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# Hearing on the standards of review applied by OAL and the quality and consistency of the office's decisions

Assembly Select Committee on the Oversite of the Office of Administrative Law

# ASSEMBLY SELECT COMMITTEE

# ON THE OVERSIGHT OF

# THE OFFICE OF ADMINISTRATIVE LAW

State Capitol
Sacramento, CA

August 13, 1984

Assemblyman Rusty Areias, Chairman

MEMBERS

Doris Allen
Gerald Felando

Phil Isenberg
Elihu Harris

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# OVERSIGHT OF THE OFFICE OF ADMINISTRATIVE LAW

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August 13, 1984
2:00 p.m. to 4:30 p.m.

State Capitol, Sacramento



Assemblyman Rusty Areias, Chairman

Members Present:

Assemblywoman Doris Allen
Assemblyman Phil Isenberg
Assemblyman Gerald Felando
Assemblyman Elihu Harris

Staff:

Bob Hoffman, Consultant
Dolores Saint, Secretary

84-9-286

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**ASSEMBLY SELECT COMMITTEE ON THE OVERSIGHT OF THE OFFICE OF ADMINISTRATIVE LAW**

**AUGUST 13, 1984**
**SACRAMENTO, CALIFORNIA**
**STATE CAPITOL**

**ASSEMBLYMAN RUSTY AREIAS, CHAIRMAN,**

CHAIRMAN RUSTY AREIAS: This is one in a series of hearings we are having on the Office of Administrative Law. We have with us Assemblyman Harris and Assemblyman Felando. Assemblywoman Allen and Assemblyman Isenberg are up in Water Committee and should be down shortly.

The Office of Administrative Law Oversight Committee was set up as an oversight effort to review the conformity of the office to the statutory mandates that created the Office of Administrative Law. It is a bipartisan committee and we had our first hearing on June 27. I see many familiar faces. I think many of you were in attendance.

There were five areas of concern that were reviewed and of those areas we have chosen OAL's standards of review for this subsequent hearing. I would like to call on Linda Stockdale Brewer, the current director of the Office of Administrative Law, to address that subject area. Welcome Ms. Brewer. Do you want to come up?

I would like to have everyone limit their comments to ten minutes. Session has been called for 4:00 and they are taking the consent calendar up at 4:20. So, I suspect that we can probably continue the hearing until about 4:20. We've got a

long list of witnesses. I would like to make one change to the agenda. I understand that Mr. Belliveau and Mr. Moskowitz have time conflicts. They have other obligations so, I am going to move them up to second and third. Then we'll continue down our published list of people that have asked to testify.

Ms. Brewer?

MS. LINDA STOCKDALE BREWER: Thank you very much. Good afternoon, Mr. Chairman, Mr. Harris, Mr. Felando, ladies and gentleman. I am Linda Stockdale Brewer, Director of the Office of Administrative Law. Thank you for your interest in and support of the Office of Administrative Law and for providing this opportunity to assist the Legislature in updating this committee on our progress in carrying out the office's mandate.

As you know, our workload has been very heavy this past four years and the staff has had to work extremely hard to meet the demands of reviewing hundreds of thousands of pages of transcripts, testimony, and regulations by the 30-day deadline. However, our staff has been both diligent and productive as we are progressively implementing the nation's most comprehensive regulatory oversight mandate. Therefore, it is with great pride that I accept this opportunity to discuss the function, accomplishments, and also the challenges facing this new state agency, which has been charged with carrying out the Legislature's mandate and the Governor's promise that we work together to relieve the people of California of the harmful and unnecessary burdens caused by the imposition of inappropriate regulations.

I understand we are short of time today so to ensure that the commenters here today have an opportunity to present their remarks, my statements will be very brief.

I am very proud of the progress we have made to date and welcome all suggestions for improving the operations of this unique office. At the last hearing of this committee, one commenter, who had spent several hours at OAL reading through all of our withdrawal letters that OAL had issued, offered what I considered to be a constructive suggestion, which we have since implemented I am happy to say.

Although this commenter had found nothing out of order in the content of these withdraw letters, on June 27th he informed this committee that he believed the public would be better served by easier access to the information contained in these withdrawal letters. Both this committee, at that time, and I agreed with him, even though our withdrawal letters had always been available to the public. However, I didn't realize until after his testimony at the last hearing that there was enough interest in their contents to warrant regular publication of these withdrawal letters in the OAL Notice Register.

I am pleased to inform you that we have acted on that suggestion and I have with me today the printer's proofs of our last week's editions of the publication in which appears all of our withdrawal letters for the previous week. And this will continue throughout the operation of OAL.

I believe our quick response to that comment or suggestion is a concrete example of how we can accomplish constructive and positive results when all interested parties work together to benefit the people of California. And, therefore, I look forward to hearing more constructive suggestions this afternoon.

I would also like to report that I appreciate the Lieutenant Governor's continued interest in OAL. His thoughtful comments and his frankness in admitting, as he did at the last hearing, that some of the Legislature's mandate to OAL is tough to implement, unquote.

As most of your know, Mr. McCarthy took time on July 20th to report by letter to the Governor on his continued interest in OAL. Governor Deukmejian's reply to Mr. McCarthy's report is a concise and comprehensive statement of the current status of all our top priority programs at this time. The letter also testifies to Governor Deukmejian's support of the office and his eagerness to work with the Legislature to insure the continue success of this vital, bipartisan agency.

Since the Governor's very brief letter to Mr. McCarthy is so pertinent to any discussion of OAL and as it is far more concise and comprehensive in describing our plans for accomplishing the major challenges that are faced by OAL than any statement I could have written myself, I've asked for and received permission to read from it today. I would like to quote:

"As you know, I have long complained about excessive governmental regulation, citing the adverse effects it has on business and consumers alike. During the gubernatorial campaign, I called for the implementation of meaningful regulatory reform, including the abolition of regulations which are not authorized by law, do not serve an important public interest, or result in cost far outweighing the minimal public need for the regulation.

"Since the beginning of my administration, we have taken significant steps to achieve this goal, which remains an important priority of my office. In April 1983, I created a Task Force on Regulatory Reform to embark upon a new, unprecedented phase of regulatory reform in California state government. The goals were to seek public input on the practical effect of specific regulations on society, to obtain the public's recommendations concerning regulatory reform, and to include a benefit/burden analysis in determining which regulation should be eliminated as improper or unjustifiable. The reform effort was further guided by my directive that regulations essential to protect the health and safety of the people will be maintained and vigorously enforced.

"The task force's review closely followed that required by AB 1111 but was distinguishable therefrom because the statutory focus of the AB 1111 review (which is still in progress) is on the legal basis of existing regulations. The task force added a new and important dimension to the scope and quality of the AB 1111 process. Private citizens, businesses, and broad representative segments of the public were offered an opportunity to apprise the Executive Branch of practical, day-to-day burdens and problems imposed by governmental regulations.

"This comprehensive solicitation of citizens' views was without precedent in state government. Over 280,000 contacts were made, including letters and media releases; and public comments were used to guide state agencies in identifying regulations for amendment or abolition. In some instances, public input alerted agencies to the need for basic changes in statutes to resolve regulatory problems.

"The task force targeted over 7,000 regulations for repeal or amendment, over and above those identified in the AB 1111 process. And my office is monitoring the process of the second phase of the reform effort -- compliance with the legal requirements of the Administrative Procedure Act pertaining to the actual abolition or amendment of these regulations.

"At the same time, the Office of Administrative Law, under the director of Linda Stockdale Brewer, is making significant progress in implementing AB 1111, despite the major problems she inherited from the prior administration.

"As you acknowledged, a major backlog in the review process as had accumulated prior to January 3, 1983. Moreover, the past administration's unrealistic acceleration of the Legislature's timetable for OAL's review of the regulations seriously disrupted the orderly process originally contemplated. For example, this acceleration circumvented the agencies' plans for public participation in the AB 1111 review and made it virtually impossible for OAL to carry out its goal of conducting an independent review of regulations.

"I am pleased to report that Ms. Brewer and her staff and working hard to overcome these obstacles and complete a meaningful review under AB 1111. As of December 1983, OAL had completed its review of all of the 10,407 regulations the agencies submitted to OAL for amendment or repeal under AB 1111. Moreover, it will be reviewing the remaining 7,232 targeted regulations as they are submitted to OAL during the current year. OAL has also retained jurisdiction to evaluate any regulations the agencies have chosen to retain, and will complete this review prior to the 1986 deadline established by AB 1111.

"Regarding so-called underground regulations, (he goes on to state) you will be happy to know that agencies within the Executive Branch of state government have begun exercising their own initiative to curtail these regulations. As for OAL's discretionary authority under AB 1013, the Legislative Analyst recently raised the question whether this function should be handled by the Attorney General's Office rather than OAL. Ms. Brewer feels that it is appropriate to await the resolution of this issue prior to the exercising of OAL's discretionary authority under AB 1013.

"You have also expressed concern over OAL's purported delay in adopting its own regulations concerning the regulatory review process. I am informed, however, that OAL's progress is consistent with and will meet the schedule established by the Legislature in the 1984-85 Budget. OAL's efforts in this regard are in sharp contrast to those of the prior administration which abandoned this major project.

"Lastly, you suggest that OAL has thwarted the effectiveness of the Small Business Flexibility Act (AB 2305). To the contrary, Director Brewer has been commended by the Senate leadership for her and OAL's efforts to assist small business to understand and participate in the regulatory process; and Ms. Brewer's actions were instrumental in obtaining necessary statutory amendments to provide OAL with the legal authority to reject proposed regulations which fail to consider their adverse economic impact on small businesses.

"In sum," the letter concludes, "much progress has been made toward achieving our regulatory reform goals. We have the greatest confidence in Ms. Brewer, and you may be assured that

OAL and my administration will continue our efforts to obtain meaningful public participation in the AB 1111 review process, to complete the review on schedule, and to eliminate the regulatory hardships that have long been a burden to the people of our state."

I shall endeavor now to keep my concluding remarks as concise and as straightforward as the Governor's letter.

As you know, the Administrative Procedure Act provides OAL no discretion to give state regulatory agencies the benefit of the doubt. Our standards for legal review and the procedures that agencies must comply with in preparing regulations to be submitted to OAL are specified in great detail in the Administrative Procedures Act. We are not authorized to approve a rulemaking file that is incomplete or deficient and we have never done so.

All of OAL's decisions are based strictly on the criteria established by this Legislature. These decisions are all court ready, and I am proud to tell you that our competence and our impartiality is testified to by the fact that since I became director no one has ever won a lawsuit on a single one of our decisions. We are aware of the fact that in the past some state agencies were inconvenienced by our not having completed the process of adopting regulations and that some private individuals are anxious for us to adopt our AB 1013 regulations. But, as I said at the beginning of my remarks, these two projects are our highest priorities and we are proceeding on schedule to complete them.

In closing, I simply want to add that in keeping with the spirit of the public hearing process required by OAL, I am grateful to this committee for providing yet another opportunity to discuss OAL's standards of review and the consistency and quality of OAL's decisions. It also gives me an opportunity to inform this committee that OAL has a long standing offer to all individuals who write regulations for state agencies to telephone our office whenever they have procedural questions. I am assured by my legal division that all such questions are routinely answered promptly and consistently and I think the fellow sitting next to you can attest to that since he formerly worked with us. Therefore, I join the committee in looking forward to a constructive dialogue this afternoon with the individuals you have invited to discuss our office and how we can work together to improve it.

Thank you very much.

CHAIRMAN AREIAS: Thank you, Ms. Brewer. I have a couple of questions in my mind that have arisen from your comments. One about the 1013 process, dealing with underground regulation. You had said that you are waiting for Leg Analyst to make its determination before you are going to go ahead with those regulations?

MS. BREWER: In the 1984-85 Budget process, we were asked to submit a schedule for adopting regulations to the Assembly Budget Committee. That committee suggested that we go ahead and start the preparatory work, i.e., to start drafting

proposed regulations and to not go forward until be had reported back to them in November. At that time the Leg Analyst will be required to decide, or will opine whether or not OAL will carry forward this function or whether or not the Attorney General's Office should do so. But, in any event, we will have reached the draft regulation stage so that in case the Attorney General's Office is the one...

CHAIRMAN AREIAS: What is the date of that again?

MS. BREWER: November of this year.

CHAIRMAN AREIAS: November of this year. In the written recommendations that were made to this committee, which we will be forwarding to you following this hearing, there seems to be a lot of problems relative to the clarity that you refer to in the Administrative Procedures Act; the six criteria that you use for reviewing your regulations. You are saying that that is outlined sufficiently and that the standard of review should be very clear. That is not what we are getting from the agencies that have to deal with the process at OAL. Many of their comments deal with the inconsistencies, the arbitrariness of it. I don't think it is clear and anything that you can do to further expedite the development of your own regulations, for reviewing regulations, I think is going to help this process significantly.

ASSEMBLYMAN GERALD FELANDO: You know maybe before we start taking sides on this whole thing, we ought to start looking at some of the regulations that are being shot down and what agencies and what departments are doing the screaming and the

criticizing. Obviously the OAL is dumping a lot of regulations that are going beyond the criteria and beyond the authorization that the department or the agency has. And rightfully so they would be screaming and yelling about it. But, maybe rightfully so the OAL is shooting them down. So, I really wouldn't put a lot of weight on what some of these departments and agencies are saying. I mean it is tough luck. It is about time we had somebody strong enough in there that will start dumping some of those stupid regulations that they propose.

CHAIRMAN AREIAS: The problem that they are pointing out, and I would be glad to supply you with their correspondence Mr. Felando, is that the time that elapses from the time that they present these regulations and the time they get the findings of OAL, they feel that if they had their own regulations that it could be greater expedited. So, what we are doing is cutting down on the process. But, I think you ought to read them and you would find agreement.

