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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

February 4, 2011

The Committee on Legal Services met on Friday, February 4, 2011, at 10:56 a.m. in SCR 356. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Carroll
Senator Roberts
Senator Schwartz
Representative B. Gardner, Vice-chair
Representative Labuda
Representative Levy
Representative Murray
Representative Waller

Senator Morse called the meeting to order.

10:57 a.m. -- Tom Morris, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Air Quality Control Commission, Department of Public Health and Environment, concerning stationary source permitting and air pollutant emission notice requirements, Regulation Number 3, 5 CCR 1001-5.

Mr. Morris said these are rules of the air quality control commission concerning stationary source permitting and, in particular, concerning greenhouse gases and how the commission

has regulated them. There are four issues. The first two relate to a permitting threshold and, in one respect, our conclusion is that the regulatory threshold is too stringent - it is too low - and, in another respect, our conclusion is that the regulatory permit threshold is too high. The third issue relates to whether greenhouse gases are an air pollutant under the regulatory definition. The last issue relates to whether greenhouse gases are exempt from the requirement to pay annual emission fees.

Mr. Morris said this is a complicated area. I'm going to go into a little bit of background to explain why this is an issue. Greenhouse gases are a relatively different type of pollutant than has traditionally been regulated under the "Clean Air Act" and that has some consequences for how the rules were structured. Back in 2007, the United States supreme court held that greenhouse gases are an air pollutant under the federal "Clean Air Act". After that happened, the environmental protection agency (EPA) promulgated a rule regulating greenhouse gases, specifically their emissions from new motor vehicles, and the greenhouse gases, therefore, became subject to regulation, which is a term you'll hear a lot about this morning and afternoon. They became subject to regulation about a month ago, on January 2, 2011. Two regulatory programs are triggered once greenhouse gases become subject to regulation, but we are concerned with only one of those and that is the so-called operating permit program for major sources. Major sources are those that have the potential to emit at least 100 tons per year of any air pollutant. The reason I say that greenhouse gases are different from what has traditionally been regulated is that they are emitted in much greater quantities and by a much wider variety of sources than most other pollutants. Consequently, once greenhouse gases became subject to regulation by virtue of this motor vehicle emission rule, the existing statutory permit threshold of 100 tons per year takes on a new significance. Under the normal types of pollutants, only relatively major sources emit enough to become a major source and have to get an operating permit, but the greenhouse gases are different because they have many more thousands of sources. According to the EPA, there are about 6 million sources nationwide that would require operating permits at the 100 tons per year level. Under the EPA rule that is kind of the background for what our air commission did, the EPA promulgated what is called the tailoring rule that raised that permitting threshold from 100 tons per year to 100,000 tons per year and by doing that they are regulating only a tiny little slice of the sources. There is nothing in the federal "Clean Air Act" that says that the EPA can do that. Our air commission then took an identical regulatory track in promulgating the rules that are in front of you today and now there are two tests that a source must meet in order to be a major source. It has to emit 100 tons per year of any air pollutant and it also has to emit at least 100,000 tons per year of what's called carbon dioxide equivalent, and I'll get into what that means a little bit later on. I will point out Attachment A [attached] to the memo. It has all these technical, regulatory definitions.

Mr. Morris said in any event, the commission's statement of basis and purpose explained why it was doing what it did. It contains an excerpt from the state implementation plan report that was submitted to the legislature this past January 15. It says that while the 100

tons per year threshold is appropriate for emissions of traditionally regulated pollutants, such as nitrogen oxides or sulfur dioxide, it should not be applied to greenhouse gas emission sources. The central issue that you're going to need to decide today is should they or shouldn't they be applied to greenhouse gases? If not, why shouldn't they be? Is there something in statute that authorizes the commission to not regulate sources at the 100 tons per year level but rather at the 100,000 tons per year level? Our conclusion, obviously, is that there is nothing in the statute that authorizes the commission to regulate greenhouse gases at only the 100,000 tons per year level. The commission's rationale for why it should not be applied is that application of the existing thresholds to greenhouse gas sources would require permitting of thousands of very small emission sources, create undue burdens for these sources, and overwhelm the resources of Colorado's air pollution control division. There is nothing in there about statutory authority, but the commission focuses on the practical consequences of what regulating at the 100 tons per year level would mean. The regulation of greenhouse gases clearly presents these administrative challenges, but it's not an absurd result; there is nothing inherently wrong with the statute regulating greenhouse gases at the 100 tons per year level. I submit that in our state statute there's nothing that says it would be absurd or impossible to achieve. The EPA, in its tailoring rule, where they tailored the applicability criteria, enlarged it from 100 to 100,000. One of the rationales they gave is what they're calling the one-step-at-a-time doctrine that says that given these administrative burdens, we'll get there eventually, let us implement this one step at a time, but what they've done is committed to not regulate sources below the 50,000 tons per year level by five years from now in 2016. If you take that one step, if cutting it in half over five years is a step, it's going to take them 50 years to get down to the 100 tons per year level, in 2061. That's a long time to come into compliance with the clear and plain meaning of the statute. Our conclusion is that rather than twist the statute to conclude that it authorizes them to delay compliance and multiply this 100 tons per year threshold by 1,000, the better approach would have been for the commission to come to the legislature and seek legislative guidance and perhaps statutory authority. I'm fully aware that there are practical consequences of this Committee finding that these rules are unauthorized and there are ways to fix the situation. We can always change the statute and there may be other ways to address that. This is precisely the type of policy issue that the legislature has traditionally wanted to be involved in and if the statute isn't working, this is the process for the legislature to become aware of that and to take steps to address it.

Mr. Morris said since we have some new members, I'll briefly go over what this Committee's charge is. It is very narrow. It's not about should the rules continue or is the policy behind the rules something we want to encourage or promote. Rather, it's very narrowly focused on a rule's statutory authority under our administrative procedures act in that no rule shall be issued except within the power delegated to the agency and as authorized by law. Any rule or amendment to an existing rule issued by any agency that conflicts with a statute shall be void.

Representative Levy said this is a general background question. I think basically you're saying that the commission doesn't have any authority analogous to this tailoring rule that the EPA invoked. Do we not have any precedent here in Colorado for avoiding an absurd result? Mr. Morris said I will mention to the Committee that the tailoring rule has been subject to extensive litigation in the D.C. circuit court of appeals, which is where those cases are originally filed. There's been something like 26 different petitions, consolidated into a couple different lawsuits. That litigation is ongoing about whether the EPA had authority under the federal "Clean Air Act" to do what it did in the tailoring rule. As something of a consequence of that, the rules that we have here have what's called a recission clause that says essentially that if the federal rules are held to be invalid, to the same extent the regulation of greenhouse gases under these rules shall be limited or rendered ineffective. I searched our statutes under absurd results, one step at a time, and administrative workload and there may be some things along those lines, but I'm not sure giving a 50-year time frame to get to that point would be countenanced by anything in our statutes or in our case law.

Mr. Morris said the first rule issue is that there is no statutory authority to aggregate greenhouse gas emissions. Under the rules, all the greenhouse gases are added together for purposes of reaching this 100 tons per year threshold or the 100,000 tons per year threshold. By allowing greenhouse gases to be added together this way, the rules' current threshold is too low. I'm going to go through Attachment A. It has all these definitions and I'm going to go through them in some detail. Rule I.B.23. of Part A of Regulation Number 3 defines greenhouse gases as the aggregate group of the following six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. These gases are treated in the aggregate based on the total carbon dioxide equivalent. Carbon dioxide equivalent is described in rules I.B.10. and I.B.44.b. of Part A of Regulation Number 3 to say that the carbon dioxide equivalent is determined by multiplying the mass amount of emissions (tons per year) for each greenhouse gas by that gas's global warming potential, and summing the resultant values to determine the carbon dioxide equivalent. The global warming potential is laid out in a table in a federal rule in the code of federal regulations that lists the six greenhouse gases and two categories of greenhouse gases. There are particular chemical compounds such as carbon dioxide, nitrous oxide, methane, or sulfur hexafluoride, but then there are two categories or families of compounds and those are hydrofluorocarbons and perfluorocarbons. In the table, there are actually a lot of different substances listed, and most of those are the hydrofluorocarbons and perfluorocarbons. Carbon dioxide is sort of arbitrarily assigned a global warming potential of one. The greenhouse gas that has the highest global warming potential is sulfur hexafluoride, which has a global warming potential of 23,900. How this works is you take each gas in tons per year, multiply that gas's tons per year by its global warming potential, add those numbers up, and you get the aggregate global warming potential. You also add the masses together to get to the 100 tons per year. Let's have a hypothetical source that can emit 50 tons per year both carbon dioxide and sulfur hexafluoride. When you add up those tons per year, that equals 100 and if you multiply each of those by their global warming

