emergency rules and we're putting us into the mix and we're going to end up bringing the agency in and having a full-blown hearing on why it's taking so long, and in the mean time, they could be working on getting this thing adopted. I just think we're grasping for something and inserting hierarchies and oversights that really aren't warranted. I respect Mr. Brackney's efforts to respond to Representative Gardner's question about separation of powers, but I don't think there really is a difference. We don't

supervise the agencies at that level. We determine whether the rules are consistent with statutory authority, but we don't look at whether they're working fast enough or too slow or should have put more FTEs on the issue or not. I'm just not comfortable with this approach.

Representative Roberts said we're not searching for a problem. The problem is actually identified and what we're searching for is a good solution. I don't have a problem with this. I think that is part of what we do in this Committee, but I think a section like this sort of sends an additional message out that we don't want abusive implementation of emergency rules. The problem is getting too tight on good cause for the secretary of state. I think we can do this incrementally. We give the secretary of state, whoever that is, the ability to make that determination. I don't feel like we're trying to micromanage, but we're trying to redirect and not have emergency rules continuously promulgated. I'm not uncomfortable with the section. I just don't know that we want to drill down good cause to too fine a detail because that could trip things up.

Senator Morse said I agree with Representative Roberts. Why do we have rules in the first place? Because the legislature directed that a policy be implemented that needed finer direction than the statute. Why are we passing a statute, often with a safety clause, and then it takes 90 days, and then another 90, and another 90, and another 90 to implement the rule? Granted, I don't remember the numbers from last time either, but we did get some sense of the times when this is happening. Part of our discussion was, right now it's 90 days and we're being asked to change it to 120, but there will be times when it will be 180, and times when it needs to be even more than 180. This Committee came to the conclusion that if we put 180 into the statute, that will become the new floor. So what we were doing here was sending a very strong message that we passed a statute, get the rules implemented and let's get some regulatory certainty for everyone concerned. If it's going to take you more than 180 days, we're not saying no, we're saying that's a huge hurdle and you've got to come back to this Committee. Know that and plan accordingly. For the most part, our statutes are passed though August and so the 180 days is going to be about the first of January or February, and we'll actually be here in session anyway and could have that hearing. I know there will be exceptions to that but I think it sends a strong message from the legislative branch to the executive branch without interfering with them that we passed a statute, so implement it. Let us review the rules that you used to implement it, which we can't do until you actually adopt them. The emergency rules don't really count. Maybe this isn't exactly the right approach, but I think in theory this approach makes a great deal of sense, although I am sensitive to the

logistics of actually working it out. I think it sends a strong message to the executive branch, which was part of what I was interested in.

Senator Carroll said two thoughts on the last thing, putting the substantive process questions aside. The first is that I think on page 3, it's worth clarifying that if they hit that fourth stage and come to this Committee, that they need to get permission on or before the expiration of the 180 days. I think we just want to tighten that up so there is no gap where we get it scheduled on day 190 and then what do we do in the mean time. I think we want to be real clear that if this is the process the Committee decides to go with, that permission needs to be obtained on or before the expiration date. The second point is that I don't think we need a safety clause, but I think we do want a date certain, given how many rules are affected. One suggestion is we don't do a safety clause, but we make the bill effective January 1 or something. I think for clarity, the departments and the secretary of state's office want to have a bright line on when this would be governing.

Senator Schwartz said I just want to clarify. I found the document from last time and since 2006, the range was 15-19% were emergency rules.

Representative Gardner said I want to note that this was a problem brought to us, that the agencies think they need more time. I thought the original request was 180 days and the Committee was not comfortable with that idea, and after discussion we're trying to create a hierarchy. I don't know, and I'll be interested to hear from the secretary of state's office, whether that is right in the hierarchy. My original suggestion was to send it to the governor's office. All of these people work for the governor and he's elected by the people of Colorado. When the time comes, someone who is responsible for the people of Colorado ought to be making this decision about the extension of rules and what it means to have good cause. As has been noted, we have statutes and rules need to be made and we need to get on with the process and not create a bureaucratic norm of I've got 120 days so we do it and what happens if we go beyond. I would like the sense of the Committee, but I'm hoping that this process is not something that can be circumvented, whatever we decide it is, by multiple uses of adoptions of regulations. My sense of this question from Mr. Brackney is this is a one-time deal. You adopt the emergency regulations and follow the process however it takes you.