CHAIRMAN AREIAS: Question by Ms. Allen and then we will go to the next witness.

ASSEMBLYWOMAN DORIS ALLEN: Well, I think it is extremely important that we read the materials that were provided to the committee. I think first of all that is what we are here to do, is to see what the problems of the different implementations of the regulations, et cetera, to make certain of what is happening to the oversight that we are supposed to perform here of the Office of Administrative Law. But one thing

that I have seen, and I am not talking now or at least in my investigations, of looking into even the Office of Administrative Law in the past, is that in the past, even prior to Ms. Brewer coming into a leadership role in that agency, that this office has been used very politically. Laws have been passed by the Legislature and regulations have been developed by the appropriate agency, and in the past legislators have gone to the agency, put pressure on OAL to overturn regulations for the benefit of them in their districts. And I think that kind of political pressure that took place, and was absolutely given into by the past administration, is the very thing -- I think sometimes it has probably created some problems for Ms. Brewer, that now she is under suspect because this happened in the previous administrations. And I think that if we are going to get into a kangaroo court here then we have to dredge up all of these improprieties that have happened prior to her taking charge of this agency. I was reading some of these press things, and it didn't appear to me like what I remember us doing in committee. And I would hope that we are not here to put someone on trial for something that is suspect, that we've had no evidence of yet, that has occurred, other than the suspicions supposedly by the ALRB that she is showing favoritism to growers because she attended a function and was a speaker there.

But I would hope that what we do here is that we are looking at things objectively, looking for -- not beating the bushes or whatever, but we are looking at real things that are

occurring and real facts and not using this as a political ploy to try to control how the bills are interpreted and finally put into regulation and then use this office for overturning or -- in the past that has been done. I don't know that that has been done at this point, but, from what I am hearing it has been used for that, prior to Ms. Brewer.

CHAIRMAN AREIAS: Ms. Allen, as the Chairman of this oversight effort, let me just say that my highest priority is to see to it that the Office of Administrative Law is depoliticized as much as possible, consistent with, I think, the reputation that the Legislative Analyst has developed over a period of years. That is the only way it is going to continue, the only way it is going to survive, and that is our highest priority.

ASSEMBLYWOMAN ALLEN: Well, I hope that we are not looking at it like she is , you know, she is under suspicion right off the bat.

CHAIRMAN AREIAS: No.

ASSEMBLYWOMAN ALLEN: I mean, to me let's take it as it comes. I would like to see what was sent and I haven't seen that. But I don't think we should accuse Ms. Brewer of perhaps doing things that have taken place in the past until we have some concrete evidence in front of us that that is occurring.

CHAIRMAN AREIAS: What are you talking about, the past administration?

ASSEMBLYWOMAN ALLEN: Yes.

CHAIRMAN AREIAS: And granted, you know, there were some mistakes that were made. There have also been some mistakes with the present administration relative to the task force, relative to the Orange Growers meetings that were held down in South Valley. I think in retrospect Ms. Brewer would admit that those were mistakes, but this office has to be depoliticized as much as possible and that is the only way it is going to work effectively.

ASSEMBLYWOMAN ALLEN: Because there is a lot of power there as there are in the agencies as well, this is something that is supposed to be a checks and balances against that kind of power of regulation. And I am with you. I mean, that is why I am anxious to serve on this committee, as long as we remain objective as well, to make certain that we are have checks and balances in our system of government. But, not just to immediately put someone under suspect because the potential is there.

CHAIRMAN AREIAS: Mr. Isenberg and then I would like to call Mr. Belliveau.

ASSEMBLYMAN PHILLIP ISENBERG: Ms. Brewer, my apologies. I was not at the last hearing, but in the interim, as a matter of fact, I had some benefit. I sat down for about a two-day period and read all the material plus the transcript in preparation for today.

One of the things that struck me was that it is almost impossible reading it, as I have done, to quantify who has done

what where. And part of the problem, it seems to me, is that we are shifting from a calculation from page numbers of regulations, to regulations either as a group or by section, and for the life of me, as I went through the material the staff tried to calculate, I can't figure out what is left to do and what has been done. That is not meant as any criticism of anyone. It is meant more to suggest to you that I think the most important thing that could be done in the next ten days is to have an easily understood and consistent set of analytic tools available to us, going back in time if you could, but also projected ahead because I just remain puzzled as to where we are and what is going to happen next.

MS. BREWER: Mr. Chairman, may I respond to his remarks please?

CHAIRMAN AREIAS: Yes.

MS. BREWER: I really thank you for bring that question to light at the top of this hearing.

First of all, I agree with you. The numbers are confusing and that has to do with a difference in the way numbers have been calculated. On November 30th of last year, we went and requested all the agencies to count regulations, not pages. In the California Administrative Code there are a lot of blank pages. So, if you count 28,000 pages of regulations, you might be counting 1,000 blank pages. But, I am happy to report that in less than ten days, we will have an anniversary report coming out, this is our fourth anniversary, that will explain all of those discrepancies.

ASSEMBLYMAN ISENBERG: If you can advance that, how do you intend to calculate -- by regulations, by pages, by what?

MS. BREWER: By regulations because people are governed by regulations.

ASSEMBLYMAN ISENBERG: I have not looked at regulations for years, but there was a time, much to my own horror, I had to look at the Department of Health Services regulations and I recall them to be quite voluminous. They were all one regulation, but they were aggressively detailed. And I wonder, and this is my second point, in highlighting the agencies that in existing regulation compliance have not been moving, I wonder if you are not understating the problem by saying, "Gee, there are only 400 regulations to examine," when each regulation may have 25 pages in it and therefore the volume is greater. There is a point at which the page numbers are valuable as a tool to determine whether the agencies are doing something.

MS. BREWER: You are absolutely right. And we have, for the last six months, been undergoing a comprehensive devising of a system to count pages. For example, I have the figures for the last six months. The number of pages of just regulatory statements, material, that has come through is 12,985. The number of pages in the rulemaking file that we have to review, and that is the transcripts, testimony and so forth, was 55,683. So we are calculating statistics on every possible way of identifying what we do; number of pages, number of regulations, number of pages in rulemaking files and all of that will be available.

ASSEMBLYMAN ISENBERG: All right. The last thing is, the testimony last time seemed at least to indicate that Industrial Relations and Health and Welfare were the entities with the largest accumulated backlog.

MS. BREWER: That's correct.

ASSEMBLYMAN ISENBERG: I assume no matter how you calculate it that is still true isn't it?

MS. BREWER: No, I don't think the transcript would have indicated backlog. They are the ones...

ASSEMBLYMAN ISENBERG: I'm sorry, slowest in reviewing their existing regulations.

MS. BREWER: No. Let me help correct what the statement said. We have a 1986 legislative deadline for them to review their existing regulations. Those -- there are three agencies, not just Health Services and Industrial Relations, but also the Department of Social Services. Most of those agencies are under continuous federal mandates to either adopt regulations or change them so they have the farthest out of that 1986 deadline. But all of them are on schedule.

The Department of Health Services, I believe, will complete their AB 1111 review by either the end of this year or the middle of next year, but all of them will meet the 1986 deadline.

ASSEMBLYMAN ISENBERG: Is your document to come out in the next two weeks also going to show a work flow chart for each department, particularly the big departments that have a lot of work to do, setting goals and time tables for them?

MS. BREWER: That is available through my office. I hadn't planned to include it in the anniversary report, but if you would like to have copies of that.

ASSEMBLYMAN ISENBERG: Well, the only thing that I suggest to you is that as you look forward to a 1986 date, at least for the larger agencies with the bulk of the work to do. It is probably important that they understand and you publish so that they know you are going to hold them accountable to it -- something like a time table of their existing...

MS. BREWER: Oh, we do that. We have a annual rulemaking calendar that is available now and out, if you would like to have a copy of it. It gives a time line and a proposed date for adopting all regulations. We do that every year, project out for the entire year.

ASSEMBLYMAN ISENBERG: Okay, thank you.

CHAIRMAN AREIAS: Thank you, Ms. Brewer.

MS. BREWER: Thank you for the question.

CHAIRMAN AREIAS: Mr. Belliveau.

MR. MICHAEL BELLIVEAU: Good afternoon, Mr. Chairman and members of the committee. My name is Michael Belliveau and I am Director of the Hazardous Material Program for Citizens for a Better Environment. CBE is a national nonprofit public interest organization with about 15,000 members in California. One of our primary focuses is to advocate solutions to urban environmental pollution problems.

What I would like to do is to offer you some background of my involvement in rulemaking as it relates to hazardous waste control, summarize my conclusions about OAL actions, and substantiate those conclusions with a brief chronology of some rules.

CHAIRMAN AREIAS: Mr. Belliveau, if you can do that all in ten minutes, we look forward to hearing your testimony.

MR. BELLIVEAU: I am going to try. I should just say that we've had a keen interest particularly in toxic waste control regulations. Actually, we're engaged in litigation now against the State Department of Health Services for its failure to meet statutorily imposed deadlines for adoption of 11 separate sets of hazardous waste regulations. The latest development in that is that we have obtained a court order requiring the Department of Health Services to submit to new deadlines for submittal of those regulations to OAL.

Through this involvement...

ASSEMBLYMAN FELANDO: Hold it. What's that got to do with OAL?

MR. BELLIVEAU: This is background material.

Through this involvement, and our testimony...

ASSEMBLYMAN FELANDO: You know, you're borderlining on letting this committee get out of control and out of line. You're entering an area...

CHAIRMAN AREIAS: Mr. Felando, he's in the first 30 seconds of his testimony. Why don't you let him go for a while and I'll determine whether it's germane or not.

MR. BELLIVEAU: Through our intensive involvement in the regulatory and rulemaking process for hazardous waste control, we've come to scrutinize OAL actions. We have very serious concerns with regard to their involvement. It is our opinion that the Office of Administrative Law has violated the Administrative Procedures Act on several occasions, and we believe that it appears to be a renegade agency operating in a manner that's not fully accountable to the public.

Let me summarize my conclusions from our involvement in hazardous waste rulemaking. We've found that OAL encourages agencies to withdraw regulations rather than have the OAL formally disapprove of them. They did that to the regulations proposed for ranking hazardous waste superfund sites. We believe that this hinders the public's ability to monitor OAL's rationale for disapproval since unwritten negotiations accompany regulation withdrawal.

Two, for hazardous waste criteria regulations, OAL disapproved of the regulations without providing specific, sufficient reasons until after the 10 day period during which agencies can appeal to the Governor had expired.

Three, for those same regulations, OAL failed to read and review submitted regulations within the 30-day statutory deadline.

Four, OAL, for those same regulations, substituted its judgment for that of the agency when the regulations were disapproved, and,

Five, for the same regulations, OAL took an extra 30 days to review already disapproved regulations and then totally shifted the grounds for disapproval through this extra, illegal review.

Now, for another set of toxic waste control regulations required by the Federal Resource Conservation Recovery Act, we have a most serious concern. The OAL director, Ms. Brewer, had informed an agency, the Department of Health Services, that regulations would be disapproved of before those regulations had even been submitted to OAL, and I'll speak more specifically to that.

We're concerned also that the combination of dilatory agency action such as in the case of the Department of Health Services, which claims that its statutory duty ends when the regulations are submitted regardless whether they become effective or not, the combination of that action and what we believe is a renegade regulatory reform agency which we believe has violated its own statute, results in delayed regulation that seriously threatens public health, particularly in the case of toxic waste control.

Now, I'll run through a brief chronology of the regulations known as criteria for identification of hazardous waste, also known as the CAM regulations for the California Assessment Manual. The authorizing statute for these regulations was enacted in 1977, effective January 1, 1978. There were long delays in development of the final proposed regulations but there

was considerable discussion about what should be in them. Finally, on December 12, 1983 there was a public hearing on these regulations. On February 23, 1984, the Department of Health Services submitted these regulations to OAL and on March 26th, the regulations were disapproved. Now, the disapproval letter that was sent to the department was less than one and a half pages long. It did not reject the regulations on any of the six statutory criteria, rather it said that the department had failed to respond to each public comment and that it had failed to include technical material which was incorporated by reference in the proposed rules. None of the specifics of these two allegations were included in the rejection letter. Meanwhile, the 10-day period during which the agency could appeal to the Governor was proceeding. More specific items as to why those regulations were rejected were not forthcoming from OAL.

Finally, on April 5th, on the tenth day, the Department of Health Services appealed OAL's rejection to the Governor and it cited three reasons for urging the Governor to overrule this rejection. First of all, it alleged that OAL had failed to specify reasons for its disapproval within 30 calendar days as required by the Administrative Procedures Act. Second, by OAL's own admission, it had failed to actually read the regulations that were proposed and submitted within 30 calendar days as required by the Administrative Procedures Act. And third, it alleged that the disapproval of those regulations was in error and that OAL had substituted its own substantive judgment for that of the department.

Now, sometime shortly after that, Vance Ray, the Governor's legal secretary, informed the Department of Health Services that their appeal would not be considered by the Governor's office and that they should go and work out their differences between the department and OAL.

On April 12th, OAL finally provided a detailed opinion on why the regs were originally disapproved. This was much after the 30-day period. The next day, on April 13th, Health Services sent a memo to OAL notifying them that they had withdrawn their appeal to the Governor and that they would hope to resolve all issues within another 30-day period. Now, this 30-day period in which OAL was allowed to review the regulations is beyond the 30-day period that they already used that was set forth in the Administrative Procedures Act.

Then on May 11th of this year, OAL issued a 25-page, what they called an, "advisory review." In this advisory review, they totally shifted the grounds for the original rejection of the regulations citing problems with clarity, nonduplication consistency authority and necessity. We believe that these actions were in violation of the requirements of the Administrative Procedures Act. As of today, there has still been no resubmittal of these rejected regulations to OAL.

One other quick...

CHAIRMAN AREIAS: You have one minute.