potential you'll see that you're way above 100,000 tons per year. The result under the statute is that it would not be a major source because it can't emit at least 100 tons per year of any air pollutant. It's only when you add these things together that you get to 100 tons per year. But, the result under the rules is that it would be a major source because it can emit 100 tons per year of greenhouse gases when you add those together and it can emit at least 100,000 tons per year of the carbon dioxide equivalent. Now, there is no statutory authority for the commission to add pollutants together in this manner. I will mention the commission has submitted a document to the Committee and it has some arguments about this issue. It talks about how the commission has authority to aggregate and it gives the example of the statutory definition of air pollutant. It says air pollutant is any fume, smoke, particulate matter, vapor, or gas or any combination thereof. It says, historically, combinations of different chemical compounds have been aggregated by the commission for permitting and it gives an example of volatile organic compounds. I will mention, however, that is due at least in part to the fact that the statute specifically mentions volatile compounds and so there is statutory authority to treat this whole family of chemicals as a single type of air pollutant and that's in section 25-7-109 (3) (j), C.R.S., where it mentions volatile compounds. In that same section of the statute, section 25-7-109 (2) (c), C.R.S., there is a reference to carbon oxides, which is a family. It would include carbon dioxide and it would also include carbon monoxide, which is kind of the traditional air pollutant. It, also in that same section 25-7-109 (2) (c), C.R.S., mentions fluorides, as a sort of a family. So, the hydrofluorocarbons and perfluorocarbons could arguably be treated under the statute specifically as a specific type of air pollutant and all those types of compounds could be treated as a single one, but you could not add fluorides together with carbon oxides. The statute refers to them separately, treats them separately. There is an example of a place in the statutes where the statute does specifically give the commission the authority to aggregate a type of pollutant together for purposes, in this case, of determining whether a source is a major source under the operating permit program. That class of pollutants is called the hazardous air pollutants. Section 25-7-114 (3) (a), C.R.S., says a major source means any stationary source that has the potential to emit 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. That is an example where the legislature gave explicit authority to aggregate pollutants. They didn't do this for greenhouse gases and, indeed, greenhouse gases are not specifically mentioned anywhere in the state statute. The closest we have is in section 25-7-109, C.R.S., where it refers to carbon oxides and fluorides as these two chemical families, and based on how the "Clean Air Act" and how our state act have been operating, you're not allowed to add these different categories together to reach the 100 tons per year level. For that reason, our conclusion is that the rules are invalid and should not be extended.

Representative Waller said the only area I'm struggling with is when you reference that part of the statute that would allow the enactment of these two rules, section 25-7-114 (3) (b), C.R.S. It gives the first part of the definition of major source and then it says directly emits,

or has the potential to emit, 100 tons per year or more of any air pollutant. My issue is it's silent on aggregation, yet in your conclusions in the memo you said they must be counted separately. I don't read that. The statute doesn't say you can't count them in the aggregate, so there's a little bit of a conflict there for me. Mr. Morris said clearly my argument would be easier if it said any single pollutant, but it doesn't say any single pollutant. It says any pollutant, but I think the plain meaning of that is "a" pollutant, not pollutants in total. It doesn't say pollutants, it's singular. The way it's been implemented historically has been any single pollutant unless there's some particular reason to treat a whole chemical family as one, like volatile organic compounds.

Mr. Morris said that was the first of four issues. That was the tough one. The second issue is kind of the flip side in that the rule is too lenient because it allows a source that does emit at least 100 tons per year of any single pollutant to not get an operating permit because under the rules you have now two standards you have to meet, both the 100 tons per year of any air pollutant and the 100,000 tons per year of carbon dioxide equivalent. I'm going to refer to the second example under Attachment A. This is a source that emits 100 tons per year of carbon dioxide. It meets the 100 tons per year threshold, but its global warming potential is one, so its carbon dioxide equivalent is 100. So, this is a source that emits 100 tons per year, but it doesn't meet the second test that the rules add of the 100,000 tons per year of carbon dioxide equivalent. The result under the statute is that it is a major source and the result under the rules is that it isn't. Here, the rules have too high of a threshold and are too lenient. Rule I.B.25.b. of Part A of Regulation Number 3 says exactly what I just said that the definition of a major source is a stationary source that has the ability to emit 100 tons per year of any pollutant, subject to regulation. That's how they add all of this about the 100,000 tons of carbon dioxide equivalent, by defining what is subject to regulation. That definition is in rule I.B.44. of Part A of Regulation Number 3 and you'll notice that the introductory portion to that rule refers to "any air pollutant", so the way the rules treat greenhouse gases is as an air pollutant, which is significant for a third issue coming up later. This introductory portion describes what subject to regulation means for all these other air pollutants but then says that greenhouse gases shall not be subject to regulation except as specified in other rules and the one that is of interest to us is rule I.B.44.e.(i), which says concerning operating permits, you have to have the potential to emit 100,000 tons per year of carbon dioxide equivalent. The commission again submitted its response. It says the legislature never intended such a pervasive pollutant to be permitted at this threshold. I don't know what the legislature's intent was back in 1973 or 1974, and in all the times it's been amended since then, there's nothing in there about greenhouse gases. I don't know what it intended, but it didn't very clearly say that a major source is a source that has the potential to emit 100 tons per year, and there's no exception in there in case a lot of sources meet this definition and it would be burdensome for them to get permits and it would be hard for the division to issue those permits. None of those exceptions are in there. Our conclusion is that rule I.B.44.e.(i) is contrary to the statute and should not be extended.

Mr. Morris said the third issue is, I think, an oversight by the commission in promulgating the rule and that relates to the definition of an "air pollutant". The statutory definition is set out in section 25-7-103 (1.5), C.R.S., and some of the language is directly quoted from the federal definition of an air pollutant. As I mentioned at the beginning, the U.S. supreme court held that greenhouse gases are an air pollutant under the federal "Clean Air Act" and in the commission's statement of basis and purpose of this rule, they say that the state statute definition mirrors the federal definition. Indeed, as I mentioned before, on the rule that we just talked about, rule I.b.44. it talks about for "any air pollutant" subject to regulation means "this" except for greenhouse gases it means this other thing. The whole rule is based on the premise that greenhouse gases are an air pollutant. If it's not an air pollutant, what is the commission doing regulating it? The whole idea of major source and operating permits is based on the potential to emit air pollutants. Greenhouse gas has to be an air pollutant for any of this to work. Rule I.B.6. of Part A of Regulation Number 3 contains the regulatory definition of air pollutant. Unlike the statutory definition, which is this very broad thing, the regulatory definition specifically lists the types of pollutants that are in fact subject to regulation, but they didn't amend that definition in this rule to add greenhouse gases. I believe that's simply an oversight. I think everything in this rule presumes that greenhouse gases are a pollutant. Therefore, our conclusion is that this particular rule conflicts with the statute and should not be extended. Again, the commission's response talks about this issue. It refers to the state statute that allows the commission to exempt air pollutants and it says that under federal law, greenhouse gas permits are only required for sources that emit 100,000 tons per year. Again, it says the commission has the authority to exclude greenhouse gases less than 100,000 tons per year from the definition of air pollutant, but they didn't do that. They didn't exclude greenhouse gas sources below 100,000 tons per year from the definition. They just didn't include it at all.

Representative Levy asked are you saying that they could have done it had they just invoked the right language and said expressly that we are using this statute to exempt greenhouse gas emissions? It would be okay if they had just intoned the language the statute requires them to intone? Mr. Morris said no, the whole rule is based on the premise that greenhouse gases are an air pollutant. I'm saying their argument just doesn't make sense, it doesn't really follow what they did. The whole thing is based on the premise that greenhouse gases are an air pollutant. That's why we're talking about major sources that have the potential to emit 100 tons per year of air pollutants.

