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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

April 20, 2011

The Committee on Legal Services met on Wednesday, April 20, 2011, at 7:34 a.m. in SCR 356. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Carroll
Senator Roberts
Senator Schwartz (present at 7:35 a.m.)
Representative B. Gardner, Vice-chair
Representative Labuda
Representative Levy
Representative Murray
Representative Waller

Senator Morse called the meeting to order. He said the first matter before us is review of rules of the air quality control commission. We did take public testimony on this the last time, so we are at a stage where we just need to refresh our recollection and decide whether to add these rules to the rule review bill to extend or not.

7:36 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 this is just a brief review from two months ago. There are four issues and the rules conflict with the statute in different ways. In one sense, they aggregate the greenhouse gas emissions for purposes of counting toward the 100 tons per year operating permit threshold and by aggregating the six separate greenhouse gases, the threshold is actually too low. With other pollutants, such as hazardous air pollutants, there is specific statutory authority to aggregate, but there is not authority to aggregate in general. In another way, the rules conflict with the statute because the operating permit threshold is too high by having this 100,000 tons per year of carbon dioxide equivalent for a second test that is required. The third conflict is that greenhouse gases are exempted from the requirement to pay the emission fees. Then there is the "air pollutant" definition. Greenhouse gases are not included in the regulatory definition but everything else - the federal law, the state statute, and the rules - presume that greenhouse gases are an air pollutant. I'll mention that six years ago there was another air pollution issue in front of this Committee on new source review. At that point, our position was that the rules were authorized and I'll point out how the statutes treat those two areas differently. The new source review portion of the statute is very general and it says that what the commission does has to be consistent with the EPA requirements. With regard to the greenhouse gases and operating permits, the statute is pretty specific. It says that you have to have 100 tons per year of any pollutant. Rather than being consistent with EPA requirements, the rules have to be consistent with Title V, which is the operating permit program under the federal clean air act. Under both the state and federal clean air acts, it is 100 tons per year, not 100,000 tons per year.

Mr. Morris said I'll briefly go through a couple things that talk about air pollutants and, in all of those contexts, "air pollutant" means greenhouse gas. The commission has admitted that the state definition of air pollutant mirrors that of the federal definition. The *Massachusetts v. EPA* case held that greenhouse gases are an air pollutant and operating permits apply to major sources, which are defined as sources that have the potential to emit 100 tons per year of any air pollutant. Under that authority, the EPA promulgated the tailoring rule that increased the operating permit threshold from 100 tons per year to 100,000 tons per year. They did that through what was called the "subject to regulation" rule and a carbon dioxide equivalent requirement. Finally, the rules exempting the greenhouse gases from the emission fee requirement conflict with the statute. That requirement to pay the fee applies to regulated pollutants, which is a subset of air pollutants. It's clear to me that

the rules are self-contradictory in treating greenhouse gases as air pollutants for every purpose except for the definition of "air pollutant".

Mr. Morris said the purpose of the rule review process is not merely to identify problems with rules but also problems with the statutes. Here you have a federal overlay where the rules may well be authorized under federal law but our state statute has not kept up with developments in federal law. I'll mention that you have several options in front of you. You could do nothing, not take a vote, just move ahead from here to consideration of the rule review bill. In that context, the rules would be extended. You could hold a vote on the rules to either extend the rules or to not extend the rules. You could introduce a bill to affect the statute. That would be a little bit different from how the Committee has operated in the past, but you certainly have the authority under the statute to introduce bills. Legislation to fix statutes based on rule review issues is something this Committee has directly not done in the past, but it doesn't mean you couldn't do that. You would probably want to think carefully about how to proceed with that. It would be possible to amend the statute to authorize these rules without being specific about greenhouse gases and having the statute, similar to the rules, contain what's called the recission clause that says that if the EPA rules are ultimately held to be invalid then the state rules would be invalid to the same extent.