MR. BELLIVEAU: Okay. On the so-called RCRA regulations which are very comprehensive...

ASSEMBLYMAN ELIHU HARRIS: Before you do that, let me say something on that. How do you reach the conclusion it is a renegade agency from what you just said? You indicate that there may be some problems in terms of review, there's some time problems which I think we're looking into, but I don't really understand how you reach those conclusions which you stated. I mean, you may have just decided you're playing semantical games but I want to be fair. I want to make sure that I understand what you're saying. I think there are some problems that you cited but I'm not sure that they, in fact, lead me to the conclusion that it's a renegade agency; rather, that there are problems with the agency that we ought to be looking into.

MR. BELLIVEAU: Well, I could also couch them in terms of being serious concerns about the agency with regards to not reviewing regulations within 30 days, rejecting regulations without sufficient reasoning, taking extra days to review, shifting the grounds for rejection of regulations, really holding the regulations up in a bind.

I'd like to just make a real brief statement on the other toxic waste control regs, the so-called RCRA regulations. It's our opinion that OAL has really been in gross violation of the spirit and intent of the Administrative Procedures Act by notifying agencies that certain proposed regulations will be disapproved before those regulations had even been submitted to OAL. On at least one occasion, Mr. Joel Moskowitz, Deputy Director of the Department of Health Services, in charge of the

Toxic Waste Control Program, informed me, and this was in a phone conversation on February 17th in which I took notes and typed up my notes, that Linda Stockdale Brewer, the Director of OAL, had personally advised him that the so-called RCRA hazardous waste regulations would be disapproved before they had even been submitted to OAL. Now I find that, if it is true, if Mr. Moskowitz' allegation is true, and I don't have any reason to believe it not to be, I find that to be a rather outrageous action and posture of the agency.

I'll just close by saying that those actions...

CHAIRMAN AREIAS: Your time is up, Mr. Belliveau. Let me go to Mrs. Allen and then we're going to go to Mr. Felando.

MR. BELLIVEAU: Okay, I'll close here and I'm open for questions.

ASSEMBLYWOMAN ALLEN: I think my concern here is that I'm hearing so many accusations, allegations, rather than anything too substantial. The thing that's bothering me, even in a court of law, you know, when a reputation is on line here too, that circumstantial evidence is labeled circumstantial; hearsay evidence is. And what I'm hearing here is "he said," and I heard, "and if it's true," but those still have all of the earmarks of accusation. And if we're going to go and proceed in this manner, I would hope that Mrs. Brewer would be allowed to respond or the other gentleman, Mr. Moskowitz, would be allowed to respond to this kind of testimony because that becomes a little bit like a roast.

MR. BELLIVEAU: I'm very sensitive to your concern, Assemblywoman Allen and I have memos and correspondence that substantiate all the items that I said with regards to the criteria regulations. And Mr. Moskowitz, I believe, is available to respond to these concerns as well.

CHAIRMAN AREIAS: Mr. Moskowitz is our next witness, Mrs. Allen. Do you have any further questions? Mr. Felando.

ASSEMBLYMAN FELANDO: You indicated that the Office of Administrative Law had substandard judgment. Who's call is that? Is that yours personally, or is that the outfit that you work for? Or who's going around calling people substandard judgment? Yours?

MR. BELLIVEAU: No. What I said, Mr. Felando, was that they had substituted their substantive judgment for that of the agency. In other words, they, by rejecting the regulations in the way they did, had substituted policy judgment where policy judgment should be exercised by the agency, and the Department of Health Services agreed with that.

ASSEMBLYMAN FELANDO: Mr. Moskowitz had some comments to make about the agency also. I'm going to be interested to hear what Mr. Moskowitz has to say.

MR. BELLIVEAU: I will be too.

CHAIRMAN AREIAS: Any further questions by the committee members? Thank you, Mr. Belliveau.

MR. BELLIVEAU: Thank you.

CHAIRMAN AREIAS: Our next witness will be Mr. Joel Moskowitz. Is he here? Jennifer Tachera?

ASSEMBLYMAN FELANDO: No Moskowitz?

CHAIRMAN AREIAS: We were notified before the hearing that he would have to leave at 2:30. We were hoping to get him on before then. Jennifer, you're here in his place, I take it.

MS. JENNIFER TACHERA: Yes, I am and Joel had, I believe, provided a letter to this committee outlining his views.

CHAIRMAN AREIAS: He provided a letter, but what the consultant is telling me is he didn't outline his views. We'll get a copy of it.

You're from the Department of Health Services?

MS. TACHERA: Yes. My name is Jennifer Tachera. I'm with the Toxic Substances Control Division of Health Services; I'm here to answer your questions.

CHAIRMAN AREIAS: I've got a question and I'm sure Mr. Felando does and Mrs. Allen as well. I'm wondering, did OAL warn you not to submit the RCRA hazardous waste regulations? Did they warn you not to submit them as Mr. Belliveau claimed?

MS. TACHERA: We did have a conversation with OAL staff concerning...

ASSEMBLYMAN FELANDO: I've got to clarify something.

CHAIRMAN AREIAS: Let her finish and then we'll go to you.

ASSEMBLYMAN FELANDO: I want to clarify something right off the bat. When she says "we," who is "we?" You were there?

MS. TACHERA: I was there.

ASSEMBLYMAN FELANDO: You took part in that conversation?

MS. TACHERA: Yes.

ASSEMBLYMAN FELANDO: So it's not I, it's we. You and who else?

MS. TACHERA: We, meaning myself and Harvey Fry.

ASSEMBLYMAN FELANDO: I am going to be fair. And you?

MS. TACHERA: Harvey Fry and myself. Joel was not present.

ASSEMBLYMAN FELANDO: And you are talking OAL now.

MS. TACHERA: Yes. This was Bud Starr and I believe Christine Whitney, and Linda Stockdale Brewer was there briefly.

CHAIRMAN AREIAS: What were you told?

MS. TACHERA: Actually, the purpose of our meeting was to discuss the fee regulations because we had promulgated some emergency regulations for our hazardous waste control account fees. In the course of our conversation, we began talking about other regulation packages and the issue of the RCRA regulations came up. Because they're extremely lengthy. They run 1,500 pages or close to it.

CHAIRMAN AREIAS: More specifically, were you asked not to submit them?

MS. TACHERA: No. We were asked about the possibility of submitting them in increments.

CHAIRMAN AREIAS: If you didn't submit them in increments, what did they tell you would happen?

MS. TACHERA: There was no discussion about failure to submit them in increments. I think it was more the concern that OAL be given adequate notice about when particularly large or particularly controversial packages were going to be filed so that they could adjust their workload. And we discussed that when we file public notice some 60 days prior to when we would be adopting regulations that they are given notice because we initially file with them for publication in the Z Register. However, that wouldn't necessarily indicate how controversial a regulation package was. So the conversation was more, how could we formally or informally alert them to when we would have a particularly controversial package. The effect of that is, the more controversial a package the more we would have public comment and the more the agency would have a need to respond to this public comment.

ASSEMBLYWOMAN ALLEN: Did you find an impropriety in that type of suggestion?

MS. TACHERA: Not as far as controversial, no. No one would really know that other than the agency directly working on this. Because the length a package is doesn't necessarily indicate how controversial it is.

ASSEMBLYWOMAN ALLEN: In other words, that suggestion was not necessarily improper.

MS. TACHERA: I didn't believe it was, no. And I don't believe any of the current formal tracking mechanisms really address that and I can understand why they would have a need for knowing that a package was controversial.

CHAIRMAN AREIAS: Well, that seems to be in direct conflict with what Mr. Belliveau is telling us. He outlined kind of a chronology of events.

MS. TACHERA: Okay, well this was on the fee. The conversation that I'm relating to you had to do with the fee package. As far as the chronology that Mr. Belliveau laid forth with respect to the CAM regulations, that is basically correct, yes, as far as the dates of submittal, dates of letters back from OAL, memos and so on.

CHAIRMAN AREIAS: You mean in terms of the failure to review, in terms of the 30 days? Is that what you're referring to?

MS. TACHERA: Well, the subsequent letters from OAL, I think they were denominated a memorandum, did appear to raise issues that were not in the initial opinion that was dated April 12th.

CHAIRMAN AREIAS: Did OAL shift the grounds of its disapproval after the regulations had been returned to you?

MS. TACHERA: I would say that their memorandum indicates that they did, that these are other issues not previously discussed.

CHAIRMAN AREIAS: You appealed OAL's disapproval to the Governor's Office. Is that correct?

MS. TACHERA: Yes.

CHAIRMAN AREIAS: And what were you told by the Governor's Office?

MS. TACHERA: Well, this went through agency, through channels and so on, the word that was given back to staff was that the Governor's Office felt that we should work cooperatively with OAL to resolve any difficulties.

CHAIRMAN AREIAS: Now, as the Chairman of this committee and from my understanding of the function of OAL, that seems to be a direct conflict. I have real problems with this whole withdrawal process in that when you initiate this withdrawal process, what you do, in a sense, I think, is you get dangerously close to negotiating regulations which, I think, politicizes that particular process. The only appeal is to the Governor's Office?

MS. TACHERA: Right.

CHAIRMAN AREIAS: When the Governor's Office won't accept that appeal, and in a sense says, "no, we won't accept the appeal, we don't want to review it ourselves, take it back and try to get along," in a sense, that's a withdrawal process of a sort. And we're getting into more negotiations.

MS. TACHERA: It is a permissive appeal and I ...

CHAIRMAN AREIAS: No, it is not a permissive appeal. As I understand it, once an appeal is made to the Governor's office, the Governor can either accept or reject.

MS. TACHERA: Right. And generally they reject. I think in recent years there's only been a few that they've ever taken up.

CHAIRMAN AREIAS: Is that correct?

ASSEMBLYWOMAN ALLEN: On your point, on withdrawal, it's my understanding, and correct me if I'm wrong please, but it's my understanding that, if they were not allowed to withdraw, or if that withdrawal provision was not there, the pages and pages and pages of regulations could be filed and one reference item could be wrong and they could reject the entire package on deadline because one reference section could be wrong. Thereby, if there were not that withdrawal procedure or availability to them, it would <u>really</u> throw some problems into the works, if they were not allowed to withdraw and correct and bring back in a proper form. Am I wrong about that?

MS. TACHERA: Well, OAL, of course, can reject according to their criteria. It's been my experience that when they see problems with a package, they see this as a matter of courtesy, of giving the agency the opportunity to withdraw.

ASSEMBLYWOMAN ALLEN: Correct.

MS. TACHERA: And oftentimes, the agency will withdraw to work out these problems and then resubmit.

ASSEMBLYWOMAN ALLEN: Not necessarily to negotiate, but to have something pointed out that is wrong. Maybe not the entire package, something that is wrong, but they don't want to have to reject in total the entire package, but withdraw and be

able to correct that one segment of it in order to have the entire package accepted which is not necessarily always an onerous situation. It can be a very workable or congenial or helpful situation and not necessarily in conflict with the problems that you foresee. That could happen, but without the withdrawal process, I think they could be in more trouble.

CHAIRMAN AREIAS: No. I think Ms. Allen, you're missing the point that I'm trying to make. The only appeal that an agency has if they differ with the Office of Administrative Law is to the Governor's Office. And in light of the lawsuit against DHS, why did you withdraw your appeal? You withdrew it from the Governor's office, is that correct?

MS. TACHERA: Well, the Governor's Office indicated they didn't wish to take it up.

CHAIRMAN AREIAS: Does the Governor's Office have that option under the statutes?

MS. TACHERA: Yes. That's... They don't? They don't?

CHAIRMAN AREIAS: It's my understanding that the Governor's office does not have that option under the statutes. Once an appeal has been made to the Governor's Office, in effect, what the Governor is doing is throwing it back to OAL and giving them kind of a supreme authority where the law calls for the Governor to accept appeals if an agency does not agree with OAL's determination.

MS. TACHERA: In any event, the Governor's Office did not take up the appeal.

CHAIRMAN AREIAS: And the Governor's Office indicated to you that they would like you to withdraw that appeal or they suggested that you withdraw that appeal. See, and that's the politicization that I'm referring to that I think endangers this whole concept and the agency, this whole withdrawal process. Whether you're talking about a withdrawal from the Governor's Office or whether you're talking about a withdrawal from OAL by an agency and the ongoing, somewhat negotiations of regulations.

Yes, Mr. Felando.

ASSEMBLYMAN FELANDO: Well, I would think the Governor has the right just as a court of law has the right to decide whether in fact they're going to hear the case. I mean, many, many times in many, many thousands of cases are submitted to the various courts of appeal and that doesn't necessarily mean that those courts are going to hear them. It would be the same thing with the Governor's office. He may not feel that he should not be in on that particular appeal. You have to give him some headway. As far as talking about the politicization of this whole subject, it's interesting to note that all during the time that Jerry Brown was Governor, we were working with a democratically-controlled legislature that nothing was political about the office of OAL, but now all of a sudden that we got a Republican Governor, the whole thing is politicized. And I think that you're being political and unfair, very unfair.

CHAIRMAN AREIAS: As I understand the statute, Mr. Felando, the Governor does not have to act on the request by the

agency. But to ask an agency to withdraw, you know, is another matter altogether. At least I make that distinction.

MS. TACHERA: I'm at a staff level, and the information that was transmitted to us, informally, verbally, was that we had been directed to work with OAL. I can't be that specific about whether DHS withdrew under pressure or the Governor's office told us that they wouldn't take up the appeal. If that distinction is important, you'd have to ask someone else.

CHAIRMAN AREIAS: Thank you, Ms. Tachera. Are there any other questions? Personally, I think the law is very clear. I don't know that the Governor's office understands that aspect of the statute. If he refused to hear it, in effect, he is agreeing with OAL. But to ask an agency to withdraw it and put it back in OAL's lap.