Mr. Morris said the last issue relates to the requirement to pay annual emission fees. That requirement applies to a statutory definition of something called a regulated pollutant. The requirement for that is $22.90 per year per ton of regulated pollutant. Section 25-7-114.7 (1) (b) (I) (B), C.R.S., lays out the definition of what a regulated pollutant is and it says that it means each pollutant regulated under section 25-7-109, C.R.S. By regulating these pollutants, actually the commission is regulating greenhouse gases under section 25-7-109, C.R.S. The rules show that greenhouse gases are in fact regulated pollutants. Rule VI.C.1.e.

of Part A of Regulation Number 3 says that regulated air pollutant means each pollutant regulated under section 25-7-109, C.R.S., except greenhouse gases. The commission treats greenhouse gases as a pollutant regulated under section 25-7-109, C.R.S., but provides an exception. If you look at the statutory definition, there's no authority for the commission to exempt certain types of pollutants from the definition of regulatory pollutant. Section 25-7-114.7 (1) (b) (II), C.R.S., provides a statutory exception and it says that regulated pollutants for purposes of assessing fees shall not include fugitive dust, but there's nothing there that gives the commission the authority to do an analogous exemption. There's also a provision in section 25-7-114.7, C.R.S., that allows the commission to exempt sources of pollutants from the requirement to pay these annual fees. That ties into the commission's response that says the commission shall designate by rule those classes of sources of air pollutants that are exempt and then asserts that the commission exempted greenhouse emission sources from the requirement. But it didn't exempt sources; it exempted the gas itself. If you look at the rules, there is an exemption for all those sources that don't have to file what's called an air pollutant emission notice and there is a long list of sources, such as fireplaces, air conditioners, safety flares, and agricultural operations. What the commission has done is exempt a pollutant, and there is no statutory authority to exempt a pollutant by rule and therefore, we believe that rules VI.C.1.e. and VI.D.1. conflict with the statute and should not be extended. That is the end unless there are questions.

11:32 a.m. -- Garry Kaufman, Acting Administrator, Air Quality Control Commission, testified before the Committee. He said one of the fundamental rules of statutory interpretation is that statutory provisions must be read as a whole. That rule is absolutely essential today. What Mr. Morris has advocated and what he's presented is that the commission has no authority to adopt a greenhouse gas permitting threshold through the Title V program at 100,000 tons per year, but instead is required by the statute to adopt a threshold at 100 tons per year. In support of this he cited the definition of "major source" and within that narrow context, he makes a very good point. However, within the context of the statute as a whole, it is apparent that what the commission did was not only within its authority but was actually required by what you, the legislature, had directed us to do, and to adopt the threshold that Mr. Morris advocates would be in direct violation of our authority under the statute. To understand why the commission's rules were proper and within its authority, I think we need to understand a little bit about how air pollution law works and recognize that it's a joint effort between the federal government and the state government. Under the federal "Clean Air Act" and EPA regulations promulgated under that act, states are required to establish air quality programs to help ensure compliance with national air quality standards. While states are afforded flexibility in adopting certain strategies to achieve this goal, there are certain minimum requirements that states must provide for under the federal law. The Title V operating permit program is one of those requirements. The Title V operating permit program was established under the 1990 amendments to the federal "Clean Air Act" and pursuant to those amendments, the act stated that the EPA was required to adopt regulations establishing the minimum elements of an operating permit program.

The 1990 amendments go on to say that states are required to develop operating permit programs that comply with the requirements of the "Clean Air Act", including specifically those regulations adopted by the EPA. In meeting the requirements of the federal law, in 1992, the General Assembly authorized and directed the commission to promulgate rules and regulations as are necessary to implement the minimum elements of a permit program provided in Title V of the federal act. That's at section 25-7-105 (12), C.R.S. Ever since then, the commission has done just that, following this directly to the letter of the law, adopting regulatory revisions to address changes in the federal requirements that meet those requirements but do not add to or go beyond those requirements. In other words, we've done just what you told us to do, adopt those things that you are required to adopt, but adopt no more. I want to be very clear on this point: When we talk about the commission adopting the greenhouse gas requirement, there's only one reason we adopted that. Not because we felt it was good policy, not because we were going out to address a particular problem that we identified, but because, and only because, the federal government required us to adopt these regulations. We pretty much adopted them verbatim, but within our statutory scheme. We didn't change the provisions, we did not make them more stringent, we did not make them less stringent, we did just as we've always done, what was required under federal law, no more no less. Ultimately any statutory provision means what the legislature passing the statute wanted it to mean. To accept the interpretation of staff would mean the General Assembly intended the commission to adopt a permitting threshold for greenhouse gases that was 1,000 times more stringent than required under federal law. It would mean that the General Assembly intended that the commission was required to pass regulations that increase the number of Title V permitting sources from less than 100 per year to over 33,000. It would mean that the General Assembly intended that we make tiny sources of air pollution and treat them as major sources of air pollution. To give you a little perspective on this, what's a 100 ton per year greenhouse gas emitter? That would include a 20 horsepower diesel engine or it would include a .2 million BTU fuel burning device such as a furnace or boiler. To get some perspective on that, a typical fuel burning device in a house furnace is between .07 and .11 MMBTU and a boiler is about .05 MMBTU. Just a typical household alone would be about a 75 ton per year greenhouse gas emitter. If you have a larger house, if you have a couple furnaces, if you have a large furnace, you would then under the definition Mr. Morris is advocating, be a major source under our program. That would mean sources such as my child's elementary school, the state capitol, and virtually every office building downtown would now be major sources that would have to get the most complex permit that we require.

Mr. Kaufman said I'll speak very briefly regarding the fee provisions because to adopt the interpretation that Mr. Morris has advocated, that would mean that the commission and department are required, not allowed, to collect hundreds of millions if not billions of dollars in new fees every year. This is not the intent of this statute and we don't believe that's right. Mr. Allison is going to go through some of the statutory provisions in more detail and explain why the statute specifically provides some of the flexibility that we believe it does.

11:38 a.m. -- Will Allison, Attorney General's Office, testified before the Committee. He said I represent the department in matters with respect to air pollution law. Although we obviously disagree with the recommendations of staff, we do appreciate their perspective and their careful consideration of what are admittedly some novel and rather complicated issues. We understand how they arrived at some of their conclusions. In fact, they reflect some of the debates and discussions and litigation that are going on at the federal level with respect to the EPA's tailoring rule. Nonetheless, as it stands, under federal law, the EPA currently regulates greenhouse gases at the 100,000 tons per year threshold and the commission promulgated regulations that mirror the federal program, consistent with both state and federal law. As Mr. Morris properly pointed out, although the policy issues surrounding this are quite significant, the intent of this hearing is fairly narrow, and that is to determine whether the commission's rules were promulgated consistent with their statutory authority. As part of that analysis, as Mr. Kaufman pointed out, it's important to look at the statute as a whole. When that's done, we believe that the clear intent of the legislature is that Colorado implement a Title V permitting program that's consistent with the federal program. The legislature gave the commission broad and explicit authority to promulgate regulations in order to remain consistent with the federal program. I'd like to quickly touch upon three statutory provisions that I think are important and talk about the commission's authority. All of these are under article 7 of title 25, C.R.S., of the Colorado air pollution control act. Under section 25-7-106 (1), C.R.S., the commission has maximum flexibility to develop an effective air quality control program and may promulgate such combination of regulations as may be necessary or desirable to carry out that program, including classifying and defining different degrees or types of air pollution. Under section 25-7-105 (12), C.R.S., the legislature has provided that the commission shall promulgate rules and regulations as are necessary to implement the minimum elements of the federal Title V permit program. Under section 25-7-114.3 (4) (a), C.R.S., of that same act, the legislature has provided that the operating permits and requirements for permit applications in Colorado shall be consistent with Title V of the federal act. Because Colorado's permitting program must be consistent with the federal program, the commission's adoption of rules to ensure consistency is appropriate. Under the federal Title V program as of today, greenhouse gases are only regulated when they trigger these higher thresholds, and Colorado amended its thresholds to be consistent with the federal program. Conversely, if Colorado were somehow required to permit sources at emission levels 1,000 times lower than the federal program, I believe that would be inconsistent with the federal program. Accordingly, reading simply one statutory definition, in this case the definition of major source and its reference to 100 tons per year, in a vacuum and literally without any reference or consideration of the context of the other sections of that same act in my opinion leads to a result that would contradict the legislative intent for the commission to establish and maintain a program that's consistent with the federal program. That's not to say that at times Colorado cannot be more stringent than the federal government, but when the commission wants to promulgate regulations that are more stringent than the federal program, our state act sets forth a specific process for doing that under section 25-7-110.5 (5), C.R.S.