7:43 a.m. -- Will Allison, Attorney General's Office, testified before the Committee. He said the tailoring rule is a federal rule. This is the federal government's first approach to regulating greenhouse gases and they intend to do so in a phased approach. This is the first phase, where only a very limited number of the very largest sources will be regulated for greenhouse gas emissions. The EPA is requiring states to take a similar approach. I certainly appreciate Mr. Morris' perspective; I understand how he arrived at some of his conclusions and it reflects the debate that's going on at the federal level. We obviously arrive at a different conclusion. I think it's fair to say that the two sides arrive at different conclusions by focusing on different portions of the state air quality act. I think what we need to do here is look at the act as a whole. When that's done, a couple major things hit you square between the eyes. First, it's clear that the legislation requires the state to have an operating permit program that is consistent with the federal program. Secondly, it's clear that the act prohibits the state from being more stringent than the federal program, with exceptions, but when you want to invoke one of those exceptions there are very prescriptive requirements that need to be met. The state needs to jump through numerous hoops and make a dozen findings in order to be more stringent than the feds. Finally, the commission has broad rule-making authority to maintain a program that is consistent with the federal

program. That's exactly what occurred here. If these rules are not extended, the practical effect in the short term would be that the state would regulate greenhouse gases at a level that is 1,000 times more stringent than the feds. We'd be the most stringent state in the union and that is not what is contemplated by the state air quality control act and is not a result that was advocated by anyone during the rule-making proceedings that led to these rules, including any industrial source or any environmental organization. With respect to the rules themselves, you heard Mr. Morris talk about the definition of "air pollutant". The definition of "air pollutant" specifically says that it does not include any emission exempted by the commission consistent with the federal act. That's exactly what happened here. The commission, through its rule-making authority, exempted certain types of greenhouse gas emissions, entirely consistent with the federal act. The commission has broad authority to make conforming changes to ensure that there's ongoing consistency with the federal act. We believe that was appropriately done here, and, therefore, we would respectfully request that the rules be extended.

7:46 a.m. -- Garry Kaufman, Acting Administrator, Air Quality Control Commission, testified before the Committee. He said this is one of those cases where if you look at different portions of the statute there's clearly some conflict. No matter how the ruling comes out, the other side is going to be able to say you didn't look at this provision or your ruling conflicts with this provision. On the one hand, there is this 100 tons per year limit that is very different than what the EPA has done and so if the Committee finds that the commission was authorized to regulate at the EPA level, that would not be doing a complete service to the literal language of the definition in the statute. On the other hand, there are numerous provisions in the statute that provide that the commission must be consistent with and not more stringent than what the feds have done and so if the Committee finds that the rules were not authorized, that's not going to do justice to the literal interpretation of that language. In cases like that, ultimately the question is what did the legislature intend. To figure out what intent is, it's often useful to look at what are the consequences. In adopting a 100 tons per year limit, the consequences would be rather dire and would mean that the legislature intended that the commission was not only authorized but was mandated to adopt a permit limit that was 1,000 times more stringent than anywhere else in the country. This would mean that all sorts of tiny sources of air pollution would be considered major sources under our statute, including elementary schools of about 150 students, the state capitol, and probably every office building in downtown Denver, and even, in some cases, a large family home. A 100 tons per year greenhouse gas source is something as small as a 20 horsepower diesel engine. It may be a little presumptuous for me to say, but I don't believe that was ever

the intent of the statute and was certainly not the intent of the definition of "major source" but really was supposed to apply to what we all consider to be large sources - industrial sources, refineries, steel mills, electric generating units. Ultimately, you can read these together by saying that the 100 ton per year limit was meant to apply to traditional air pollutants, such as nitrogen oxide, sulfur dioxide, or PM10, and that greenhouse gas sources are really a different kettle of fish, and that the program needs to be done in accordance with what's done on the federal level and consistent with the overarching mandate to the commission with respect to the Title V operating permit program that we have a program that is consistent with and no more stringent than what is done on the federal level. That's exactly what the commission did in this case so, therefore, we urge you to approve the rules and find that they were authorized.