Our next witness is Robert Fellmeth from the Center for Public Interest Law.

MR. ROBERT FELLMETH: Mr. Chairman, members of the committee, my name is Robert Fellmeth. I'm a former prosecutor, specializing in antitrust. For the last five years, I've been a professor of law at the University of San Diego Law School teaching California regulatory law and regulatory law in general. I direct the Center for Public Interest Law at the University of San Diego. I edit the California Regulatory Law Reporter, and publish in the area. My most recent book is California Regulatory Law and Practice. I spent five years as a member of the Athletic Commission, three years as its chairman.

You've heard from Gene Erbin from the Center, who had a number of comments to make about OAL. We're very interested in the subject matter. We have some 40 interns at the university who monitor the various regulatory agencies and we've been very concerned about this whole process. We're not concerned about comparing this administration versus the previous administration. Such comparisons miss the point entirely of what's wrong with OAL. Our criticisms of OAL have been exactly the same in the Brown Administration as they are now.

The problem with OAL, members of the committee, is a structural one. It is a serious one and it is a nonpartisan one. We've been very interested in deregulation. Because of the existence of OAL, we have been able to send our interns into the various agencies; with the pressure and the hammer OAL has provided, we have been able to, at the agency level, participate very effectively in deregulating agency rules throughout the gamut of various agencies in California. We are very interested in deregulation, not only in terms of eliminating unnecessary and improper rules and regulations, we're also interested in eliminating unnecessary agencies wholesale beyond the scope of APA.

Now I want to speak succinctly about the key question which we all should be addressing: "What now, what do we do now?" We have a structural problem. It doesn't matter who has done what in the past, we believe the future is guaranteed given the kind of structural setup that's been established. The law needs

to be amended. Without the critical fine tuning that is now called for, three or four years after its implementation, it would be better to have no OAL at all and no review process at all versus what will occur, and what is occurring, not just in this administration but in the prior administration as well.

Now, OAL has managed a review of most of the existing rules and I think major contributions have been made. Thanks to the Legislature and OAL prodding, we've been able to participate in those changes and we're very happy about it.

What about new rules? Should they be subject to review by OAL? Whether the reviewer be Republican, Democratic, American Independent, Peace and Freedom or extraterrestrial, we don't care. The point is, the person who sits in that OAL room, the 21 attorneys, what are they in a position to do, structurally, given their background, given their expertise, given the information they are provided by the system? The answer is as follows:

Should they review authority? Yes.

Should they review clarity? Yes.

Should they review consistency? Yes.

Should they review for reference? Why not.

Should they review for nonduplication? Yes.

Should they review for necessity? No. Absolutely not.

Why? First, why they should review the first five? The first five can be considered by an outside party without subject matter expertise, without hearing the evidence directly. The review can be summary, it can be efficient. There is no need for

a complex, burdensome record. There is little likelihood of procedural barriers emanating from an OAL. Review on these five bases is a major step forward in administrative reform, particularly vis-a-vis, obviously, pre-1980 law or laws in other states.

Before OAL, agencies were free to engage in ultra vires and incomprehensible rules that were ultra vires, that were beyond the authority of the agency and that included incomprehensible language. Now, I could not understand a good portion of the boxing rules of the State of California, while I sat as chairman of the Athletic Commission. In fact, judging from the Olympic refereeing and boxing, I think some of these rules have found their way into the international forum. The incomprehensibility of rules, the lack of clarity is not a matter for judicial review. In general, without OAL, they find their way into the rules. They sit there. Nobody knows what they mean.

A lack of authority, that's not reviewed often. That <u>is</u> a matter for judicial review but it is only reviewed when someone challenges the rule on the basis of ultra vires rulemaking. It very rarely happens, very rarely. One out of every 10,000 rules is so challenged. As a result, you really don't have any mechanism to do that.

So, with OAL addressing itself to those five basic criteria, every rule can be challenged. Every rule is automatically reviewed. That is a major, momentous step forward.

Now, why should necessity not be one of the criteria used by OAL, any OAL?

First of all, it inevitably translates into what is necessary, what is a good idea. It necessarily, because of its ambiguity is interpreted to mean "preferable." It conflicts necessarily with the very same APA statute mandating deference to the expertise of the agency involved. It involves a decision by a party, in the case of OAL, without expertise, subject to "X" party. And yes, political jawboning. Yes, Democratic too, very much so, and decisions made by a person who did not hear the witnesses. It requires a detailed record, because of this, for each and every rule, including deregulation rules.

When I was with the Athletic Commission, I initiated a program, before AB 1111 was passed, to engage in major deregulation. The Athletic Commission badly needed it. They were licensing everybody. They were just not licensing the promoters, they were licensing the ushers, the announcers, and the ticket takers. The ticket printers were even licensed. Deregulation was badly needed. Our rulemaking in deregulation was challenged by OAL, the Democratic OAL, even though it was deregulation in nature.

It is a bureaucratic problem, a procedural problem, in fact. And this is what you have to look at when you structurally look at OAL. It is going to be very easy for an agency, with the expertise, to snow a group of 21 attorneys or one attorney, or two attorneys, who has jurisdiction over four or five agencies in

the record. It is going to be very easy to find those key words that must be in the record. What is going to happen over time, and it is now happening, is that the review process by OAL in the area of necessity becomes unrelated to substance. It becomes a procedural game. And indeed OAL is now paying more and more attention to procedure as it inevitably must. It is not looking at substance as much. Did you respond to each and every public comment? Did you file your notice with the proper signatures? Did you, did you, did you? That is what is happening.

It, by necessity, must happen because OAL is not equipped to make the kind of expertise judgements that must be made apart from the record. It doesn't have the record. My advise, my two-cents worth to you, preserve five of the six criteria without factual record requirements with summary review and expedited procedure for approval.

Eliminate necessity as a criteria for OAL. Rules may be unnecessary, but this is not the body structurally to make the decision. Eliminate it and all the appendages needed to support it.

Create a streamlined, quick and important review for clarity, duplication and authority. Rules must be within the agency legislative mandate and <u>all</u> rules will be so checked, an important step. An enormous advance in putting California ahead of every other state. If we want to guarantee wisdom, i.e., the need to advance regulatory purpose, we appoint the right people to these boards, we confirm the right people to these boards. If

these people make an error, it will most likely be because they are uninformed, or because they are improperly swayed. You do not correct that through review by a more politically oriented and less informed entity.

CHAIRMAN AREIAS: Mr. Fellmeth, Mr. Isenberg has a question.

ASSEMBLYMAN ISENBERG: If OAL does not review based on necessity, who does?

MR. FELLMETH: I think that is the fundamental, generic purpose of the rulemaking agency.

ASSEMBLYMAN ISENBERG: Well, all right. OAL was created because agencies and departments were perceived as improperly exceeding their authority, improperly overregulating, improperly refusing to revise their regulations and, in fact, generating a California Administrative Code that would kill any of us if dropped from a height of two feet on our head.

MR. FELLMETH: I know, it has been disgraceful.

ASSEMBLYMAN ISENBERG: Well, the Legislature doesn't review regulations and I suspect that you are not proposing that we do it.

MR. FELLMETH: No.

ASSEMBLYMAN ISENBERG: The courts review regulations only after a challenge has been filed. OAL, in their criteria, uses "necessity" as one of the grounds. And if you agree, and maybe you don't, maybe we ought to address this question; do you think that somebody ought to take a look at regulations and determine whether or not they are necessary?

MR. FELLMETH: I think it is possible to create such a review process. It would be possible to do so. I don't think OAL is that process.

ASSEMBLYMAN ISENBERG: Why not?

MR. FELLMETH: Well, because OAL consists of individuals who do not attend the hearings; do not have any expertise in the subject matter. All you are creating in terms of necessity review is a massive additional layer of red tape and game playing, where the agencies will be submitting vast quantities of materials to OAL, which they will generally not understand, which they do not have the expertise to evaluate. They will then engage in procedural objections, which is now what is happening. In other words, you can't say we want every rule to be wise, we want every rule to be really needed in there. We don't want things that we don't think really advance legislative purpose. You really can't do that and put it in the hands of an entity structured as OAL is structured. If you want to do that, the best way is to actually make sure the people in the agencies, who are there on the scene, who do have the responsibility, who see the evidence, to make sure that they do the job, not create a policeman who doesn't have any information or a judge who doesn't have the correct information. A judge will not review an agency's finding of fact. OAL is essentially called upon, in essence, to do that.

ASSEMBLYMAN ISENBERG: Well, admitting for a moment that any institution in life will eventually become fairly rigid and

fairly formalized, admitting that the department's main purpose is to get their regulations through as best they can without doing substantial injury to what they perceive to be their department's interest and public interest, I, for the life of me, can't imagine a review process that would not involve a question of necessity. Let me just give you an example -- you think of all the silly regulations that exist in cosmetology or barber boards, and you know you have to have a little gadget spinning outside the barbershop for reasons that are lost in antiquity, but are trade in protective legislation. Now I can conceive of OAL sitting there and looking at those regulations and saying, yes, they have authority to do it, they are clear, they are precise, they have a reference in existing law, but you are taking away their ability to say they are stupid. And it seems to me, although you can criticize OAL for getting too bogged down in detail, or snowed by the departments, if somebody somewhere is not authorized to say that is a dumb thing to do, then you have really emasculated the process of review.

MR. FELLMETH: I am saying they are not in a position to decide whether or not it is a dumb thing to do. They are only in a position to be easily fooled by someone who wants to convince them it is a smart thing to do. If you really want a review process, you would literally have to create -- to do what you are suggesting -- you would literally have to create another agency to hear the evidence, or rehear the evidence and make another decision and that doesn't make any sense. Contrary to your

implication, a large number, probably an enormous number, of the rules and regulations that are properly challenged really contravene the authority standard. That is they are going beyond the authority, the legislative mandate. The Legislature says you are to do X, you are to do Y, and you are to do Z.

In the case of the Athletic Commission, you are to regulate for purposes of health, safety, et cetera. If someone then passes a regulation, as the Athletic Commission did as I first came on the commission, if someone has a fight on Friday, nobody else can have a fight in Los Angeles for a week because we want to guarantee a good crowd for the promoter. And my reaction is, wait a minute. Where is that in the legislative mandate? Answer, it is not. It is an ultra vires violation of authority. A large number of these rules are violation of authority and that you can come down on because someone from the outside can look at that. But, when you are talking about whether or not it is wise, whether or not it advances the purpose, then you are in a different ballpark. Then you are in the ballpark of is this a good idea? Is it a good idea to have that sign turning on the outside of the barbershop? Now maybe that example is easy for someone on the outside to determine, but most of them are not.

ASSEMBLYMAN ISENBERG: All right, but you indicated that most of their action, at least from your opinion, is not in the area of necessity. What proportion of their action is?

MR. FELLMETH: I don't want to say most, but a large number of rules and regulations, which should not be allowed to

stand, which should be reversed, should be reversed on the basis of authority. That is what I am saying. There are a lot of rules which are passed which may be unnecessary, but what I am suggesting is that OAL is not the body to make that decision.

Let me give you an alternative, a constructive alternative. Take necessity out of OAL review and do what you have already done -- every five or ten years clean house. Go through all of the rules just as you did this time, every ten years, and clean house, but don't set up a permanent entity with ex-parte contacts, made up of persons who know nothing about the agency, who didn't hear the evidence, to sit there and make second-guess judgments about the wisdom of rules and regulations simply because you know there are some abuses and some people pass silly rules. That's a non sequitur.

ASSEMBLYMAN ISENBERG: You've described the court system, I hesitate to point out, but...

MR. FELLMETH: But there there is an adversary process and a prohibition against ex-parte contact. And also there is no review on the basis of necessity in courts.

ASSEMBLYMAN ISENBERG: Okay, I will just stop with one comment, one observation. It seems to me that what you suggest points in the direction of OAL having a fairly pedantic, scholastic, academic role much like English majors making sure that the folks out there write in clear and concise language. And I don't think that's what the intent of the Legislature was. The intent of the Legislature, in my judgment looking back on it

to the extent we have any intent at all, was to also allow someone to say that's stupid because in the absence of OAL what had happened was that there was a vacuum. No one stepped forward to regulate it. Some departments were great, most were fairly careless. Attorneys like me write all these regulations and we have great good times doing it. I think you've at least done one thing, you have centralized the responsibility for the State of California for reviewing regulations and without that centralization you're going to go back to the scraps, the fights, the arguments, the court actions which are still going on. I know, and I don't think you see much of an improvement at all under the previous circumstance.

MR. FELLMETH: I think you've centralized it in a structurally incompetent body.

CHAIRMAN AREIAS: Mr. Fellmeth, I'm going to allow you one more minute, then Mrs. Allen has a question and we've got to go to the next witness so, if you have anything else to add from your testimony before you addressed Mr. Isenberg's question.

MR. FELLMETH: Well, I think the authority element is an important one. I think it's not a matter of pedantic analysis. It's a matter of reviewing each and every rule to make sure that the agencies are not exceeding their authority. That has never been done before. It can be done. It has been done for the last several years and it can be done with an agency that is streamlined and efficient, that has not imposed an unnecessary layer of tape which this agency is now about to do and will

inevitably do. It is structurally unworkable to have an agency of 21 attorneys sitting there reviewing all these rules and second guessing. Assemblyman Isenberg mentioned a legislative intent. The legislative intent here makes no sense at all, because on the one hand the legislative intent is that you will evaluate necessity, you will determine whether or not you think this is a good idea which is what that comes down to. On the other hand, you will also defer to the agency's expertise. Now, what intent does that communicate?

CHAIRMAN AREIAS: Okay, Mr. Fellmeth, your time is up.