Essentially, if the commission is going to adopt any rule that is more stringent than or differs from the federal act, it first has to jump through various hoops and make 12 separate and distinct findings about why more stringent rules are appropriate and necessary from a state regulatory perspective. It's a condition precedent to Colorado being more stringent than the feds and it requires affirmative action on behalf of the commission. Here, conversely, what staff is advocating is a result whereby Colorado would be significantly more stringent than the feds without the commission having done anything, and that is directly at odds with the process the legislature set up for when Colorado wants to be more stringent. The second statutory provision that's on-point with respect to stringency is section 25-7-105.1, C.R.S. That deals with federal enforceability and it says when Colorado decides to be more stringent than the feds, that's going to be a state-only program and it's not going to be federally enforceable. As Mr. Kaufman was talking about, certain programs have dual regulations where both the state and the federal government have authority. Title V permits are one of those things. They're federally enforceable once approved by the federal government. In this context, all of the regulations at issue that staff takes exception to are part of what's called our state implementation plan. They would become federally enforceable. If indeed we were to have definitions that are more stringent than the federal government, by state law those definitions would not be allowed to be in the state implementation plan and federally enforceable.

Mr. Allison said Mr. Morris walked through each of the rules that staff recommends not be extended. I'd like to also touch upon each of those rules briefly and explain why we believe promulgation of each one of those rules was within the commission's statutory authority. There are seven different rules. To summarize, five of those are definitions, four of which are identical to the federal program and which were adopted in October, and two of them relate to the fee issues that you heard testimony about. First, staff objects to the regulatory definition of "air pollutant". They say it conflicts with the statutory definition and shouldn't be extended. This is somewhat of a curious issue in that this definition was not amended in October of 2010. The commission did not address or amend this definition, so we're not quite sure why it's being recommended that it shouldn't be extended. Nonetheless, I do agree that the definition, particularly the statutory definition of air pollutant, is relevant when looking at the statutory scheme as a whole and trying to understand what it is that the legislature has intended with respect to the regulation of air pollutants. The definition in the statute under section 25-7-103 (1.5), C.R.S., specifically says that air pollutant does not include any emission exempted by the commission consistent with the federal act. Again, it's relevant in that it goes to this overarching theme of consistency, and it grants the commission broad authority to define air pollutant in a certain way, so long as that's consistent with the federal act. So long as it's regulating air pollutants consistent with the federal act, that's the legislative intent. The legislature recognized that there might be instances where in fact the EPA makes changes to the way that it regulates certain air pollutants and it gave the commission the authority to make conforming changes to state regulations in order to maintain consistency with the federal program. Here, in order to

maintain that consistency, the commission did not, as has been testified to earlier, amend the definition of air pollutant, but rather, consistent with the federal government, it went about it by adopting a regulation for what's called "subject to regulation" and defining what pollutants are subject to regulation. That is consistent with the EPA's approach, it's identical to what the EPA did, and the EPA makes clear in its tailoring rule that its regulatory changes reflect their long-standing interpretation that the "Clean Air Act", including Title V permits, are only triggered by those pollutants that are "subject to regulation". One can agree or disagree with the EPA's approach and interpretation, and, in fact, that's all unfolding as we speak in litigation at the federal level, which is going to take some time to play itself out, but as we sit here today, the EPA's interpretation of its own act is that it has the authority to do this, that its Title V program only triggers at the higher thresholds. It has required states to adopt similar provisions and Colorado's recently adopted rules are entirely consistent with the federal program as it exists today.

Mr. Allison said as you heard, staff objects to four different definitions, all for the same reason, which is essentially that each one of those definitions aggregates greenhouse gases, and these definitions are "greenhouse gases", "carbon dioxide", and "carbon dioxide equivalent" and then a definition that includes an equation of how one arrives at what a carbon dioxide equivalent is. Again, each one of these definitions is identical to that which the federal government has promulgated pursuant to the tailoring rule and, thus, they are entirely consistent with the definitions adopted by the EPA as part of the federal program. The objection, apparently, is that the definition under state law refers to any pollutant, singular, but the exact same definition also expressly provides that it includes any pollutant or any combination thereof and it's unclear to me under staff's interpretation what meaning a combination has. It appears to have no meaning, but clearly "combination" refers to more than one pollutant. The express language of state law is that an air pollutant can include any pollutant, singular, or combination, plural, thereof. In its tailoring rule, the EPA explains at some length why it is aggregating and adding all these greenhouse gases together and why they think that's appropriate. I'm not going to go into all that today, but the point is essentially the same, namely, that the EPA's interpretation of its own act is that it has authority to do this, it's done it, and it now requires states to do it. The state of Colorado, similar to other states across the nation, has done exactly that and has adopted rules that are consistent with the federal program in keeping with the legislative intent.

Mr. Allison said finally, staff objects to two regulations that deal with emission fees for greenhouse gases. This is essentially a state issue, meaning in its tailoring rule and other documents, the EPA doesn't take a formal position on whether this needs to be done. It leaves it to the states to determine if and how they want to charge fees for greenhouse gases. Staff concludes that the commission has no discretion whatsoever to exempt fees for greenhouse gases and they cite section 25-7-114.7, C.R.S., of the state act for that proposition. However, that section provides that the commission shall designate by rule those classes of sources of air pollution that are exempt from the requirement to pay an

annual emission fee. That's what the commission did here. They exempted, by rule, the class of greenhouse gas emitters as sources that need to pay the emissions fee. Perhaps the language could have been better or they could have used the word classes or sources, but the intent obviously was to exempt, for now, these types of emitters from the need to pay emissions fees. You heard, on top of the legal arguments, some of the policy arguments on why that was appropriate. In fact, to adopt staff's recommendation could essentially render that commission discretion meaningless. Again, they exempted a type of emitter from the need to pay fees and if they don't have any discretion to do that, I question what the statutory provision would even mean. In conclusion, we believe that the commission's promulgation of these rules was within the commission's statutory authority, we believe that the adoption of these rules was appropriate in order to maintain consistency with the federal act and we would respectfully request that this Committee vote to extend those rules.

Senator Carroll said I think this is one of the more complicated rule reviews we've had. Each of these rules I understand has a slightly different analysis, but it looks to me like there is a permanent structural catch-22. I think the staff has the stronger plain meaning explanation of the two and I think your explanation of the likely intent, result, and directive, if not ability, to actually stay consistent with the feds is very compelling. The structural catch-22 I see is that while you're given broad rule-making authority, broad rule-making authority can never really exceed the plain language of a statute. At the same time, you may be directed to stay consistent with the feds and what's missing in that loop is that we don't update our state statute to give you plain language cover while you're also in the process of meeting your other directives to stay consistent with the federal government. We have a permanent structural statutory problem. Our statute is ambiguous at best and I see a lose-lose situation where you either are out of compliance with mirroring the federal program or you're beyond the plain language of the state statute. It seems like the cleanest way would be to clean up the state statute to remove that tension. Let me ask for your feedback on that. Do you think there are some plain language changes we could make to the state statute in these areas that would reduce some of that tension? Mr. Kaufman said I think you're correct to identify that there is a conflict between the two types of provisions. I do think that the conflict, for the purposes of this proceeding right here, can be reconciled in that the overriding concern and directive of the legislature to the commission is that we be consistent with the federal act and that the 100 tons per year provision, consistent with that, tells the commission not to go beyond that, not to regulate, for example, at 50 tons per year. I think they can be reconciled for purposes of this. I understand your point that perhaps the statute is a little unclear and it may at some point in the future make sense to clean that up and I think there's ways to do that by adding some flexibility on the 100 tons per year. I don't think it's necessary to reach the conclusion here that we weren't authorized because I think that we truthfully were, it's just that the statute could be made a little better and a little more clear.