Senator Carroll said I vaguely remember from last time that one of the issues that came up was the state statute is not consistent with the federal statute, which makes it very tough to make sure that a rule is conforming to state statute. One of the discussions that came up is why not at least fix the state statute if you think the policy of the current rule is the right result. I think there was going to be some effort to see what it would take to make the state statute consistent with the rule and more consistent with the federal law. Maybe you can update us on was that considered and the pros and cons from your perspective about fixing the statute. Mr. Kaufman said we're not really just making a policy argument; we are making a legal argument. I understand that the Committee is here not to say we think this is a good idea and we're going to rule against what the statute says. We're not advocating that at all. We do believe that there are conflicting provisions and that the best reading of the statute is to find that the rules are authorized to resolve that conflict. We have looked at the possibility of amending the statute, and that's something that can be done outside the context of this initial decision on whether the rules were authorized. There are two issues. One is a legal concern that if the rules are found not to be authorized and the statute is just merely fixed so that they would then be authorized, it creates this doubt for sources during the interim period from January 2 when we're required to regulate these under the federal law and then whenever either the state statute was fixed or when conforming changes are made to the commission rules. That would be a concern if the finding was we don't think the rules are authorized and we'll post-authorize them. The other concern would be, especially late in the session, what else might get opened up. That's a more practical consideration. If you open up the statute at this point without some careful prep and deliberation, especially with a topic that's as controversial as greenhouse gases, you can create some unintended consequences, such as

people trying to, not just fix the statute, but do all sorts of other things depending on their perspective. As Mr. Morris said that is an option, but an option that perhaps creates some uncertainty for the sources that have not gotten permits based on our rule now and may have been required to get permits based on the 100 tons per year level.

Mr. Allison said I would just add that what occurred here was entirely consistent with what the feds did, meaning as it stands with these rules, the state act is consistent with the federal act and the state rules are consistent with the federal rules. In implementing this greenhouse gas rule, the EPA did not amend the federal clean air act. Rather, they amended their rules and certain definitions within their rules to achieve this result, and the state took a similar approach.

7:54 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rules I.B.6., I.B.10., I.B.23., I.B.44.b., I.B.44.e.(i), VI.C.1.e., and VI.D.1. of Part A of Regulation Number 3 of the Air Quality Control Commission and asked for a yes vote. Representative Gardner said I concur on the motion and concur on the request for a yes vote. I have heard both of these cases. I think one can debate which is the better case and were I a judge I would be faced with having to decide the merits of each legal case as opposed to looking at two interesting and well-developed notions of statutory construction and interpretation within a very complex legal regime. Having become convinced that both cases are cogent and persuasive, the policy considerations cause me to believe that the best option for us is to extend the rules. The motion passed on a 9-1 vote, with Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, Representative Waller, Senator Brophy, Senator Morse, Senator Roberts, and Senator Schwartz voting yes and Senator Carroll voting no.

7:57 a.m. -- Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed agenda item 2 - Action on SB 11-078 - Rule Review Bill.

Ms. Haskins said you are now sitting as the committee of reference on Senate Bill 78, which is our annual rule review bill. The bill contains the recommendations of the Committee on executive branch agency rules that have been reviewed by the Office and the Committee. All the rules that were adopted by the various state agencies on or after November 1, 2009, and before November 1, 2010, are extended in the bill, except for those that are specifically listed for expiration in the bill. Those rules that are listed to

expire in the bill will expire on May 15, 2011, pursuant to the APA. These are the rules that the Committee found should not be extended because they either exceeded statutory authority, lacked statutory authority, or conflicted with state or federal law. We do not have any amendments for the bill.

7:58 a.m.

Hearing no further discussion or testimony, Senator Morse moved Senate Bill 11-078 to the committee of the whole with a favorable recommendation. 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 Carroll said we have the advantage of a consent calendar in the Senate. For members of the House, it only takes one member to request that a bill be sent to the consent calendar. I would ask if we want to consider doing that. Senator Morse asked if there is any objection to putting the bill on the consent calendar in the Senate and no one objected.

8:01 a.m. -- Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 3 - Approval of Introducing a Committee Bill on Copyrighting the Colorado Revised Statutes.