ASSEMBLYWOMAN ALLEN: The only thing I would add to that that you, and just listening to Mr. Isenberg, who's back now, it sounds to me like you're both saying the same thing but using a different word to do it. You're saying legislative intent. I would have to agree with you for the most part that the authority comes from the legislative intent and if you're looking at a regulation from the standpoint, do they have the authority to make this regulation? And they'll say what was the legislative intent? Isn't that what issued authority and I think that at that point if you're looking at the authority to issue it and it's some, like you say, dumb regulation, say did somebody have a dumb idea that put that legislative intent to give authority to make that dumb regulation. And I think, in essence, what you're saying is if the authority is not there, they can kill it on those grounds but I think you're right. I don't see how there could be expertise for necessity of regulation centered in one

agency such as the Office of Administrative Law to be able to understand what the myriad, like you say, types of situations they have to deal with in public hearings.

MR. FELLMETH: Well, there's a reason why the courts don't do it. Courts do not do it. They will not second guess findings of fact. They will not go through the record and try to rewrite it or question it and there's a good reason they don't do it. To have a bunch of attorneys try to do it in the context of OAL doesn't make sense. It won't work and it's not working and all you're doing is working against yourself. It's going to get worse and worse and worse as the territoriality of this agency grows and as it seeks to augment its own territory as any bureaucracy does and become larger and so forth and defend itself. You're going to end up with just what you're getting, a 6,500 page document submitted by State Water Resources Control Board and did you, did you, did you questions. That's going to be the inevitable result.

CHAIRMAN AREIAS: Thank you, Mr. Fellmeth. We'll go now to Janet Vining or Jorge Leon, Agricultural Labor Relations Board.

MS. JANET VINING: Good afternoon, Mr. Chairman and members of the committee. I'm Janet Vining, not Jorge Leon, from the Agricultural Labor Relations Board. I'd like to just describe very briefly what the ALRB's experience has been with the Office of Administrative Law.

In the spring of last year, we adopted an emergency or proposed an emergency regulation concerning representatives of labor organizations taking access to agricultural employees of citrus growers, and also the investigations that take place in order to determine the correct identity of the agricultural employers in such situations. We attempted to adopt these regulations on an emergency basis but that effort was rejected by the Office of Administrative Law.

Towards the end of the time that OAL had to review our emergency proposal, we discovered that OAL had received comments from other parties, who practice before the board, and we hadn't been copied with those comments. We did ask to receive them and had a very short amount of time to respond to them, still within the emergency process. Subsequently, I met with the Director of OAL and members of her staff, along with my deputy executive secretary, in order to gain a better understanding of the emergency regulation process and the regular process for adopting regulations. Because we felt that we didn't have as clear an understanding as we needed to have --and that's been one of our problems in dealing with OAL -- we then began the process of adopting this citrus regulation through the normal, nonemergency procedure.

After we noticed a public hearing, we submitted the proposed changes, along with our rulemaking file to OAL, for review. Near the very end of OAL's 30 day review period for that regulation, we were advised that the director intended to reject

the regulation for a variety of reasons. We opted to withdraw the regulation at that time and have since worked with OAL's staff in order to try and iron out the differences that the director had with the proposed changes. I guess this is similar to what you called a negotiations process; that's really what we've been involved in.

The board has not yet determined to resubmit the regulation to the Office of Administrative Law. We are still waiting for public comment from the public on certain changes that the board decided to adopt in light of OAL's comments.

The problems that we have encountered in dealing with OAL basically revolve around the fact that we don't feel that we have or that we have seen a well-articulated set of standards and procedures. We think this partly stems from the fact that OAL does not have a good set of regulations. When OAL's enabling statute was first passed, I remember attending some of the early training sessions. There was a lot of interest in how some of these standards would develop, especially around the interpretation of necessity. There were some really distinct schools of thought on what that meant and there was a lot of curiosity and interest in how the regulations would come out hoping that they would help to define some of those standards. That hasn't yet happened. The standards of review as they are described in the statute are fairly general. The handbook that OAL has published helps to flush out some of the procedures that OAL follows but doesn't say much more about the standards for review and, in fact, just recites the language from the statute.

OAL's staff has been very helpful in all the work that we have done on the citrus regulation. What we know about the standards and procedures, we have learned from our discussions with the staff. However, we feel that to ensure consistency on a regular and fair application of these standards, as well as procedures, they should be articulated in written form, preferably in regulations. The process for adopting regulations, as we're very aware, involves a lot of public comment. Our agency has always found that public comment very helpful and I'm sure that OAL would benefit from going through the same process as they did initiate once before.

As an example of the kind of procedure that isn't well-defined, this very procedure of withdrawing regulations and then negotiating out something with OAL, returning the regulations, then resubmitting them, is not defined anywhere in the statute or in the handbook or in any regulations.

The other problem that we've encountered in dealing with OAL is one of delay. The statutory requirements build in a lot of due process which, of course, lengthens the procedure but we find that OAL also adds to that delay. For instance, after OAL advised us that it would reject our proposal on the citrus regulation changes and we informed OAL that we wanted to withdraw the regulation and reconsider it, it was a full month after that before we received a written letter from OAL actually detailing the reasons for rejection and so that slowed down our process of responding to those complaints. Since the whole procedure is

already fairly lengthy, it's critical that OAL review the proposed regulations quickly. And that summarizes our recent experience.

CHAIRMAN AREIAS: Thank you very much. Any questions for Ms. Vining? All right. We'll have our next witness, Karee Parr, Board of Registered Nurses and then we'll have Timothy Hodson.

MS. KAREE PARR: Hello, Mr. Chairman, members of the committee. I'm just going to reiterate a lot of what was said already today. I have only been doing regulations for the past four months so I'm very new to this process. I don't know anything about the prior process, the prior politicization or anything else. All I know is that I'm having a real problem with, first of all, the criteria on which OAL rejects or asks us to withdraw. We've had a problem with getting them to define especially their term "substantial evidence" which seems to differ from attorney to attorney depending on who you happen to be working with. The other problem we've had is we were asked to withdraw, or it was suggested to us that we withdraw, a fee regulation on June 17th because of some deficiencies. I discussed the deficiencies with Maureen Reilly over the phone and, due to the fact that I was new to regulations, I went ahead and withdrew the package. I corrected what I had noted were the deficiencies and resubmitted the package on July 17th, about a month later. On July 20th, I received my withdrawal letter after I had already resubmitted the regulations. In the withdrawal

letter were a couple of items that were never mentioned in the phone conversation; therefore, I did not address them. I'm still waiting approval of that second fee package. I have no idea whether they're going to ask me to withdraw it again or reject it.

CHAIRMAN AREIAS: Question by Mrs. Allen.

ASSEMBLYWOMAN ALLEN: At that point, when you were in the phone conversation for the withdrawal of June 17th, did you ask for, in writing, what needed to be done to correct your regulations enough so they would be acceptable or that they would be proper?

MS. PARR: I was advised that a withdrawal letter would be forthcoming.

ASSEMBLYWOMAN ALLEN: And you never received one?

MS. PARR: No.

ASSEMBLYWOMAN ALLEN: You proceeded without your withdrawal letter?

MS. PARR: Yes, because Maureen Reilly told me that it may take her a little while. She said, "I'll go through the deficiencies with you, and you can start the work on them." So that's what I did.

ASSEMBLYWOMAN ALLEN: Is it normal, I don't mean normal, but is it part of the process that you should receive a withdrawal letter so that you know exactly what is wrong and what could be done to correct it, prior to resubmitting the regulation again?

MS. PARR: Could you ask me that again?

ASSEMBLYWOMAN ALLEN: In other words, wouldn't it be part of the process before you would resubmit to at least have in writing, from your perspective especially, the withdrawal letter and also the reasons for the withdrawal, that you needed to withdraw. Also, what would need to be done to correct your regulation in order that it would be appropriate?

MS. PARR: Normally, I would have waited for the withdrawal letter, that is true. However, we felt that our fee package was very critical to get passed. We have a four month lag time on fees right now. As soon as it is passed we cannot collect the fees for four months after that.

ASSEMBLYWOMAN ALLEN: So, anything in the regulation, well, not the regulations, but in the law or in OAL's regulations of themselves, if there are any -- I am not quite certain at this point -- but that gives them a time limit on withdrawal letters?

MS. PARR: Not for withdrawal letters. Only for rejection letters.

ASSEMBLYWOMAN ALLEN: Perhaps that is something that needs to be addressed, I would think, especially in a situation where you would have fees; an emergency situation...

MS. PARR: Right.

ASSEMBLYWOMAN ALLEN: ...for your regulation.

MS. PARR: I was also told, or advised by our legal counsel after this, after I had gone through this, that withdrawal letters, that they normally advise us to have OAL

reject regulations rather than withdraw them because it takes so long to receive a withdrawal letter.

ASSEMBLYWOMAN ALLEN: Well, perhaps something along those lines could be a corrective action by OAL.

MS. PARR: The other problem that we have had since then was that we had two major AB 1111 packages rejected by OAL at our request. Because we had had the problem with the withdrawal letters, so we wanted something faster on these AB 1111 packages. They had been submitted -- I am not sure when because I didn't work for the Board of Registered Nursing then -- submitted once and apparently withdrawn from OAL and resubmitted as of January 17th. On approximately June 16, or July, anyway right at the day of their six months, they advised me that there were a lot of deficiencies. They also talked to our legal counsel to see if we could work through some of these things. At that point, we asked them to reject them because there seemed to be too many things. We didn't want to go through the withdrawal process and wait forever for a withdrawal letter. So, they sent a rejection letter on -- they sent the rejection letter on July 17th and it stated, in very general terms, why they were rejecting it. It said an opinion memorandum would follow.

There were two packages. On the smaller of the two packages, we received the opinion memorandum on July 27th. On the larger of two, we have not received it to date.

ASSEMBLYWOMAN ALLEN: Thank you.

CHAIRMAN AREIAS: Thank you very much.

Okay, we will go now to Mr. Gorges from the Department of Consumer Affairs.

MR. GREG GORGES: Thank you, Mr. Chairman, members of the committee, my name is Greg Gorges.

I have been staff legal counsel in the Department of Consumer Affairs for over nine years. My primary client agency during my tenure there has been the Board of Medical Quality Assurance. During that time I have drafted and processed many administrative regulations, both as new adoptions and amendments.

While that portion of the California Administrative Code, Title 16, devoted to the regulations adopted by agencies within Consumer Affairs is relatively short, compared to many other agencies because of each of the approximately 40 agencies in the department have separate rulemaking authority, the filing from the department are a major portion of the regulations noticed and filed with the Office of Administrative Law.

While we counsel our client agencies to adopt only those regulations that are authorized by statute and to make any regulations adopted as clear as possible, we saw AB 1111 in 1979 as a step in the right direction and believed that OAL would be a useful and effective agency in state government.

Based on my personal experience and that of our client agencies, I would like to make myself available for any questions or reactions regarding our experience with OAL and the rulemaking procedures in the APA.

CHAIRMAN AREIAS: I've got a question. Has OAL provided clear guidance to your department regarding its interpretation of the APA?

MR. GORGES: Well, we anticipate and look forward to regulations being adopted by the Office of Administrative Law. Certainly that will make our job easier.

Essentially, we have learned of many of the interpretations that OAL has made of the Administrative Procedures Act through conversations with the OAL attorneys when we have a rulemaking file that is faced with rejection or withdrawal. We have found the OAL attorneys to be helpful and courteous in their discussions generally but unfortunately, at times, that's not helpful if we're not aware of a particular interpretation of the Administrative Procedures Act until we are faced with a rejection of a file.

CHAIRMAN AREIAS: Do you find any of the six criteria that are used, like Mr. Fellmeth who testified earlier, who found one of the six criteria to be, in his mind, inappropriate? Do you find any of the criteria objectionable, that may end up resulting in a decision that would be inappropriate?

MR. GORGES: I think the one criterion that's most problematic for us is the clarity standard. As you know, that standard is that the regulation be easily understood by those directly affected by it. Without knowledge of an agency's program, an OAL attorney is at a disadvantage. It makes it oftentimes difficult for them to understand the language of a

regulation. We have advised our agencies to provide background material in files and to explain and justify a proposed regulation, as if the reader knew little of their program.

CHAIRMAN AREIAS: Mr. Gorges, give me an example of that, where the clarity standard shouldn't have applied.

MR. GORGES: Well, I think our Permit Reform Act regulations provide a good example. In September and October of 1983, the Physical Therapy Examining Committee and three other committees under the Medical Board filed regulations implementing the Permit Reform Act. These regulations set forth the processing times for applications for various occupational licenses. These regulations were approved by the Office of Administrative Law. In October of 1983, the physicians' assistants examining committee filed the identical regulations just with different numbers. However, this time they went to a different OAL attorney and they were rejected. OAL objected then on the basis of clarity. We made technical changes to the regulations at the time without the regulations being withdrawn because OAL had not implemented its withdrawal policy at that time. Again in December of '83, the same regulations were filed by the dispensing optician program. A different OAL attorney reviewed these regulations and had additional problem with the clarity of the regulations. The agency was forced to withdraw the regulations. My client authorized the withdrawal towards the end of January. We have not received written confirmation of the OAL's problems with these regulations as yet.

On March 22nd, the Medical Board filed the same regulations with regard to physician and surgeon licenses. A different OAL attorney reviewed these regulations and had an additional problem with their clarity. The agency was again requested to withdraw the regulations. To remedy one of the clarity problems would have required amending the regulations to read in a manner which was objected to by OAL back in October 1983. At that time, I was able to convince OAL that the regulations were not unclear on that particular count. However, on an additional count, to remedy the other clarity problem, the agency was required in effect to make the regulation longer by adding words which I felt duplicated the authorizing statute.