Senator Carroll said I think there were several citations given about rule-making authority

and broad rule-making authority, but even the broadest rule-making authority doesn't give you license to conflict or exceed the plain language of the state statute. Let's just say you have authority to do that, but is there a conflict between what was ultimately done and the plain language of the statute? I think a very good legal background was given of a variety of different places of broad authority. None of those broad exercises of authority, however, give an exemption to a plain language conflict in excess of what's there. I think there's some policy things here that are terribly important and, frankly, dysfunctional, if they aren't figured out here very quickly, so it's really hard to hear this in a policy kind of way. Does this simply exceed the scope or are we trying to do something that makes some sense here? Let's concede you have broad rule-making authority, but why is it that, for example, when you just look at two definitions, there are pieces missing from the rule that are plain language present in the statute? Where do you think you get that authority from and if we have conflicting directives, which I think is a given here, shouldn't we by statute figure out some order of what trumps what so we don't keep having this issue? Mr. Allison said very good questions. When I started my comments I mentioned that some of the debate and concerns reflect debates and concerns that are ongoing at the federal level. I think that's really a reflection of your questions. For example, at the federal level, there are parties challenging the EPA's actions and saying you have a flaw with the "Clean Air Act", Congress needs to amend the "Clean Air Act", and the EPA should not have promulgated the tailoring rule absent amendments to the "Clean Air Act". That's litigation that is ongoing and it will be for some time. Arguably, to adopt staff's interpretation would presuppose that the challengers to the EPA's action are going to win that litigation. I don't know that we should be presupposing the end result of that litigation. I think where we are is that federal law as it exists today sets forth that this is the program. Remember, where do we get our authority? Of course the commission gets its authority from the state legislature, but the state gets its authority from the federal government. This is a delegated program. The "Clean Air Act" is a federal program and the feds then delegate whatever authority exists therein to the states. For example, they have delegated to the state a Title V program. On top of that layer, you have this notion that we need to be consistent with the feds and that's all we're trying to do. There are legitimate questions about are the feds out to lunch, have they made a mistake, have they overreached? But, from my perspective, and this is a mix of law and policy, legally we need to be consistent so we should be consistent, then, as a matter of policy, there's a question of why would Colorado want to get out ahead of where the feds are right now on these types of issues and does it make more sense to be consistent and see how the federal program plays out, and if changes are made to make corresponding changes to the state act. That's, frankly, consistent with what happens with a lot of these air pollution laws. It's a very common practice that the federal government will promulgate the federal program with respect to a certain constituent, they'll get sued by environmentalists for allegedly not going far enough, they'll get sued by industry for allegedly going too far, but the state, in the interim, must adopt programs that are consistent with that federal program. If the litigation changes that program, the feds and, by extension, the states recalibrate accordingly.

Representative Levy said I think we're all struggling with the same issue here, but I think I heard you say something very different and your analysis is very different from Mr. Morris' analysis. I heard you essentially say that our authority is derived from Title V of the federal "Clean Air Act" and then you cited the statutory authority that allows our rules to be consistent with the "Clean Air Act", and you're saying for better or worse, right now the interpretation of the "Clean Air Act" as embodied in the EPA rules is that you can do 100,000 tons per year. Mr. Morris was looking only to state statute for this authority. I guess I'm wondering when is the commission allowed, permitted, or required just to adhere to state law and when is it allowed, permitted, or required to follow federal law? Is that where some of the disagreement comes from? Mr. Allison said the state can differ. State law is clear that we can be different than the feds and we can be more stringent than the feds, if, as a matter of state law and policy, the commission decides that's appropriate. But when that happens, the legislature set up a very specific process for what it expects to happen when the state wants to regulate something more stringently than the federal government. This is the 12 separate findings that I talked about. Of course, no such process occurred here. You would be more stringent through no action whatsoever. The second point is that when we are more stringent, the legislature has made clear that we reserve that type of regulation to ourselves as a state-only program. We don't want the federal government meddling in those programs that we have elected to go beyond the federal requirements. In terms of what we make federally enforceable, as a matter of state law, it's going to be the bare minimum, only that which is required by the federal act. Again, the EPA, rightly or wrongly, has instructed all the states that they are now required to regulate greenhouse gases and they expect states to do that at these levels.

Mr. Kaufman said if I could add that in the context of the Title V program, which is by definition required to be federally enforceable and part of the federal scheme, too, we don't really have that flexibility to go beyond what they were doing. I think your question addresses the seeming conflict between that very clear statutory directive that we be no more stringent than what's required under federal law and this definition of 100 tons per year. It is certainly a conflict, but as Mr. Allison pointed out, there was some flexibility that the General Assembly provided the commission in terms of the definition of air pollutant. It's 100 tons of any air pollutant. The definition of air pollutant gives the commission very broad authority, though not unlimited, to exempt out certain pollutants from that definition, which is, in effect, what's happened in this case for greenhouse gases that are below 100,000 tons. When I say the authority is not unlimited, it's checked by the fact that the commission can exempt out those pollutants as long as it's consistent with the federal act, which, again is what we've done.

Representative Gardner said Senator Carroll has juxtaposed in her questions that there was a very clear piece of statutory language that you had basically said there's a comprehensive rule structure that would overtake that. Do you concede that the rules are in conflict with some very clear statutory language? The reason I ask the question is it seems to me that

nothing could be less clear than some of the statutory provisions. Are you conceding there's clear statutory language here that you are then resorting to the larger regulatory scheme to sort of supercede or overtake? Mr. Allison said no, we're not conceding. We would concede that what the EPA has done is a novel approach, it's a unique approach that raises legitimate questions, but again regulations are meant to interpret and implement statutes and the EPA has promulgated a regulation, the tailoring rule, that it believes implements and interprets the existing "Clean Air Act". The commission followed the same procedures and we don't concede that there is an explicit conflict between the regulations and statute.

Mr. Kaufman said if I could add to that, I think what's clear is that we are supposed to be consistent with the federal act. I think what's unclear is whether this 100 tons per year definition was ever intended to apply to greenhouse gases. When this came into effect, greenhouse gases weren't on anybody's mind other than maybe a few scientists that we have never heard of. It's now obviously a very charged issue, but I don't think that back in 1992 when that definition was put in it was put in with the intent that it apply to this provision. Again, it does seem to fit. I think we all recognize it wasn't probably meant to do that and possibly in the future that might be able to be cleaned up, but I don't think that implicates our authority and our directive to do what we did, which was to follow the federal law and be consistent with the federal act.

Senator Carroll said overall, and this is really for the department, I think what we really need to do is be consistent both with the state act and the federal act. We're probably going to need some statutory direction, beyond something that this Committee does, about how we do that, because we're not really permitted to comply with the federal act at the expense of selective compliance with the plain letter of the state act, nor are we free to comply with the plain letter of the state act and ignore the federal act. I think your department is uniquely in a position to know where those tensions are and figure out what would give us some clearer guidance on that.

Senator Schwartz said I would just like to remark that I think that the commission has really tried to straddle both these directives and I think they have served the state to some extent. We have a conflict here but I don't think that there was any intent on the part of the commission or department to circumvent the state statute.