8:42 a.m. -- Charley Pike addressed the Committee. He said I just wanted to add one additional technical kind of consideration for you before you do anything to the bill. We started out with one bill. We split it into two because of concerns about the title of the bill. I just want to point out that the second

one, the one that you're focusing on now, is still rather broad. It deals with changes to the rule-making procedures. In the trailer, what we're really dealing with secondarily is extending the duration of emergency rules, which could be one bill, and revising the requirements for incorporation by reference, if you wanted to have another bill. That would give you much tighter titles, but you may want to have all this fun and you may want to go with a broader title. That's just something for you all to consider.

8:44 a.m. -- Bill Hobbs, Deputy Secretary of State, Office of the Secretary of State, testified before the Committee. He said I want to reaffirm we really appreciate these bills. I think these go a long ways toward modernizing and streamlining the rule-making process. The reason I wanted to come before you is this very issue you've been struggling with. You've already anticipated pretty much the comments that I wanted to bring up. Adding these additional layers of review do pose some problems that you've identified - legal, practical, what's the standard for good cause. One other one I want to mention is there may be a fiscal impact as well. We have an on-line rules filing program that we would need to modify with the additional steps if you go with that process. That's another consideration. I appreciate trying to deal with those agencies that have trouble meeting the time duration for emergency rule-making, but as a practical matter, I'm not sure you need these additional layers. If you're extending the duration of emergency rules from 90 to 120 days, you're solving the problem for most of the agencies right there. Not all, but you're solving the problem for most of them. There's another administrative step that we've just taken that solves the problem for most of the remaining agencies. Starting this month, we're now publishing the Colorado Register twice a month instead of once a month. That means that notices of proposed rule-making can go out faster and the notices of adoption can go out faster. As a practical matter, that probably shaves up to a month off of the process required to make an emergency rule permanent. That's going to help as well. So then, if there are other agencies that still cannot, for whatever reason, live within the 120 days and the expedited process now for making rules permanent, then I would suggest you consider either going to 150 days or simply letting those agencies deal with the existing standard in the law for a second emergency rule-making if there still is an emergency. The statute already has a pretty strict standard about imperatively necessary for the preservation of the public peace, health, and safety. If they can meet that standard, then perhaps they should attempt to adopt a second emergency rule-making. I would caution you against the additional layers of review because of the potential costs and the potential legal problems. I'm not really sure that it's necessary. Mr. Mueller has been talking to a number of the agencies and I think most of them think we could probably avoid having those

additional layers of review.

8:48 a.m. -- Sean Mueller, Acting Head of the Rules Publication Program, Office of the Secretary of State, testified before the Committee. He said Candy Herring, after your last meeting, sent out an e-mail to our advisory group, which is numerous agencies that come in and talk to us periodically and review our processes, and she asked them specifically about the 120 days. Everybody welcomed any increase because they all struggle to meet 90 days. As was mentioned earlier, most of them hadn't been hitting that. A lot of them can hit 120. Some of the advisory group welcomed that and thought that would work for them. A lot of the agencies have internal processes, their own steps to cover, and oversight, and are trying to juggle commission meeting days where these commissions always meet at the same time each month and they have to coordinate their rule-making around when that adoption can go to the commission. A few of the agencies always take a long time and do fall into that special category where they're always going to take longer for their permanent rules. However, a couple of them pointed out that they've become so accustomed to their requirements that it takes them five or six months and they just start everything earlier. They're so regularized on what they do that they anticipate. For those agencies, even though they may never hit any mark we set in terms of how long it takes to get a permanent rule in place, they're working within the system and not going around it because they're not filing emergency rules. They're saying we know how long it takes us. Hazardous materials is one we got a very detailed response from and what they described was the anticipation it is going to take a certain amount of time to familiarize their constituents of what is going to happen with the new rules, so they begin an education process perhaps six months before they anticipate adopting. What they're doing is trying to avoid anything to do with emergency rules. We collect a lot of data about how long people take to finish their permanent rules. Not every agency will file an emergency rule to go with permanent rules. Even though not everybody is completing their permanent rules as quickly as you like, they're not all filing emergency rules. Certainly, 120 days will be an enormous improvement. I think every agency welcomes that possibility.