I think that one way in which these particular problems can be remedied, and I understand the difficulties that the OAL attorneys have in dealing with regulations when they have no knowledge of the program. But I think perhaps the APA could be modified by providing that if notice has been provided to representatives of those persons who are regulated by the regulation, and if there's no testimony in the file indicating that the regulation is unclear, then I feel there should be a presumption that the regulation is clear to those who are affected by it. I feel, each attorney at OAL has a different clarity problem with the identical regulation and I don't think that's what was intended by the Legislature.

CHAIRMAN AREIAS: How about the whole withdrawal process? How do you think that affected the quality of the whole process?

MR. GORGES: Well, I think on the face of it the withdrawal process is helpful when you have a minor problem which can be clarified by making a change to the language and in resubmitting it. It seems to have, however, not made the process any more efficient. Sometimes I have had regulations withdrawn in which OAL has been very prompt with a memorandum detailing the reasons why it was withdrawn; and I've had situations, as the one I indicated, where it has been some time. In some situations I have gone forward and resubmitted the regulations without their withdrawal letter and had it rejected a second time and am forced to wait for a withdrawal memo this time before I resubmit them. I don't see any advantage to it and I don't really see a disadvantage to it, to answer your question honestly.

CHAIRMAN AREIAS: Thank you very much. Is there anything else, do you have anything else to add?

MR. GORGES: No, I don't.

CHAIRMAN AREIAS: Okay, we'll go to our next witness. Tom Topuzes, Office of Economic Opportunity. Tom.

MR. TOM TOPUZES: Thank you and good afternoon Mr. Chairman and committee members. My name is Tom Topuzes. I'm counsel with the Office of Economic Opportunity.

The Office of Economic Opportunity is in the process of drafting proposed community service block grant regulations. This is the first time regulations have been drafted by OEO in its history. During the process of preparing these regulations I contacted the Office of Administrative Law to obtain information

regarding the procedural aspects of preparing and submitting the information digest and initial statement of reasons. Ms. Donna Billington, an employee of OAL, immediately responded to my inquiry providing us with the requested information over the phone and then submitted to my office a memorandum which contained examples of proposed regulations and initial statements of reason. I appreciate the assistance provided by the Office of Administrative Law and commend Ms. Billington for her extra efforts to assist the Office of Economic Opportunity prepare and submit its proposed regulations. That is my comment.

CHAIRMAN AREIAS: Any questions? Thank you.

MR. TOPUZES: Thank you.

CHAIRMAN AREIAS: Roger Wolfertz, Department of Education. We have quite a number of witnesses and I'd hope that you could stay away from any redundancies and try to capsule your comments to about five minutes and I think we'll get through this.

MR. ROGER WOLFERTZ: Yes, thank you very much. I am Roger Wolfertz, acting Chief Counsel, State Department of Education.

First of all, in spite of your plea for nonredundancy, I would like to support the concept of withdrawal and urge that you put it into law in order to validate it. Many times we go through wrenching experiences in adopting a regulation that is fraught with controversy. And to have to accept a rejection and go back through with a notice requirements and hearing with a

possibility that the opponents will have a chance to kill the regulation when all that is wrong is some minor technicality that can be rectified through a withdrawal process, I think it should be supported, the withdrawal process.

Also, I suggest that OAL be required to submit written opinions on request of agencies especially with respect to the procedure of adopting regulations and also with respect to the six criteria prior to going through an adoption process. And one example I can give is with the definition of the regulation. In the law, the definition of a regulation is something that is mandated on another party to implement or clarify, or make clear, a law that is of general application. But it does not include any kind of rule for internal management. On the other hand, there's another statute in this particular case that requires an agency to adopt a regulation if that agency wants to give its exempt employees more vacation time than civil service employees get under the law. Well, it seems to me that under that statute it's internal management. Therefore, I asked OAL, and specifically Director Brewer, for an opinion on whether we are required to adopt the regulation in order to give exempt people additional vacation in order to decide whether to go for a regulation, and maybe have OAL reject it saying it's internal management. Or not go for a regulation and be challenged that we have no authority to do it without regulation. I did not get an opinion, the reason being that it was rather politically sensitive. So, I just decided that it was internal management

and told the department to go ahead with it administratively in order to expedite the thing.

And another situation was that sometime ago, and I think it's still true now, that various attorneys in the OAL have different opinions on the law and interpreting it.

CHAIRMAN AREIAS: Excuse me, a question from Mrs. Allen.

ASSEMBLYWOMAN ALLEN: In a situation like that where you made the determination, would that fall under the category of underground regulation then?

MR. WOLFERTZ: It could be challenged as an underground regulation, certainly. And that's why I asked for the opinion.

ASSEMBLYWOMAN ALLEN: Okay, would the proper place for opinion rest there or would that rest with the Legislative Analyst, I mean the Legislative Counsel? If they were going to ask for an opinion on something of that nature, would it be more proper to ask for that kind of an opinion from the Leg Counsel rather than from OAL?

MR. WOLFERTZ: I rather doubt it because OAL has the authority to reject the regulation, you see. If I went for a regulation and it was determined to be internal management, then it would be shot down. All that time and effort would be wasted, you see. That's why I wanted to preclude that kind of thing.

As to whether it's internal management and can be dealt with administratively, of course I don't think there's any mechanism for OAL to come in with a ruling. Certainly someone can challenge that, but I think that would have to go to court. I

don't think it would go to OAL for a decision on that kind of determination.

ASSEMBLYWOMAN ALLEN: So what you're suggesting is that perhaps OAL then should adopt some procedure for that kind of a determination?

MR. WOLFERTZ: I'm suggesting that OAL be required to render legal opinions upon requests of agencies with respect to interpretation of the six criteria and procedures leading to adoption of a regulation. Not after a regulation, certainly, but with respect to their own procedures and their own criteria. So that agencies can decide whether to go for...

ASSEMBLYWOMAN ALLEN: In other words, they could say, "that's not in our realm of regulation." They could make that kind of a determination for you, is what you're saying?

MR. WOLFERTZ: They don't have to render legal opinions, no they don't, but I would like them to do so when it's called for.

The other situation was where various attorneys in OAL had differing opinions on whether a substantive or substantial change in the adopted regulation had to go back to a notice and another hearing, or whether only the 15-day review requirement applied. We had our own opinion. I wanted OAL's opinion because we had conflicting opinions among their own attorneys. I called Director Brewer on that, too, and we had a long discussion on the phone about it. I failed to understand a lot what Director Brewer said. I asked for it in writing and I never got it in

writing so we had to make our own opinion about that and go our own way in that regard. So, there is another situation where I would have liked to have had an opinion in order to settle the matter.

Another thing that we've had trouble with is with respect to the provision in law that allows an agency to request an expedited review by OAL and an early filing with the Secretary of State. We had a regulation called "Walk-on Coaches in Physical Education" and by its own terms that regulation was to terminate on July 1, 1984. Well, in good time, we went back to review that and we adopted an extension of that to July 1, '85. When I submitted that regulation to OAL in good time, I specifically requested an expedited review according to the standards in the law, an early filing date, and I even put a cover letter on there saying, "please note that I'm asking for an expedited review." Well, had I not called OAL to follow up a couple of days before July 1, 1984, that regulation would have died by its own terms because they had done nothing. They had put it through the general channels of review and not segregated it out for an expedited review at all. So, whether this committee is interested in that or not, or it's simply a housekeeping item with OAL, I wanted to bring that up.

CHAIRMAN AREIAS: Do you have anything else to add, Mr. Wolfertz?

MR. WOLFERTZ: No sir.

CHAIRMAN AREIAS: Any questions? Thank you very much. We'll go to our next witness, Mr. Richard Ochsner, Board of Equalization.

MR. RICHARD OCHSNER: Thank you Mr. Chairman. Richard Ochsner, representing the State Board of Equalization. We have submitted to you, in writing, comments, and I would just summarize briefly.

First, you've heard a lot about, I think, the need for some clear concise, objective standards of review that the agencies can follow. The system that we have now is extremely inefficient. The Board of Equalization has been adopting tax regulations for something over 50 years and we have quite a body of regulations already developed. We have followed traditionally a practice of even before going to public hearing on the regulations, of trying to do a lot of work with affected taxpayers groups, industry, assessors and property tax regulations, that sort of thing. So ideally, by the time the regulation comes to public hearing, we resolve most of the disputes, hopefully. And you go through this entire process and after you get something where perhaps the regulation comes to public hearing, by that time you've resolved all of the differences. Then the regulation is adopted and then it goes to OAL and then they apply what is a very subjective, sometimes fine screen, review and the whole thing is bounced back. It's a very inefficient way to run government, frankly. The ideal, we think, would be of course to have OAL in at the beginning of the

regulation so they can put their input in while we're getting all this other input. That may not be practical but if they cannot do that, then certainly we ought to have clear, concise guidelines as to what sort of review we're going to have to face when we run that regulation.

CHAIRMAN AREIAS: You're referring specifically to regulations, OAL adopting its own regulations.

MR. OCHSNER: Yes.

CHAIRMAN AREIAS: And that would provide the concise guidelines hopefully?

MR. OCHSNER: Hopefully. I would urge them that in the meantime, presumably they know what standards they are applying, it seems to me that as a help to the department, they ought to at least put that in writing and give it to us so we know we can all play by the same set of rules. I know they have a difficult problem. I'm not trying to downplay that but it certainly would be helpful. I think a much more efficient system is if we all understand going in, and during the development of the regulation, what the end screening is going to be.

CHAIRMAN AREIAS: Mr. Isenberg for a question.

ASSEMBLYMAN ISENBERG: It's more of an observation. The irony of the agencies complaining about OAL is that the complaints you make about them are exactly the same that the public at large makes about each state agency in their own rulemaking position. And, I wonder if there isn't an argument that could be made, for example, about the board. My clients

used to come to me and say, "hey, we don't have any idea what they're doing, the board makes these arbitrary decisions we can't figure out." Isn't there a certain irony that even the board would notice in this regard?

MR. OCHSNER: Well perhaps, but we're attempting to adopt regulations which provide guidance and what we have here is a situation where we don't have any guidance from the agency that is doing that.

ASSEMBLYMAN ISENBERG: Can I just tell you, the constant quest of Americans for objective standards, which you've mentioned and many other witnesses have mentioned, is one that's always befuddled me since most people are incapable, in any circumstances, of uttering objective standards for themselves but they always want it for somebody else. I wonder whether the process itself isn't more important than the so-called objective standards that you're seeking, a fair, open but speedy process where all the players are part of it. They get involved, they make their criticisms, their comments. I can't imagine how you're going to get objective standards that you can anticipate in advance other than procedural.

MR. OCHSNER: We found too that just in the procedural aspect that one time OAL did have a procedure guide but we understand that they now don't abide by that and they've changed those rules. So we're finding, even in the procedural types of areas, that they are changing from time to time these approaches and so it makes it difficult for us. We think that it would be

much more efficient if all this was, at least to the extent possible, laid out somewhere so we would have something to follow. That's simply the point, we think it would be a much more efficient process.

CHAIRMAN AREIAS: And also, Mr. Isenberg, I think in that ever elusive search for objectiveness, that the agency is mandated to adopt those regulations and that hasn't happened.

ASSEMBLYMAN ISENBERG: No, I think the adoption of regulations is a criticism that's legitimately made, Ms. Brewer acknowledges that, I think. I don't think there's a person around who doesn't believe that regulations ought to be adopted. But, I would be astounded if the regulations were not overwhelmingly procedural in nature as opposed to those objective standards which is, "I want to see on paper in advance how they're going to decide the case when we submit regs to them." You won't get that, I don't think.

MR. OCHSNER: Well hopefully, we'll get something as objective as is possible. We will have an open hearing process and hopefully the agencies will be able to give their views to OAL and help them in that process. But at least at this point we don't have anything and as I say, at least in the interim, it might be well for them to set that forth for us.

One area where the board has had problems is that in writing its regulations. It has a history and a large body of regulations which attempt to explain how the tax law applies in given situations, as clearly as possible. And, in many

instances, we found that it would be helpful to the taxpayer to start out first by stating the basic rule and then adding the various, little curlicues and interpretations and this sort of thing. So therefore, many of our regulations are duplicative in the sense that they may start out by stating the basic statutory rule and then expound upon that. And we have had a great deal of difficulty recently with this nonduplication standard. As we see it, and we explain this more fully in our comments, but basically, what OAL is doing is trying to make our regulations less helpful and less understandable to taxpayers. And we don't think that that's good government that is going to help the state or is going to help the taxpayers. We would feel that if you're going to have this nonduplication standard, whatever it is, and we don't think that OAL is properly interpreting a law as it's now written. If you read what is written there, they, I think, are going far beyond that. What we think is, that at least in the tax regulation area, there should be given some recognition to the fact that it may be helpful to a taxpayer to have in that regulation some statement of the basic rule. And so duplication is not necessarily the great sin that some people seem to think.

ASSEMBLYWOMAN ALLEN: Any further questions? Thank you very much.

MR. OCHSNER: Thank you.

ASSEMBLYWOMAN ALLEN: Our next witness is Harold Cribbs with the Fish and Game Commission.

MR. HAROLD CRIBBS: Members of the committee, I'm Hal Cribbs from the Fish and Game Commission. I've been the Executive Secretary since 1975 and I've been the contact person with OAL since its beginnings so I'm very familiar with their procedures.

I would point out that we're a very active regulatory body. We have 50 filings a year and they affect some 150 sections that we actually amend, appeal or adopt. We have somewhat unique procedures in that we're mandated by the Fish and Game Code to annually review about 75 percent of our regulations in Title 14. As a result of that, we have an opportunity for considerable public input. It also brings us into a very close interface with OAL on a regular basis. We have our mammal regulations in the spring and in the early August we adopt our gamebird, in late August our waterfowl, in the fall, our sport fishing. So, on an annual basis, we are coming to OAL with proposals. We have additional areas of responsibility in the area of commercial fishing and some of those are annually reviewed.