Ms. Gilroy said there is a matter of concern that has been voiced to me relating to the ability of other persons and entities to publish the Colorado Revised Statutes. I've mentioned this to you in the past and I've done a little bit of research and have consulted with a copyright attorney and I'd like to bring before you the information I've learned and potential legislation if you're interested in sponsoring it. This matter relates to essentially two sections of the statute. One of those sections is 2-5-115, C.R.S., which states that the Colorado Revised Statutes are the property of the state of Colorado and that they shall be copyrighted as such. Parenthetically, our Office does submit a copyright registration to the federal copyright office every year after the Governor signs the bill to enact the statutes. We have not sent in the registration application yet this year. The other section of law that's critical in this analysis is section 2-5-118, C.R.S., which allows other persons and agencies to publish the Colorado Revised Statutes. It does require that they first submit prior application to the Committee, which our Office handles on your behalf. Part of that also includes that they have to pay certain fees and costs. This Committee actually approves fees and costs. Currently, we require a payment of $6,000 from those who wish to purchase the statutory

database that our Office prepares of the statutes, as harmonized, compiled, revised, and corrected. There are those who have expressed concern to me that this process inappropriately stands in the way of others who wish to publish the Colorado Revised Statutes, because they see that as being part of the public domain. They link our copyright to the fact that we're charging for them to basically have permission to publish. I began an investigation to see whether or not what we're doing is appropriate or if we need to change the way we handle it. I'm not particularly well-advised in the area of intellectual property law, so I actually consulted with an attorney from Holland and Hart, Ms. Jessica Neville, who was incredibly knowledgeable and extremely helpful to me in understanding what our rights are and what we should and should not be doing, and that's what I'm here to share with you today. As anticipated, indeed, the statutes themselves are part of the public domain and are really not copyrightable. That would probably include the numbering system and headnotes that we use since those appear in the legislation that the General Assembly approves. However, original work that we do prepare is value-added material that can be copyrighted. I refer to ancillary publications, such as our source notes that follow every statutory section, the annotations, the editor's notes, the cross references, the tables, and the indices. All that would be potentially copyrightable. You don't necessarily have to register a copyright. The copyright protection subsists on the original work, but we can do that if we wish. What would be problematic would be to require others seeking to publish to actually get permission to do it first, which is basically implied in section 2-5-118, C.R.S. That said, Ms. Neville indicated it would still be appropriate for us to charge the amount we charge for the statutory database if people want to use that in the publication of the official Colorado Revised Statutes because, from her perspective, it is essentially a convenience. It is a package, a valuable service, that we prepare; all the coding, all the database that they need, it's compiled, it's corrected, it's harmonized. Her suggestion would be to allow those who use the statutory database that we prepare, which we know will be accurate, to say they are a sanctioned publisher, as opposed to those who also wish to publish the law but don't want to pay and use the convenience of the database that we've prepared. However, we can't require them to state in their publication that it's an unofficial version of the statutes. Another suggestion she had was that we could trademark the statutes that we publish. Trademarking is a source identifier, whether it's a state seal or some other emblem or symbol or words we come up with, that shows up on what the state of Colorado actually publishes. We can even provide to those who purchase our database permission to use a limited trademark. I did a little investigation work on this. I found that it's not inexpensive to do trademarking. It does take quite a bit of time, maybe up to two years to get your trademark approved. Another way to handle it

essentially would be to say, those of you who purchase the statutory database and use the official text in that database can state that you are a sanctioned publisher, and I think you get the same effect.

Ms. Gilroy said you were provided proposed legislation. There's three sections in the bill. The first section corrects that first section of the law I mentioned, and rather than requiring that the laws be copyrighted, it states that the Committee may submit a copyright application for those ancillary publications that are original work our Office prepares on the Committee's behalf. The second section essentially is a conforming amendment and repeals what is an obsolete provision. Years and years ago it used to be that we would certify a set of the Colorado Revised Statutes to the Secretary of State who was then obligated to publish in a certain number of newspapers of general circulation throughout the state identifying that the official laws are out and available now. That process is gone and your bill to enact that this Committee sponsors each year sets that official date and I'm just conforming it there. The gist of the bill is in section 3 and that section requires permission for others, other than the General Assembly through its contracted publisher, to publish the laws of the state. This section basically does four things. One, it recognizes the four types of publications that will be out there that will fulfill our obligation to ensure that the public has access to the statutes. That's a constitutional obligation on the General Assembly. Those four things are, one, the official publication that's in the softbound volumes that the Colorado courts recognize as official evidence of the laws of the state. Second, the other publications that we do with our official publisher, such as the on-line public access, the CD-ROMs, an electronic reader you can put on your iPad or Smartphone which will soon be available for purchase from LexisNexis as well as Amazon and other providers. Third, those who actually purchase the official database from our Office and use the official text in that database. Fourth, those who don't want to purchase the database and just want to publish the laws. They'll copy it off the internet at no charge at all or they'll build it similar to the way West does currently. Parenthetically, West does purchase the database but they run a comparison of it to make sure that their version is accurate. The second thing this bill section does is allow those who do want to use our statutory database with the official text to be able to say that they are an officially sanctioned publisher using the official text of the Colorado Revised Statutes. The third thing this section does is state the assumption that anybody who publishes the Colorado Revised Statutes does so accurately. Finally, the bill repeals a few provisions in section 2-5-118, C.R.S., that are penalties that have never been exercised but that currently allow for those who publish by stating they are an official publication to pay a penalty of $250 per book or reproduction. Those who publish without your