12:11 p.m. -- Jennifer Biever, Colorado Association of Commerce and Industry (CACI), Air Quality Committee, testified before the Committee. She said as many of you know, CACI is a private, nonprofit trade association that was formed in 1965 when the Colorado chamber of commerce and the Colorado manufacturer's association merged. CACI's members employ over 200,000 Coloradans in the private sector workforce and include 40 local chambers of commerce with over 20,000 Coloradan companies with over 8,000 employees. CACI's energy and environmental council maintains several energy and environmental committees with the purpose of reviewing legislative and regulatory

proposals such as this one, often ones of potential concern to CACI members. The air quality committee has looked at this issue in particular and we testify here today in support of the revisions to the commission's regulation number 3 and common provisions that you've been discussing today that were adopted by the commission on October 21 and that you're looking at through your rules function today. Those revisions, as you've already heard, were adopted pursuant to the EPA's greenhouse gas tailoring rule and its directive from the supreme court of the United States in *Massachusetts v. EPA* with respect to regulating greenhouse gases. Particularly in that case, the supreme court determined that greenhouse gases are a regulated air pollutant under the "Clean Air Act". We think it's important to remind the Committee that the supreme court's judicial construction of a statute such as the "Clean Air Act" is an authoritative statement about what the statute means both before and after the time of its ruling. We also believe that where the supreme court has spoken on the meaning of the statute, courts and other governmental bodies must respect their interpretation in the understanding of that governing act. We think a clear understanding of the legal consequence of the supreme court's ruling in *Massachusetts v. EPA* and the EPA's implementing regulations are important to your consideration of the rules. As you heard from the department, throughout the "Colorado Air Pollution Prevention and Control Act", which I'm just going to call the Colorado air act, the General Assembly references compliance with and adherence to the federal "Clean Air Act" and the federal air quality program, and, in fact, was required to do so in order to get delegation from the EPA in order to maintain authority to implement the "Clean Air Act" in the state of Colorado. Of particular note, the Colorado air act requires the commission, when it's promulgating its rules, in particular its state implementation plan, to meet all the requirements of the federal act and they shall be revised whenever necessary or appropriate. We think that's what the commission has done here. It has implemented its duties and in so implementing, the Colorado act also indicates that it needs to take into consideration federal recommendations and requirements. Any suggestion that the General Assembly, when it was enacting the Colorado air act, did not intend to regulate greenhouse gases simply because it doesn't mention them, cannot be reconciled with established principles of the effect of the supreme court's decision in *Massachusetts v. EPA*. Like I said, the *Massachusetts v. EPA* decision means the supreme court determined that the "Clean Air Act" not only covers greenhouse gases going forward but always has and the Colorado air act is also implicated retrospectively by the very nature of the supreme court's decision. We think the commission's rules were directly responsive to and consistent with the "Clean Air Act", the EPA's implementing regulations in response to the supreme court's decision, and thus was within the intent of the Colorado air act.

Ms. Biever said the rules were also consistent with and did not exceed the significant authority that they'd been granted under that act, which has been upheld by the state supreme court of Colorado. One thing I want to mention as well is that the supreme court of Colorado has held that statutory interpretations that defeat legislative intent should not be followed and that the intention of the legislature will prevail over literal interpretations of

a statute that lead to an absurd result. The commission has already talked to you about the impractical nature of implementing the greenhouse gas emissions at the 100 and 250 tons per year threshold. It would be difficult not only for the regulators but also for the regulated community because it could means tens of thousands of additional sources that would be regulated. We're concerned that a failure of the regulations adopted by the commission to be implemented would result in one of two things. One, it would either result in implementing regulations that are more stringent than the federal "Clean Air Act" and the EPA, which you've already heard from the department they're not authorized to do either under our statute or the federal "Clean Air Act", or, two, it could result in the commission forfeiting its right to regulate greenhouse gases because its operating permit program doesn't meet the minimum requirements of the EPA's federal "Clean Air Act" program. We would be concerned that in some way that could result in an abdication of their authority to the EPA. Neither of these results comports with the legislature's intent in the Colorado air act, nor would it be attractive to CACI members with their collective interest in a healthy business environment in Colorado. We support the commission's interpretation of the Colorado air act on not just a general basis, but on a specific basis. We agree that it allows the commission to narrowly define air pollutant in the way the EPA has done, that it allows it to exempt sources, in this case greenhouse gas emitting sources, from the payment of emission fees, and that it allows them to aggregate compounds like greenhouse gas emissions similar to volatile organic compounds. The mere fact that the greenhouse gas emissions are not specifically mentioned in the act doesn't mean that a similar approach can't and shouldn't be taken there. And also that it allows them to limit the application of the 100 and 250 tons per year threshold to traditionally regulated pollutants under the "Clean Air Act". We ultimately think that the commission had broad authority under the Colorado air act to adopt these rules and that they were merely following the act's directives to comply with federal "Clean Air Act" and implementation and, accordingly, we would respectfully urge you to extend these rules.

Senator Morse asked Mr. Morris to provide the Committee with a brief analysis about the issue of Colorado's requirement to follow federal guidelines and rules generally and how he perceives that argument playing into this.

12:18 p.m. -- Tom Morris addressed the Committee again. He said nobody who is on the Committee now was here four or five years ago when a very analogous situation came before this Committee. In the background presentation, I talked about when a pollutant becomes subject to regulation, two programs become implicated, the operating permit program - that's what we've been talking about under Title V - and another program that we haven't talked about which is the prevention of significant deterioration and the new source review (NSR). A somewhat analogous situation arose when the EPA promulgated rules that some people perceived made the rules less stringent for what had to happen under NSR and the commission did what it did under these rules, and felt that they can't be more stringent than federal law. In the NSR context, our statute is very specific in one respect. It says that

the commission's rules have to be consistent with the federal EPA's requirements, so the commission had almost nothing to do but what it did. In that sense, our statute was specific with the NSR by saying specifically, not that our state rules per NSR had to be consistent with the "Clean Air Act", it said it had to be consistent with EPA requirements. There's nothing else in the state statutes that talks about what NSR is or what its standards are or anything. It just says be consistent with the EPA. Our recommendation was the rules were authorized. Somebody asked our Office to review the rules, so we made a presentation to the Committee and our recommendation was that the rules were authorized. Contrast that with this situation where we have some very specific details about what a major source is, which is 100 tons per year of any pollutant and all those provisions I talked about. On the other hand, all the arguments you heard about what is consistent, those specific references are consistent with Title V of the "Clean Air Act", not with the EPA's requirements. The "Clean Air Act" has the exact same definition, 100 tons per year. That's kind of the big picture of why I thought this set of rules is unauthorized under our statute but the NSR rules were authorized. Our statute has some specificity about what a major source is and the requirement that this be consistent with the "Clean Air Act". It says 100 tons per year; it doesn't say to be consistent with the EPA. That's the background for that.

Mr. Morris said I think this argument about consistency also relates to the definition of "air pollutant". How is excluding greenhouse gases from the definition of "air pollutant" in the rules consistent with the holding in *Massachusetts v. EPA*? The whole holding of that case was that greenhouse gases are an air pollutant and, as Ms. Biever said, it always has been. Our definition is modeled on the federal definition and the commission said when it promulgated this rule that our definition mirrors the federal definition and the rules themselves talk about for any air pollutant "subject to regulation" means one thing but with regard to greenhouse gases it means something different. All of those presume that greenhouse gases are an air pollutant and to be consistent the way they talk about being consistent, we better define a greenhouse gas as an air pollutant, otherwise the commission has no authority to regulate it, as far as I can tell, under our state statutes. Lastly, with Representative Levy's point about distinguishing who has the say over whether rules are consistent or not, there is litigation over the federal rules that's in federal court. This Committee has the first cut at whether these rules are authorized under our state statute. It's a completely different issue. Even though there are a lot of similarities, structures, and similar definitions, there are discrete differences. They are different statutes, different jurisdictions. I have one last point and that's that the commission says they don't have the resources to address this overwhelming permit load and with regard to the fees, but then they said they would have billions of dollars. The statute does have a 4,000 tons per year cap on the fees, so it explicitly looks at big sources.

Representative Levy said I want to ask you a question similar to Senator Carroll's question. This does appear in some sense to be an absurd result. I think it's safe to say it's correct we didn't have any intention of having this result because when the law was passed greenhouse

gases were not considered a pollutant, so what do we do? You may be correct that what we do is all we statutorily can do, which is apply the only law we have to apply. What would be our fix here if we wanted to try to allow the commission's result? I think we still have the issue of whether the EPA has correctly acted under Title V, but I'm not sure that's our call to make. What would our fix be here? Mr. Morris said I think there are at least a couple of ways to approach it. One, obviously, would be to run a bill, whether it's the Committee, an individual Committee member, or any member of the General Assembly, to amend the state statute, prior to, if the Committee did not extend these rules, enactment of the rule review bill to give explicit authority to the commission to make the changes I talked about that the NSR program has. It could say that a major source means 100 tons per year except as necessary to be consistent with federal EPA requirements. You could do the same for regulated pollutants, give them authority to exempt regulated pollutants, not just sources of pollutants, but to exempt particular pollutants that are emitted in huge quantities by a wide variety of sources, etc. That's one approach. There are other approaches that could maybe do something within the rule review bill itself. Those are very nontraditional and it's not something the Committee has done in the past, but that doesn't mean it couldn't be done through rule review.