My perception of AB 1111, following it very closely when it was implemented, was that we were to reduce the regulatory burden to the public and private persons and businesses and that we were to keep them informed of regulatory actions and also make us accountable for our actions. And, I think those things, for the most part, have been accomplished through OAL. I think it's one thing to look at the statistics on regulations that have been

filed with OAL, and it's another thing to consider that agencies have not filed regulations with OAL because of the possible rejection by OAL. And I think that's a significant issue that needs to be looked at. The deterrent to agencies to go outside their area of authority is there and it's a very good factor.

As you're directing your focus today on OAL standards of review and the consistency and quality of that office's decisions, I'll try to direct my real comments to those issues.

As background under the review process and the accelerated review mandated by Governor Brown's executive order, B72-80, we reviewed our existing regulations by the January 31, 1982 deadline. In that review process, it was our understanding that initially there would be 44 attorneys on staff with OAL to review the work that we had submitted. And it is somewhat interesting we do not have permanent legal staff on board so the biologists and the administrators within the department were preparing these documents and we were interested in OAL's comments on them. To my knowledge, they never have attained that 44 attorneys on staff. I think it would have taken at least 44 attorneys to wade through the paperwork that was submitted to them at that time.

I would also note that that review process was very expensive, as far as our department was concerned, with an excess of $100,000 expended upon it. I believe it's really unfortunate that there was not more done with that material that was submitted to OAL under Director Gene Livingston's tenure. I

believe that it helped us review our regulations. But I think it would have been more helpful had there been an expedient review of the packages submitted to OAL at that time so we could have known where we had faults, corrected those faults and moved in a forthright direction. And, when you think of the time and effort expended, that was somewhat disheartening.

As far as OAL standards are concerned, you are aware of the broad criteria that's set forth. I do agree that it would be helpful if OAL were to adopt regulations that would clearly identify those specific standards it expects us to adhere to. One of the problems that I'm sure you're aware of, however, is that legislative packages and court decisions, on an ongoing basis, change that review process and put new mandates, change old mandates, under which we have to operate and which OAL must judge us by. And this has caused confusion and frustration on our part. About the time we get our people trained to prepare a document, we're back to the drawing boards and redoing it again.

I'm not even convinced with the adoption of OAL regulations that all this confusion and frustration would be eliminated from the review process. It's been my experience that it's somewhat difficult to get one, let alone two, three or several attorneys to agree on an issue. No offense, but we do have that problem and, I think, not only within the OAL but with attorneys coming to us and questioning our regulations.

CHAIRMAN AREIAS: Mr. Cribbs, excuse me. That's been my experience too, incidentally. Because you were so good to

provide us with written testimony I'd like you, just in the next minute or so, to kind of highlight your testimony. And anyone in the audience who would like a copy of Mr. Cribbs' testimony, we will certainly supply you with it. Do you have any problem with that?

MR. CRIBBS: No, I do not.

CHAIRMAN AREIAS: We get a number of people and this is all very well documented and I thank you for this.

MR. CRIBBS: Two areas in which I'm sure you're interested. One, you asked about consistency. One of the things I've tried to develop with whoever has been the Director of OAL, is to understand what they need from us. I mean, it's one thing to be critical but unless you endeavor to find out what they want from you and try to meet those mandates, you have a problem. And I found Director Brewer especially helpful in that. And if there have been inconsistencies I have been able to go to her with those problems and we've been able to work, at least address those inconsistencies, and move forward in the right direction.

Secondly, we had a problem with the adoption of emergency regulations. I'm sure you're aware that in Fish and Game we have a lot of short change things that need to be dealt with. Assemblywoman Allen carried a bill for us, that Director Brewer helped us draft, that will now give us the wherewithal to deal with specific emergency situations that are unique to Fish and Game. They're not unique to the Board of Equalization or any other agency, and still bring us under that criteria.

One of the things I wish you would address as a subcommittee, is that we have been retaining files on all these OAL procedures. Some of them, for instance, the review process, generated a stack of paper ten feet tall, that's what we kept. I mean, we could have kept all that paper. It would be helpful if the statutes were specific as to how long those files had to be retained.

And with that, I would just say that we have developed a good working relationship with OAL. I'm certain there are problems, but there is with any agency that considers that many regulations.

CHAIRMAN AREIAS: We are under considerable pressure to adjourn since they are taking the Consent Calendar up at 4:20 p.m.. What I'd like to do is ask Mr. Conheim from California Waste Management Board, as well as Messers. Nussbaum, Yarbrough, Kenton Byers, and Roger Andriola, if you could just capsule your comments in about a minute. Can you do that? If you have any written testimony that you'd like to supply us with, I would welcome that input into this process. Mr. Conheim? And then I'm going to ask Ms. Brewer to come up. We've got about five minutes.

MR. BOB CONHEIM: I'm Bob Conheim, the General Counsel of the Waste Management Board. I will try in a minute to give you just a couple of highlights.

I represent, I think, a fair representation of a small agency which has a single counsel and no regulations section. I have tried to change that situation for four years, and in the wisdom of the Legislature, we have never been budgeted for more.

The lack of clear standards from OAL, makes it almost impossible for a small agency to know how to proceed in any regulatory process. The current administration of OAL is extremely helpful. I'm a great supporter of the old OAL, although it was difficult to do it at the time, and this current one, because of the personnel involved. I just want to make that point that we've talked about regulations, guidelines, whatever, but it's absolutely essential that a small agency that has no ability to have a regulation section, that is, one committed to doing this work all the time, be given some clear standards to operate. This lack of clarity has resulted in my executive officer's decision to withdraw, finally, after two years of trying to get through the first ever set of performance-oriented, waste management regulations; which the statute now calls for, performance-oriented regulations. This will result in our withdrawal of 209 repeals, which the statute has also encouraged. But I can't get them through, and I only had time to try it once. I don't have time to try it over and over and over again.

A couple of more points. On the standards, you asked one of the other commenters, for his opinion of which standards might be changed or used or whatever. I think that there are

problems with the clarity, nonduplication and necessity standards. Since people have talked about clarity, let me mention something that wasn't mentioned before. The nonduplication standard, if rigidly applied, results in a Swiss cheese approach to regulations. OAL and the Administrative Procedure Act was designed to guarantee, hopefully, clear, concise, consistent regulations. However, there is no statute guaranteeing that the legislators adopt clear, concise, consistent legislation. So the quality of legislation varies. Some of the points in the statutes need clarification, some really do not. But what happens is, your regulated community, then, instead of having a comprehensive set of regulations in one book, is forced to carry the statutes in one hand, a Swiss cheese set of regulations in another hand, and then perhaps a nonregulatory guidance material, a third volume, somewhere else.

I have several other comments and time permitting I'd like to put them in writing, but I don't have time to do that now. I appreciate the opportunity to talk to you today.

CHAIRMAN AREIAS: I'd welcome an opportunity for you to come by our office and speak to the consultant. He can put them into writing for you. All right?

MR. CONHEIM: I'll talk to Bob, thank you.

CHAIRMAN AREIAS: Mr. Nussbaum?

MR. TOM NUSSBAUM: Thank you, Mr. Chairman and members, I'm Tom Nussbaum, General Counsel with the California Community

Colleges and have been so for the past five years. We regulate 70 community colleges, we don't really regulate districts, we have about 600 regulations.

Just a few points on what we believe is wrong and a few constructive comments, we hope. The problem essentially is that this is a four year old agency. We have 57 pages of statutes setting forth the operations of this agency and each of those statutes, many of them, have been amended two and three times. The rules of the game have changed incredibly in a very short period of time. If you really analyze this body of law, it's far too specific for statute. And part of the problem is that the law, itself, is too complex in statute. I think it goes to the other point that the Office of Administrative Law ought to be regulating a lot of this detail and we ought to be working with them on what that detail ought to be. So the first problem is possibly the statute itself.

The second that we experience, is the documentation requirements that other witnesses have described. I won't go into it, but, again, imagine yourselves in a position of an agency. If you have to respond to every comment and objection, no matter how silly, irrelevant; every comment and objection made on every regulation, think of that, hundreds of letters that you may get, that you would have to respond to in a rulemaking file. It takes incredible amounts of time and forces agencies to almost have to think about circumventing the process.

The third point is it takes very long to adopt regulations. If you add up all the dates, the hearing dates, the notice, the fifteen day period, the withdrawal at the eleventh hour, it comes out to be four to six months. That's as fast as you can do it. I have worked in legislation as the agency's lobbyist and I can tell you, from my point of view, it's easier to get a bill passed than it is to draft regulations and get them by the Office of Administrative Law. I think the committee ought to look at that.

ASSEMBLYMAN ISENBERG: Is that because we don't ask you enough embarrassing, stupid questions that you'd have to respond to?

MR. NUSSBAUM: I don't have time to give you a proper answer to your question.

CHAIRMAN AREIAS: Wind up, Mr. Nussbaum.

MR. NUSSBAUM: Yes, I will. Simplify the statute. Give the Office of Administrative Law the authority to regulate. Provide a service orientation for the Office of Administrative Law. Allow them to help agencies at the front end. And, third, consider differentiation in the agencies being regulated. An agency like ours that regulates districts is different than an agency that regulates individuals.

CHAIRMAN AREIAS: Thank you very much. Sorry to cut you off. If you have any other comments, please supply them in writing.

Mr. Yarbrough from the Highway Patrol.

MR. HERBERT YARBROUGH: Thank you, Mr. Chairman and members of the committee; I'm Herb Yarbrough, representing the Department of Highway Patrol.

Our relationship between the Department of the Highway Patrol and the Office of Administrative Law has been cordial and mutually supportive since the establishment of the office in July 1980. Our regulation review required by AB 1111 was completed in December 1981, with very few amendments and repeals being required. The office appears to have a sympathetic understanding of our problems and has worked cooperatively with us in resolving them.

The only area in which we have any problem is that of review of regulations submitted for filing. Recently, we have been asked to withdraw regulations, apparently before the office has completed a total review. We conclude this because upon resubmission, we have been asked to withdraw the regulation again for a different reason. Since the requests for withdrawal inevitably come at the ends of the review periods, and current law allows OAL a new 30-day review period following each resubmission, considerable delay is involved in actually getting the regulations filed.

We believe the regulatory process, if we're going to retain the withdrawal procedure, could be improved. If the Office of Administrative Law were required to disapprove or file

within ten calendar days, a regulation that it has reviewed and that has been withdrawn for correction of specific defects in the rulemaking file and resubmitted for review.

CHAIRMAN AREIAS: Thank you. It's a good suggestion.

Are either Mr. Byers or Mr. Andriola here?

MR. DAVID WRIGHT: I'm from the Commission on Teacher Credentialing, Mr. Andriola began a vacation.

CHAIRMAN AREIAS: You're here for Mr. Andriola?

MR. WRIGHT: Yes, I'm David Wright.

CHAIRMAN AREIAS: This is your testimony? Do you want to highlight this in about two minutes? Then, we'll call Ms. Brewer?

MR. WRIGHT: Thank you again. I am David Wright, Commission on Teacher Credentialing.

Our agency is expected and required by law to adopt standards for licensing school personnel, and it's through regulations that we do this. We also have regulations for evaluation and approval of college programs, the preparers of school personnel. We've been supportive of the concept of a watchdog agency that oversees the regulatory process. The AB 1111 process was, on the whole, very positive and very helpful. But we encountered some difficulties, that have already been alluded to by some previous witnesses, in our attempts to adopt new regulations since 1980.

In particular we've had difficulty understanding what constitutes a factual basis or a need for regulation. When, for instance, the field and the public and the parents and the teachers and the school administrators and the school board members and the college and university professors all tell us that teachers need to know better how to control and manage the activities of students in the classroom. We think that their testimony should constitute a factual basis for such a regulation, that would govern the approval and evaluation of a preparatory program in a college or university. Documenting the need for such a regulation consumes a great deal of time. It is difficult to do and to live up to a legal standard that would hold up in court.

The evidence in the published literature for say a correlational relationship between a teacher's skill or a teacher's knowledge on the one hand, and pupil gains in terms of achievement test scores, is often lacking. It just isn't there. And so we have to rely on the best advice that the professionals, the public, the parents, and the professors can give us. We think that that kind of testimony should be represented in our regulations and should be accepted by the Office of Administrative Law, as a factual basis for the need for a regulation.

CHAIRMAN AREIAS: Thank you, Mr. Wright.

Ms. Brewer, I have a question, and I think the other committee members, as well, are interested in hearing your version of the alleged threat, for lack of a better word, to Mr. Moskowitz, regarding the RCRA regulations. What's your interpretation of that dialogue and the discussion that took place?

MS. BREWER: Until that comment was made today, I've never heard that statement made, so I can't respond. Is Mr. Moskowitz here?

CHAIRMAN AREIAS: No. I think he was and was called down to the Governor's Office.

MS. BREWER: I have no recollection of ever having had a conversation of that type and we absolutely do not do that.

CHAIRMAN AREIAS: You know, in my mind it's a very serious allegation and...

MS. BREWER: If it were true, I would agree with you. And I think we should postpone discussion until Mr. Moskowitz can come in and make the statement. I know nothing about that.

CHAIRMAN AREIAS: Thank you. Any other questions of Ms. Brewer? Do you have any comments that you'd like to make?

MS. BREWER: Yes, I would, if I may. May I have two and one half minutes to summarize the three witnesses that preceded me, please?

CHAIRMAN AREIAS: Until they call the Consent Calendar, you can.

MS. BREWER: Okay, I can certainly understand that. I just want to thank the committee, again, for recognizing that OAL is working very hard to accomplish a great deal under very tight restrictions and tight deadlines. I'm grateful to everyone who has come forward today to give their suggestions and I would just like to speak specifically to a few of the points that were made today, in order to clear up any misunderstanding that may still exist, in no particular order.