permission to publish currently have to pay a penalty of $500 per book or reproduction. There's even an ability for the Committee to require they send notice to whoever they sold their publication to saying they did not have permission to publish it. Those sections would be repealed because we've never proceeded on them and it removes us from being enforcers and having to look on the internet for what's out there. Just for your own comfort, I ran this proposed legislation by Ms. Neville and by former revisor of statutes Charley Pike, and both felt it was really good. Ms. Neville thought this was a much better approach. Mr. Pike was pleased. I'm presenting this to you for your consideration. If you would be interested in going forward I think this actually cleans up the law and puts the General Assembly in a better position should those who want to publish the Colorado Revised Statutes not seek permission from you all to do so.

Senator Carroll said I think this makes a lot of sense. In the part that's contemplating a little bit of modernity about the different ways the statutes might appear, I just wanted to be clear that it wouldn't, in any way, prohibit the state from making available for free an application version of the statutes that's not somehow exclusive to anyone else doing it. It just remains an option for the state if we were to choose at some point, but it would also be an option for a sanctioned publisher as well. Ms. Gilroy said you're correct, it would not. The way it's written is it authorizes us to work cooperatively with our current contractor and we are doing that with LexisNexis right now. There is a demand for it. I've had folks contact me seeking the permission to have titles 18 and 42 because they want apps for cops so they have it handy right there on their Smartphones, and they don't want to pay the $6,000 or even the $2,000 we charge for just law and none of the ancillary publications. I think the goal is to make a lot of different methods for folks to publish the law, hopefully accurately, which is my main concern, and get it out there from a number of different sources including us.

8:14 a.m.

Hearing no further discussion or testimony, Senator Roberts moved to move the bill forward. 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 Roberts and Representative Gardner agreed to sponsor the copyright bill. Senator Brophy, Senator Carroll, Senator Morse, Senator Schwartz, Representative Labuda, Representative Levy, Representative Murray, and

Representative Waller agreed to be co-sponsors on the bill.

Ms. Gilroy said I do have one more thing I'd like to raise with the Committee. I just wanted to let you all know that we have been working with LexisNexis, our official publisher, to update our on-line public access version of the Colorado Revised Statutes, which always seem to be a little bit behind. Right now, if you go on-line, you would have access to the 2010 Colorado Revised Statutes, but we would like users who are on-line to know whether or not legislation has passed during the 2011 session that is amending a section of law. We've worked with LexisNexis to provide links so that when you go to a section of law on-line you will see under the headnote a link to a 2011 amendment to this section. You can click on that and it will automatically take you to the session law that is amending that section of law, without mucking with our database at all. I'm really excited and I think it's a great thing.

8:17 a.m. -- Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 4 - Update on Changes to the OLLS Budget for FY 2011-12.

Ms. Eubanks said in your packet is a one-page summary of the budget. The main reason we wanted to come back to you and let you know where our budget for 2011-12 ended up is that on first glance it looks like our budget increased from the budget the Committee approved earlier this session and I wanted to explain exactly why it looks that way, what happened along the way, and what we anticipate will still happen during the legislative session. If you compare the original budget request that we brought to you and you approved and then what our final request as reflected in the legislative appropriation bill ended up being, it looks like our budget was increased by approximately $45,000, which might be a little surprising considering what's been going on with the state budget in general and in light of the state revenue situation.