Senator Morse said at this point I'm going to use my prerogative as the Chair and pull this matter off the table so we have time to think about this and figure out what the right answer is before we move forward with it. That also means that I'm going to lay over the second item on our agenda until we get a chance to sort through this issue.

12:27 p.m. -- Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 3 - Approval of OLLS Budget for FY 2011-12.

Ms. Eubanks said there were a number of documents given to you yesterday, but I'm going to focus on two documents and try to boil down the budget to some basics, although I'm happy to address any questions you may have arising out of any of these documents. Bottom line, our request for fiscal year 2011-12, without including funding for the PERA AED and SAED payments, is $5,132,601. That represents a 0.85% reduction from our current year's budget. Including the PERA AED and SAED payments, we're requesting $5,320,237, which is a reduction of 0.22% from our current year's budget. At the end of this presentation, we'll be asking the Committee to approve this budget request, but before we do that I'd like to explain some things about our budget and how we got to these bottom line numbers. You can tell from the chart in the budget overview that we have four major components to our budget: Personal services, which is the lion's share of our budget, operating expenses, OLLS travel, and the Commission on Uniform State Laws. Our budget was prepared in accordance with six directives from legislative leadership. The first directive was that we accomplish a 1.5% reduction in funding for personal services. That equates to a funding reduction of $68,894. In addition to that funding reduction in personal services, we were also directed to comply with the JBC common policy to fund the increase

in the employer's contribution for the health, life, and dental insurance costs that was recommended by the department of personnel and administration for all state employees. That increased cost is approximately $25,000. What the itemized sheet does is boil down for you exactly how we accomplished the 1.5% reduction in personal services and also funded the increased costs for the health, life, and dental insurance. When you net that out, you won't see on the spreadsheet or anywhere else where it says a 1.5% reduction because some of the reductions were then offset by the increase in the insurance costs. Basically, we took a reduction to the aggregate of 1.5% in our personal services through a reduction in continuation salary, annual leave paid, short-term disability, and comp time paid. We also had a couple of small increases in terms of costs for medicare tax. Some of the salary that was previously paid to an employee who recently retired that was exempt from medicare tax is now subject to that tax, so we had that additional cost. We also have had a small increase in the rate for short-term disability insurance. What we did was actually reduce more than 1.5% in personal services to net out those two small increases in cost. Basically, to accomplish the 1.5% is the top part of that chart. Then, it lays out our increased costs of the $25,117 for the increase for health, life, and dental insurance and then how it nets out in terms of the total reduction in personal services of $43,777, and that ends up being a 0.95% reduction in our personal services component of our budget. In addition to those two directives that we've complied with, there were some other directives that affect our personal services budget. First of all, no surprise, we were directed not to build in any funding for merit or salary survey increases and we have not done that. I will make you aware that this is the third fiscal year that we've been asked not to fund merit or salary increases. Everyone is in the same boat, we understand that. We were also asked to reduce our FTE authorization by one. This particular FTE is being transferred to Legislative Information Services (LIS) so they can fund an additional employee within that office. It's coming from one of our unfunded FTE, so it leaves us with basically a 55.1 FTE authorization, with 49.5 FTE that is actually funded in our 2011-12 fiscal year budget. In addition, we were directed to continue the 2.5% shift of the employer contribution for PERA. That was something that occurred in the current year's budget resulting from legislation. There is a bill working it's way through the system right now, Senate Bill 76, which the Senate took up on second reading this morning, that would continue that for fiscal year 2011-12, and so our budget builds in that continued reduction in the employer contribution. Unfortunately, part of the legislation is that the cost shift goes to our employees, and their contribution to PERA is actually increased so their take-home pay is less, but that's so there wasn't a fiscal impact to the total amount of revenue that PERA was receiving through employer and employee contribution rates. Those are the five components that directly affected personal services and are reflected in that component part of our budget. In addition, in terms of the other three components of our budget - operating, travel, and the Commission on Uniform State Laws - you'll note that we have no funding increases in those components. We have reallocated some moneys within our operating expenses to focus more moneys directly on the budget item for registration fees, which is the primary way we pay for professional development in terms of conferences and CLE programs. We're hoping to provide more

opportunities to our employees for professional development with the additional funding. We are not changing at all our request for travel, including in-state as well as out-of-state travel. In terms of the Commission on Uniform State Laws, again we are not asking for any funding increases for the commission's work. We are moving it within the budget because the national meeting for the commission will be held in Colorado this year. We are moving the travel funding from out-of-state to the in-state line and then for the next fiscal year, because the meetings will be held out-of-state, that money will be moved, but we're not changing the amount of money for travel. The other directive we got from legislative leadership was to go ahead and build in the funding for the PERA AED and SAED, which is statutorily required and done to help deal with the unfunded liability problem of PERA and those numbers are also built into our budget, although those numbers are not actually built into our line item appropriation. They are done in the aggregate for all of the service agencies in the House and Senate on a separate line item within the legislative budget. We do calculate how much for our Office is the cost, as do all the other entities.

Senator Morse said we approve this budget and that goes on to the Executive Committee who approves the legislative budget in total from all the different departments within the legislature.

Senator Carroll said I just wanted to think Ms. Eubanks for making a difficult budget as clear as possible. I really do see some pretty impressive value we get out of what this Office delivers for the people of the state of Colorado. I know you have taken to heart very seriously doing a lot more work with less, like we're asking everyone else to do. I wanted to thank you for doing that and while I know there are a lot of fabulous people who do deserve the merit raises and it's a hollow substitute, I just wanted to thank you and everyone in your Office. They are no doubt worthy and deserving of it and at least can get our appreciation if nothing else.

12:39 p.m.

Hearing no further discussion or testimony, Representative Gardner moved to approve the budget and forward it to the Executive Committee. The motion passed on a 10-0 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Carroll, Senator Morse, Senator Roberts, and Senator Schwartz voting yes.

Senator Morse said I too would echo on behalf of the entire Committee the sentiments of Senator Carroll. We have very interesting debates on the floor of the Senate and talk about state employees but it is very interesting that within this building we understand that we have some of the best of the best in all of our departments and your Office is absolutely no exception. We so appreciate everything that you do and the way you drop whatever you're doing and deal with whatever of us, in either chamber, in either party, needs, and work the

late hours when the committees go late and work the late hours when the floor work goes late. It appears, I know, sometimes to go unnoticed, but it really doesn't, so, again, thank you from the bottom of our hearts and we look forward to working with you.

12:42 p.m. -- Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 4 - Proposed Timeline for RFPs for the C.R.S. Contract on Publications.

Ms. Gilroy said the proposed timeline for the RFP process is being handed out. As you were told previously, the renewal for the publications contract is coming up. This contract provides for the publication of not only the Colorado Revised Statutes, the official version of Colorado law, but also the session laws for the state of Colorado and with that the red book, which is the tabulation of all changes to all statutory sections each and every year. I should mention also there is a CD-ROM that is available as well. The constitution requires the General Assembly to provide for the publication of all the laws that are passed and, statutorily, that requirement rests with this Committee. Currently, our Office does almost all of the publication work in-house. This is kind of rare; the majority of states don't do the kind of publication work we do. We actually create the statutory database. We do all of the revision work and editorial work, and we write all of the editor's notes, source notes, annotations, the index, the tabs, and the tables that compare changes from the law. Basically what we do is provide the statutory database to our contractual publisher who currently is LexisNexis. They are based out of Charlottesville, Virginia. They essentially format the books, add headers and pagination, bind the books, and distribute them for us. We, as part of our contract, receive 3,150 sets of the C.R.S. and approximately 1,100 sets of the session laws. You'll notice, when you look at our budget, there's a significant amount set aside for printing costs. That's the publications contract. It's about $217,000 in your budget proposal. Currently, our contract is for approximately $150,000, but we are providing in that contract session laws and statute books to governmental entities across the state. Many people don't realize that, but it's in our budget to do that as part of the publications contract, so courts and local governments all have access to the books through our budget. What's required is that at least every 10 years, we have to put the contract out for bid. The statute and the constitution require that it go out to some standard bidding practice such as a request for proposals and then the contract needs to be awarded to the lowest responsible bidder. However, the Committee can take into consideration any economic, fiscal, or tax impacts to citizens of the state of Colorado in awarding the contract. The usual practice is to have a contract for a maximum of five years, which can be renewed for an additional five years. That's the situation we're in right now. LexisNexis was originally awarded the contract in 2001 for five years. We extended that for an additional five years back in 2007, so it will expire in December 2012. I'm in front of you today about this, which seems a lot in advance. However, it's kind of a lengthy process and, in fact, the statute does require that the contract needs to be in place at least six months prior to its expiration, which will be June 2012. I intend to be working on, as you'll see from my proposed timeline, the language for the RFP