Senator Labuda said Mr. Mueller mentioned there are some agencies that regularly go over. Mr. Mueller said they're not necessarily going over with emergency rules but their permanent rules, their process. There are a couple that have statutory exemptions, like the public utilities commission has their own calendar because they have so many layers of hearings and feedback that's required that they have their own clock. Their emergency rules last 210 days. I think one of the water commissions has a special time allowed that's

already been put in place. And like I said, there's a couple others where they've learned how long it takes then to get it done internally. A good thing is they can be so organized about it, that they're not usually filing emergency rules and not being entrapped by long periods to complete them. Rather, they're avoiding emergency rules entirely. For them, none of this would necessarily affect them, because even though they're really missing the mark in terms of how long they take to complete their process, they've anticipated it so well they just begin the process much earlier, and they start their oversight earlier. I don't think they're gaming the system, they're just working within it and their own structures.

Senator Labuda asked what is the sense of the Committee? Do you want to continue questioning? Do you want to take a vote now? Do you want to come back and discuss this more?

Senator Carroll said I think we need a little bit more time on drafting and discussion, so I prefer we not do a vote today. I have a question for the secretary of state's office. You've seen how there are two different bills now. If we did nothing but take 90 days to 120 and doubled the frequency of publication and the additional things we're allowing in here - and maybe the fact that if you don't meet the deadline the rules expire, which would be a natural reason to not want that to happen instead - would that take care of your sense of the process? Mr. Hobbs said with respect to the gap problem, I think it does. As far as I'm concerned, that would be sufficient, the 120 days and the more frequent publication. There are other items these bills offer that I think are important, such as the updating of the "State Administrative Procedure Act" to reflect on-line publications. I assume you're not ruling that out.

Senator Carroll said I'm treating that separately. Mr. Hobbs said the incorporation by reference and what we talked about with respect to 120 days and more frequent publications I think agencies can live with that, and that avoids what Senator Morse pointed out is a higher ceiling becoming the floor. Emergency rule-making should be the exception and I think that is workable.

Representative Labuda said I was just chatting with Debbie Haskins who reminded me we also have to do the rule review bill and since we're getting close to the time to go on the floor, I'm going to propose that we adjourn now and plan to meet again next Wednesday at the same time. Is it the sense of the Committee to go along with what Senator Carroll and Mr. Hobbs were talking about to narrow down these bills to basically two or three items?

Representative Gardner said I'd like a clarification. What I heard Senator

Carroll suggest is that agencies would get one shot at emergency rules and if they aren't able to get it done in 120 days, those rules expire. What I hear Mr. Hobbs describe is the current process in that there is a standard for a second round of emergency rules. I have to say, I found the agency findings justifying emergency rules to be extremely inconsistent, which was the most disturbing thing to me. I guess I'd like some clarification about this issue and how the Committee feels about it. I'm perfectly satisfied with the one-time shot. If we're going to do something else, then I'd like to take a look at those standards and what's required to do an extension.

Senator Morse said my suggestion is we leave this debate right where it is and pick it up. I think there's still stuff going on here and I don't think we can give the drafter some more instructions as to a new draft. I think that's what we really need to discuss. We do need to do it halfway quickly to get these bills introduced, so we probably do have to meet next Wednesday.

8:56 a.m.

The Committee adjourned.