Ms. Eubanks said there were several changes made to our budget after you approved it. You might recall that the budget that we came to you with included a reduction of an amount equal to 1.5% of our personal services budget for 2010-11, and so actually the budget that you approved was a reduction of almost $69,000 offset by an increase we needed in funding for increased employer contributions for insurance costs. After you approved our budget and things were moving forward in terms of finalizing the legislative appropriation bill, we were given a second directive from leadership to also decrease our budget request by another amount equal to 1% of personal

services from our 2010-11 budget, which approximated another almost $48,000. The original 1.5% reduction had to come out of our personal services. This second reduction could be taken out from personal services or operating expenses. We had that directive for an additional cut, but then there was also in our budget request that you saw originally the assumption that the PERA shift on the 2.5% employer contribution was going to be continued. Our budget that you approved had that reduced employer contribution rate. Because of things going on with the bill that would continue that shift, Senate Bill 76, that bill is still pending in the legislature. It was decided that all of the funding reductions for that continuation should be included in Senate Bill 76, rather than in the legislative appropriation bill, because the legislative appropriation bill was going to go through earlier than Senate Bill 76. The amount of the funding for the employer contribution for PERA was actually increased in our budget by almost $94,000 and so that's the primary reason why right now our budget reflects an increase in funding. What we anticipate is that if the General Assembly decides to continue that 2.5% shift in PERA contributions, then our budget will be reduced again by $94,000. Basically, our bottom line, assuming that occurs, is that our budget will be $60,000 less than our 2010-11 budget, so we will actually have a funding decrease from our previous year's budget. Until that happens the number in the appropriation bill actually reflects an increase. The one other change to our budget that I did want to make you aware of and this was an amendment that was done on second reading in the Senate is that 2.1 FTE was cut out of our budget. It was unfunded FTE. You might recall in the budget request that we brought to you, we were already reducing our FTE by one because we are transferring that over to Legislative Council for LIS staffing purposes. So now we have a reduction in FTE from our 2010-11 level to 53. I just wanted to make you aware of that.

Senator Roberts said I have a budgetary question, not related to Ms. Eubanks presentation. In trying to do some research on legislative history with archives, I have been told that in order to access tapes to committee hearings, it's going to cost me $65 an hour and that it's impossible for me to go listen at no cost, which I guess is how it used to be. I have to say I'm flabbergasted, because some of us want to do our job well in terms of going the extra step to go into past history. Do you have a line item? How do we do our work if archives is going to charge $65 an hour to access information? It reminds me a little bit of statutory publications and it just seems that particularly as legislators we should not be denied access to that at a cost that's prohibitive. Ms. Eubanks said we've had these discussions in our Office because it is somewhat troubling and it's not necessarily just listening to the legislative tapes, it's also access to files. It's my understanding that archives is doing this

because of budget cuts. What is especially problematic on the tapes is that some of the older technology tapes, because they become more fragile, require the archives people to set it up and they control a lot of the access because they're very fragile. I think some of the newer technology where it's stored digitally it's not so much effort. We're operating under those constraints. We've imposed limitations. We have an approval process in our Office when our folks want to access something at archives to try to minimize our costs. In terms of members, usually if you are interested in accessing something, have our Office do that for you so that we can pay for it out of our budget. We do try to absorb those costs in our budget and we try to minimize them to the extent possible. It's very frustrating not only to access the tapes but also to access member files because these are the materials of the General Assembly and we should be able to have access to them and yet they're charging us for it. It's difficult that they won't give us a waiver.

8:26 a.m. -- Dan Cartin, Director, Office of Legislative Legal Services, addressed the Committee. He said what we can do is follow up on this and, one, find out whether there might be some way to have an informal exception in connection with legislative materials that are stored or archived at state archives. I'm not sure that's doable or not. Two, maybe set up a process whereby if you or other members want to access archive information that we either find the money in our budget or work with Legislative Council or state archives to make accessing that particular information a little bit more economical. Let me follow up with the Committee on that particular issue and see if there's some options to ease the costs.