in the next several months and I would hope to present it to you all no later than July and that's what's on this proposed timeline, although if we can get it together prior to you all leaving in May I would propose we do that so you can approve the RFP. I plan to change it significantly in the sense that I want to put a lot of emphasis on public access to our on-line version of our statutes. Even Representative Murray in her orientation yesterday to the Committee observed that it's not necessarily an intuitive, easy-to-search, on-line version, so I'm going to be focusing on that in the RFP. Once it's posted, with a deadline of posting by August, and with a deadline of September to get proposals in from potential bidders, this Committee would need to meet. We would do a presentation to the Committee with a summary of all the proposals we've received, and you all can hear presentations from each of the publishing companies that present a bid to you. You can at that time make your decision and select a finalist or you could ask for additional presentations and set another meeting at which to have those and then make your decision. Ten years ago when this was done, it was all done in one meeting in October. I think the Committee had planned to meet in September, hear presentations, and make a decision in October; however the September meeting had to be cancelled. I really want to make efficient use of your time. I would like to see it coincide with another meeting you might have with rule review issues. Typically, those begin in September so I would anticipate that probably we would be looking at a September meeting and then possibly an October meeting. Your agenda is typically pretty heavy in November but as an outside deadline, I would propose that November be the very latest you would select the final bidder. That would give me the opportunity to work with the publisher you all select to negotiate the terms of the contract through the months of December and January and have the contract finalized and circulated for signature by all the interested parties that have to sign it and totally in place by June. That's the proposal and timeline. I'm happy to take any questions you might have with respect to the RFP process.

Representative Labuda asked can I go on vacation this summer? If you could let us know as soon as possible whether we will meet in July or August, that would help me. Ms. Gilroy said absolutely. I'm going to start working on it immediately and it is my goal to try to get it done before you all leave in May.

Representative Gardner said we may want to have this conversation more off-line, but there have been tremendous changes in publications in the past decade, probably more than ever, and there's been a lot of consolidation in the law book publishing area. Do you have any sense of what we expect to have in numbers of competitors? We'll get what we get, but do you have any sense of wether it will be two, three, or five? What was it 10 years ago? Ms. Gilroy said 10 years ago, four bids came in. I know there will be at least two, possibly three, that I'm aware of right now. I've actually worked with Kae Warnock at NCSL to do a 50-state survey to see what other states are doing in terms of what their official format of the law is. Right now, these books are our official law, not our on-line version. I'm not sure even that's the right approach to take. I'm trying to gather information about what other states are doing. There are fewer and fewer publication companies that are interested in this.

There were four last time and I anxiously await to see how many there will be this time. I can forewarn you all that I suspect you'll be lobbied, so you may actually know before I do who really has a strong interest in this contract.

Representative Gardner asked if people are actually lobbying Committee members concerning source selection? Maybe we need guidelines for the Committee about that. This is a legislative procurement, but it does strike me that we put out an RFP in the way we should be awarding as the best value against that RFP, not something else. Ms. Gilroy said I don't know how much lobbying was done the last time, but you're right. Both the statute and constitution require you to select a publisher based on the lowest responsible bidder and there is some qualifying language that allows you to consider tax, fiscal, and economic impacts on citizens of the state. Whether or not companies have any ties to the state of Colorado, they might be educating you about that.

Representative Gardner said I wasn't correct actually, but that was very tactful of you. I said something about best value. I need to look at the statute more carefully, but if it says lowest responsible bidder, that's a very different thing than us awarding to what we determine is the best value. That's probably worth some discussion off-line as well. Ms. Gilroy said I did attach the publication statute to the proposed timeline and highlighted those provisions for your edification.

Senator Brophy said you might remember a couple summers ago when some entrepreneur had developed an iPhone app that allowed access to the C.R.S. through their iPhone that I thought was fairly creative, but of course was outside the bounds of the copyright that existed for the vendor that produced these. I have a desire to make something like that possible with this new contract if you believe there is a legal way to do that and if you could make that part of the RFP that either the vendor develop that or develop a way to license that or something to allow the new technologies to more rapidly adapt to this product for everybody's benefit. Ms. Gilroy said you read my mind. I agree with you. One of the portions of the 50-state survey that I crafted with Kae Warnock at NCSL asks other states what e-products they have for their statutes. Right now, Colorado doesn't have anything that I'm aware of. Not that that couldn't be done, couldn't be done by an outside private interest, or my thoughts were even I'd like to see us do it in-house. I'd like to see LIS take that on and I've actually talked to Michael Adams about it. It absolutely is an area I want to address in the RFP. It's something I've discussed with LexisNexis to see what other e-products that they might be able to help us with, not necessarily as an app because I understand that is a pretty hefty application for a phone, but maybe a piece of the statutes, like for peace officers who may want title 42. Maybe the reader style, something that can be done that way. There may be a variety of e-products we could come up, so I do intend to address that.

Representative Labuda said for the Committee's information, last summer when I was the Chair, I received an e-mail which made me wonder. It was addressing this. I remember

passing it on to Ms. Haskins and asked if she could help because I personally don't want to get involved in any negotiating of contracts.

Representative Murray said one thing we might look into as you're going through this process is the state internet portal authority might be able to develop the app that Senator Brophy was referring to and they could perhaps do it at no cost, but we do need that to be part of any contractual arrangement with perhaps some other vendor.

12:55 p.m.

The Committee adjourned.

ATTACHMENT A

Acronym	Term	Definitions	Rule
GHG	Greenhouse Gas	Means the aggregate group of the following six greenhouse gases: carbon dioxide (CO2), nitrous oxide (N2O), methane (CH4), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6). **These gases are treated in aggregate** based on the total carbon dioxide equivalent (CO2e) as the pollutant GHG. . . .	I.B.23.
GWP	Global Warming Potential	For example: The GWP of carbon dioxide is 1 The GWP of sulfur hexaflouride is 23,900	40 CFR Part 98, Table A-1
CO2e	Carbon Dioxide Equivalent	A metric used to compare the emissions from various GHG classes based upon their global warming potential (GWP). The CO2e is determined by **multiplying the mass amount of emissions (tons per year), for each GHG constituent by that gas's GWP, and summing the resultant values** to determine CO2e (tons per year). The applicable GWPs codified in 40 CFR Part 98, Subpart A, Table A-1 – Global Warming Potentials are hereby incorporated by reference as in effect as of October 30, 2009, but not including later amendments.	I.B.10.
	Subject to Regulation	Concerning operating permits (Sections I through XIV of Part C), at a new or existing stationary source that will emit or have the potential to emit 100,000 tpy CO2e;	I.B.44.e.(i)

Examples						
A source can emit the following:		Emissions			Result under Statute	Result under Rules
		TPY	GWP	CO2e		
50 tpy of:	carbon dioxide	50	1	50	Not a major source because it cannot emit at least 100 tpy of any single air pollutant	A major source because it can emit at least 100 tpy of GHG and 100,000 tpy of CO2e when all GHG are added together
	sulfur hexaflouride	50	23,900	1,195,000		
	Total	100		1,195,050		
100 tpy of carbon dioxide		100	1	100	A major source because it can emit at least 100 tpy of an air pollutant	Not a major source because it cannot emit at least 100,000 tpy of CO2e