Senator Roberts said I did speak with Ed DeCecco yesterday because I know he in the past had explored the same subject area, and he's checking to see if he has a recording somewhere. It was very alarming to me to know that we would be prohibited. Particularly with term limits, we don't have those people in the building anymore, and, as we draft our own bills, it's pretty critically important to have access to archived information. I don't want to be confrontational about it, but I don't want to be denied access. I can appreciate that the old tapes are fragile, but if they're that fragile, they're trash or there should be some way for us to access information because it can be very important.

Senator Carroll said I guess the question is if the tapes are that fragile, it seems to me that given the public interest and the public right, in addition to the legislative, we ought to be looking at digital conversion of the degrading tapes lest we lose that. What would it take for us to begin to convert it into a nondegrading technology so that it's more searchable and less time for people

in the future? Mr. Cartin said we'll follow up on that. Clearly on a list of options would be legislatively addressing that, and we can bring that back to you as well.

Senator Morse said I can tell you that the executive committee is looking at replacing the recording system that we use now because it is antiquated and getting to the point where they can't even get parts to fix it anymore. We're looking at the possibility of upgrading to newer technology, so that will solve some of the problem and make it available for everybody.

Representative Murray asked if Mr. Cartin has an idea of what percent of the archives is not digitized. Furthermore, I wonder if we should look to the state historical fund with some help for this.

Senator Morse said these are good questions for Mr. Cartin to follow up on since he doesn't actually oversee the archives himself.

Senator Brophy said there are actually private entities that can do this conversion and so I would ask that you pass that along to archives. It really is important and it's fairly inexpensive. You'd be surprised how much space it takes to store all of those tapes. You no longer have to do that when you make a digital recording and copy that recording in a backup location. It frees up a lot of space. It's time to make that move and I think it will significantly reduce the actual cost of accessing that material. Hopefully it will also reduce what we pay to access that material.

8:32 a.m. -- Tom Morris addressed agenda item 5 - Report on Updating Legislators About Colorado Court Opinions.

Mr. Morris said we have been talking to you about a project for updating the General Assembly about court decisions. We made a presentation, got feedback from you informally, and now we're coming back with what we're actually proposing to do. Essentially, we will have a website that contains the cases and send out a quarterly e-mail. You have a copy of what the e-mail might look like. We already provide updates on our annotations to our publisher on a quarterly schedule, so the e-mail would go out quarterly when we've finished annotating the cases and they've been edited. At the same time, we would also put them onto our web page. There are two categories of cases. There are the cases of interest that meet the list of criteria. The criteria has been slightly expanded from what we talked about earlier, based on the feedback that we got from you folks. In the e-mail is an example of what a summary of a case of interest might look like. I'll point out that everything

that is underlined in the e-mail is a link, so there will be a link that would take you to the actual opinion, and there's a link to the law that is being construed. There is also a link to the person who you could talk to about the case, who read, annotated, and summarized the case. There's also a link to the criteria, so if you're interested in why we're talking to you about the case, here's a list of the criteria. There will also be a link to our homepage that has a judicial opinions web page that is organized by committee of reference. Our Office will look at the case, think about the area of law and which committee would have jurisdiction over that. We will list the committees in the e-mail and each of those names is a link to our homepage if you're not interested in this particular case of interest but you want to see what else has been decided in the last three months or for the past year. Each committee will be further subdivided by areas of law so that you can quickly get to the areas that are of interest to you. We're hoping to get this functional by this fall.

Representative Labuda asked if there is a way to alert the members of the General Assembly before we go into summer session that this is coming and to look for an e-mail in the fall? Mr. Morris said we can send a mass e-mail to all the members or you could mention it at the mike.

Representative Gardner said I don't know if you've anticipated that there will be some amount of public demand for this e-mail. Would you distribute it to the public if they ask to be put on the listserv or is it out there for CORA requests? Mr. Morris said we have not anticipated that we would be sending the e-mail to individuals. Something I failed to mention is that we will be using Twitter on our webpage and the cases will be on our webpage in a prominent way so anyone who is interested we could just direct them to our webpage.

Representative Gardner said just for comment, the House Judiciary committee had an informal roundtable with some judges from the court of appeals and one of the judges said that they often write in the cases that this is something that the General Assembly might want to take a look at, but does anybody ever pay attention to that? I said as a matter of fact, we are about to institute a system to do that and they were excited.

8:38 a.m. -- Julie Pelegrin, Assistant Director, Office of Legislative Legal Services, addressed the Committee. She said I just want to add that we haven't got the website totally figured out yet. It's still in some planning and development stages, so if you read this over and think of anything that would be helpful you would like to see, please let us know.

8:39 a.m. -- Bob Lackner, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 6 - Litigation Update.

Mr. Lackner said as you know the Office regularly briefs the Committee on legal actions involving the General Assembly. This morning, I'll only be discussing one case, which I believe has elicited some interest on the part of one or more members of the Committee. That is a case that was filed earlier this month in federal district court. It's *American Tradition Institute v. State*. Two nonprofit organizations, the American tradition institute and the American tradition partnership, as well as a private citizen named Lueck who resides in Morrison, sued the state and several officers over the constitutionality of the state's renewable energy standard (RES) mandate. The individuals being sued are the governor, the executive director of the department of regulatory agencies, the three commissioners on the public utilities commission, and the director of the public utilities commission. As the Committee may know, the RES requires the state's major utilities to obtain 30% of their power generation from renewable energy sources by the year 2020. As some of you may recall, in 2004, the voters passed an initiative calling for 10% of the electricity sold by utilities to come from renewable energy sources by 2015. That was Amendment 37. The General Assembly has raised that target twice since then. Under the most recent effort to raise the target, which was last year, it was raised to the current 30% by 2020. The plaintiffs claim that the Colorado RES discriminates on its face against what the plaintiffs allege are legal, safer, less costly, less polluting, and more reliable in-state and out-of-state generators of electricity sold in interstate commerce. The plaintiffs also allege that this discrimination is forbidden by the commerce clause of the U.S. Constitution, which reserves the regulation of interstate commerce to the federal government. Specifically, the complaint alleges that because the state mandate provides economic benefits to Colorado's renewable electricity generators that are not available to out-of-state power generators, and because the state imposes burdens on interstate electricity generators that are not balanced by the benefits to Colorado and its citizens, the RES violates the commerce clause. The complaint also states that the law promotes renewable sources and discriminates against lower cost, more reliable energy generation from out-of-state suppliers, which it alleges is unconstitutional. The complaint is 51 pages long. It raises 13 different claims for relief. The complaint seeks declaratory and injunctive relief, asking for an order prohibiting state officials from implementing the RES and related programs, including the standard rebate offered and the tradable energy credits program. The complaint also requests damages in an unspecified amount. I don't believe the state or the individual defendants have yet filed their answer. A scheduling conference

is set for June 13 of this year. The person following this litigation in our Office is Duane Gall. Subject to the proviso that I'm not an expert in either the commerce clause or renewable energy, I'm happy to answer any questions you may have.

Representative Labuda asked if the suit just addresses the statutes that we passed? It doesn't address the constitutionality of what the voters did, does it? Mr. Lackner said I believe you're correct. I believe what the voters did is now a part of the Colorado Revised Statutes, which has now been supplemented by actions of the General Assembly, so that the action is now codified in statute. It's those statutory provisions the plaintiffs allege are unconstitutional.

Representative Labuda said I understand the statutory part, but does the complaint challenge what the voters did in the constitution as it violating the commerce clause? Mr. Lackner said I don't know that what the voters did originally is in the constitution. I believe it was a statutory mandate that the General Assembly has subsequently added to. Looking through the complaint, as best as I can tell, all of the allegations go to state statutory provisions.

Senator Carroll asked if this is a matter of first impression or are we aware of any other courts stripping down a renewable energy standard? Mr. Lackner said I did come across an article in the *Denver Business Journal* and it quotes an attorney with the plaintiffs who said that similar suits have been filed in Maine and Massachusetts, but those were settled before trial. That's as much as I know about what's gone on in other states.

Senator Schwartz asked if those suits in Maine and Massachusetts were filed by the same entity? Mr. Lackner said the article didn't specify. That's a good guess, but I don't know precisely.

8:48 a.m.

The Committee adjourned.