They are, one, Mr. Fellmeth suggested that we eliminate the necessity criteria. If we were to do that, we would be striking out the public's right to participate in rulemaking, and the right to make the Executive Branch accountable to them. I cannot support, and I want the record to reflect this, his attempt to undemocratize our government, in that manner. If that's what the Center of Public Interest Law really wants, I would disagree with that recommendation to the committee.

Ms. Vining charged us with delaying regulations. However, our time limits are very specifically prescribed by law; we have either 30 days, ten days, or six months, depending on the type of regulation that is submitted to us and we have never once missed a deadline that would hold up in court for issuing an opinion.

Mr. Gorges says that clarity is the most problematic for him since OAL was established. What you should know, however, is that the public, who is not here represented today in comments,

tells us that clarity is the greatest problem for them, when it comes to understanding regulations. Because especially when you're dealing with boards and commissions and such things as medical licensing regulations, the regulated community is undefined, because it changes every year, just because one set of potential doctors understands the regulations, doesn't mean that they are going to understand the next ten-year set. So I disagree with him that we should relax the clarity standard.

Several commenters, as well as yourself, asked about withdrawal. This is always, I want to make it very clear for the record, at the discretion of the agency. There is a provision in the statute for returned regulation, but they always have the option to refuse and allow us to disapprove the file. And the only reason we will disapprove it is because it's incomplete or deficient, according to some legal criteria. We will be happy to comply with any request for agencies if this committee decides that we stop...

CHAIRMAN AREIAS: Ms. Brewer, I think where you and I differ is that I think there is a clear distinction between a refusal and a withdrawal. What I'm afraid of is that this process is being subverted and politicized, frankly, as a result of that withdrawal process. I think there is a distinction between a withdrawal and a refusal.

MS. BREWER: I don't understand what a refusal is. Do you mean a disapproval?

CHAIRMAN AREIAS: Excuse me, a disapproval.

MS. BREWER: Okay, let me help clarify the law for you on that point, Mr. Areias. There is really no difference between a disapproval letter and a withdrawal letter. The jurisdictional limit, as it relates to regulations and the way they are adopted in the state, begins once the notice is filed with our office. The agency then has one year from the date that notice is filed, to either withdraw, if it's rejected, they can go back to notice and hearing, or else they don't have to. But they have one year, once they submit a valid notice to our office to get the regulation through in an approvable form. So it is a courtesy.

I've heard several commenters here, and I heard this when I first came up to Sacramento, we don't understand what the standards are; we've never gotten detailed letters about what's wrong. My commitment at my Senate Confirmation hearing was to open up the process to demystify OAL. I said I was going to codify our opinions and start issuing into legal journals, into the courts, and we are doing that. And one of the things, you can trace every decision we've made on whether it's necessity. We've got case law now, and you can find every opinion that I've issued since I've been here on how we rejected, and consistently I might add, on each of the six standards.

CHAIRMAN AREIAS: Can an agency appeal a withdrawal?

MS. BREWER: You don't appeal withdrawal. You can appeal a disapproval.

CHAIRMAN AREIAS: Okay, so if an agency is told to withdraw, I mean...

MS. BREWER: You're putting words in my mouth, if I may suggest that. What I said was, every agency ...

CHAIRMAN AREIAS: I'm not putting those words in your mouth, I'm just asking you clearly. The statute calls for an approval or disapproval. When you ask an agency to withdraw, how can an agency appeal the withdrawal?

MS. BREWER: They don't. They can appeal our disapproval. The statute provides...

CHAIRMAN AREIAS: But you're not disapproving, you're withdrawing.

MRS. BREWER: There is a specific section in the Government Code that is entitled "Returned Regulation." I agree that when we adopt our regulations, we ought to specify with greater clarity what that means. That section in the Government Code provides no timeline, provides no procedures for what happens once, and I believe that exact language is, "the regulation may be returned to the agency for failure to meet any of the standards." It has nothing to do with disapproval. Now, we can go ahead and disapprove, but I heard several commenters here suggest that there's a small technical matter to be cleared up; for example, a reference citation. They would prefer to withdraw it. There's no need to appeal, for example, to the Governor, a technical reference. There's also a provision in the

law for any person, the statute says any person may go into court and seek a declaratory judgment. As you know, Mr. Isenberg, declaratory judgments aren't very expensive. But no one's ever done that, so I don't see the problem. I keep hearing a lot of perceptions about the problem and I would be very happy to deal with the facts, if you have a specific case.

CHAIRMAN AREIAS: Yes, go ahead, Mr. Isenberg.

ASSEMBLYMAN ISENBERG: The testimony from Mr. Yarbrough of the CHP was pretty clear. It was supportive testimony by the way, favorable of you, favorable of the agency, but he indicated at least a current problem is that apparently requests to withdraw, suggestions that the proposed regulations be withdrawn, have occurred twice at the end of the review period.

MS. BREWER: Okay.

ASSEMBLYMAN ISENBERG: And I can understand how a department pressured for time, perhaps understaffed, would encourage that to happen so you don't run afoul of your time deadlines.

MS. BREWER: I'm glad you asked that specific question. Let me explain to you in painful detail how files are reviewed at OAL.

ASSEMBLYMAN ISENBERG: Not painful.

MS. BREWER: Well, it's going to be 30 minutes; 30 seconds was a pain, if you'll bear with me.

ASSEMBLYMAN ISENBERG: I can bear that.

MS. BREWER: Our staff instituted a new procedure when my general counsel, Roseanne Stevenson, came on board. We have a consistent system of review where every regulation that comes through that office goes through sort of a pyramid approach. Twelve attorneys are here and they review and it comes up to the level and finally it gets to me ultimately. I see every regulation that is either approved or disapproved, and I take full responsibility for all the decisions that have been made since I've been here.

But, what we do is, we sort of do a skeletal examination of the first regulation. We have a check list. Within the first ten days a regulation is in OAL, they've gone through a checklist to see if there are any egregious violations of statute. And then as they get closer to the deadline, they'll alert the agency. They'll call and say, it looks like we may have a problem here. You should be aware that this may, you know, prove to be fatally defective and you'll have to either - we'll have to reject it or you'll have to withdraw it.

As we get closer to the deadline, the problems become more apparent, when we have more factual data based on our review of the file to get a more firm conclusion. We'll call and say, that the 30 days is up, because if we don't make a decision in 30 days, it's automatically approved, and I refuse to permit any file to go through and just become effective by operation of law. So, we either have to reject or file it with the Secretary of

State. And so we call them and say, if you withdraw it, if there are technical changes that need to be corrected, we will issue a detailed opinion letter to help you get it through the process, and we do that. I think most recently, the last opinion letter we issued was 41 pages that explains specifically all the concerns that had either been raised in the rulemaking file, which was 8000 pages, and our attorneys went through every page. So it's an attempt to help them, but they are not forced to. I allow them to withdraw in lieu of disapproval, because I recognize that there are a lot of regulations that have to get through and the appeal to the Governor takes sometimes 45 days and those 45 days are better spent, I think, if you've got a federal program that you're going to lose money, working on that regulation, rather than going through the appeal process, because ultimately, you're going to get sued if it doesn't work, and it's not legally adopted. So that's been the choice of the agencies. We have not forced anyone to withdraw. Is that responsive to your question?

CHAIRMAN AREIAS: Somewhat. I don't know that I agree with you, though. I think it all stems back to the problem with the regulations. The incidence of this withdrawal process would be much more limited if you had regulations and if there was some clarity. In much of the correspondence that we received from various agencies, they talked about the problems of no clear standards; of finding a technical problem, having to withdraw

their regulations, then resubmitting them, and your attorneys finding another technical problem that was there the first time. Those types of problems came up over and over and over again.

MS. BREWER: I don't have the benefit of those comments, so I can't respond directly to each of them. But I think as a general statement -- I'd like you to be aware that one of the commenters, I can't remember - Mr. Belliveau, I believe it was - talked about the fact that an agency had been directed in 1977 to start adopting regulations and they were finally submitted to my office two weeks ago. It was 8000 pages and we're expected in 30 days to review technical data that it took the agency almost eight years to compile.

CHAIRMAN AREIAS: Do you have any suggestion to this committee about such situations like that, in terms of some legislative initiative that we might take to remedy that problem?

MS. BREWER: I think we all need to sit down and examine more - I don't think the Legislature ever anticipated OAL's having to review 12,000, 112,000 pages of testimony and transcripts per month. One approach, and this is off the top of my head, again not ever having the benefit of seeing the comments that you received, you might extend review deadlines based on the number of pages. If a file contains more than 10,000 pages, then OAL shall have 35 days. That's just off the top of my head without giving it more thought. I'd like to have an opportunity to give it considerably more thought before I would make a recommendation, however.

CHAIRMAN AREIAS: Question by Mrs. Allen.

ASSEMBLYWOMAN ALLEN: I'd like you to explain your - if it occurs, evidently it did with the testimony, saying that you had requested the regulations in increments, 8000 pages in that short span of time would be a great deal of review.

MS. BREWER: In that particular file, if I may elaborate, is contingent upon another agency's files. Two agencies are trying to adopt federal regulations that the feds are going to have six months to review, by the way, and if California's regulations aren't legally adopted, the feds are going to disapprove them and kick them back and we're going to lose money in the hazardous waste programs anyway. But that particular one, the Water Board's regulations are dependent upon Health Services' regs and Health services regs aren't in there. So it's more complicated than just the number of pages. Those particular regulations are interdependent upon two different agencies.

ASSEMBLYWOMAN ALLEN: Another question I have is, you had objected very strongly, as I think Mr. Isenberg did, to removal of necessity. If you would, for my benefit, explain how you define and what it means to you, the criteria of necessity.

MS. BREWER: I think the barber pole example that Mr. Isenberg referred to, best explains why it's important to continue to have OAL objectively review the standard of necessity. I would venture to say that 96.2 percent of the time,

when we get regulations through demonstrating that "necessity by the agency," they merely submit conclusory statements. "We have adopted this new program and therefore we think these regulations are necessary." That's not factual. Very often, we have commenters on the other side who will say for example, and again this is consistent with another change in our statute which took place effective January first of this year, "there are other alternatives," the commenters will say, "to accomplish the same objective that the Legislature had in authorizing you to adopt these regulations." They don't address the alternative. They say, "we don't care what they said about alternatives, we want to impose these mandated standards." So the Legislature, itself, is continuing to define the necessity standard. We, and I have to disagree with the commenter who said we're not at the public hearings, we are at every public hearing that's conducted, because we get the entire rulemaking file, the transcripts and all the facts.

The Legislature is redefining necessity. For example, you talk about you've added language to require that the agencies look at economic impact that it's going to have on small businesses and private individuals. They don't always do that. They say there is going to be no impact on small businesses and that goes to the necessity standard. Not just is it necessary to implement this legislation, but is it necessary to do it this way and have they addressed the small business impact? Have they

addressed the impact on private citizens? So, the Legislature's continuing to define necessity and I think it's a very important standard that we have an objective, some objective procedure for examining and weighing what the public has to say about the necessity and what the agency has to say. If we don't do it, we've got just the agency there, and that's like putting the fox in the chicken coop and I don't think that's what the Legislature intended when it created OAL.

CHAIRMAN AREIAS: Mr. Isenberg for a question.

ASSEMBLYMAN ISENBERG: Well, it's more of a comment. It seems to me we're at the point where we really ought to start trying, and perhaps the staff could do it in written form, to develop what amounts to a working paper which outlines the various comments, criticisms, suggestions, that have been made, without judging whether they are good or bad. But, there's been enough repetitiveness in some areas, so that it seems to me that we could probably get 20-25 ideas broken down probably by the procedure OAL follows, because I think our next hearing really ought to focus fairly systematically on identified concerns and what, if anything, can be done about them. And, it would be helpful for me, at least, to have that kind of laid out in advance in a form we could read.

MS. BREWER: May I make a suggestion? I would invite this committee to our public hearings. We are going to be holding public hearings on regulations. We have gone through and

done what you just suggested. We have a couple more to add based on some of the comments I've heard.

CHAIRMAN AREIAS: When are those public hearings going to take place?

MS. BREWER: They will be taking place within the next three months, but you have the schedule in your package of information that I sent you last time.

ASSEMBLYMAN ISENBERG: Is that part of the continuing pain you would like to inflict on the committee? (laughter)

MS. BREWER: No, I'm just trying to save the taxpayers money. We can incorporate the comments, because I really would like to have the Legislature participate in that process of adopting regulations where it's possible.

ASSEMBLYMAN ISENBERG: You mean regulations for yourself?

MS. BREWER: Yes, we're going to be adopting regulations on the informal opinions that we've been requested to issue and also on our procedural guidelines. Our staff has gone through and made up a two page list of areas where we ought to adopt regulations, so I would like to invite the committee to join us and have the next hearing there.

CHAIRMAN AREIAS: Thank you, Ms. Brewer.

I appreciate your comments and think they are very constructive and we'll proceed in that vein, Mr. Isenberg.

One more question relative to a comment you made at the first hearing, Ms. Brewer, about your willingness to enforce all the standards of the APA. Do you have any constructive suggestions in terms of changes that you'd like to see made to the APA?

MS. BREWER: Oh, yes, I do. And in fact that's my next project for my next year. That whole APA needs to be completely rewritten and restructured as far as placement of certain code sections. That's one of the projects we have on the burner as soon as we get our regulations adopted.

CHAIRMAN AREIAS: Can you specifically outline a couple of areas that you'd like to see addressed in the APA?

MS. BREWER: Changes off the top of my head? One of the things I've done, and this is only internal, it doesn't require changes, I believe that part of OAL's mission should be to look at statutes that need to be recommended to the Legislature for repeal. We have that authority and next year, once we get a chance to go through the APA and do a comprehensive revision, I'd like to start reporting annually to the Legislature. We have gone through the files and the public has identified and, again, that barber pole statute is a very good example; a 1935 statute that requires regulations to impose a requirement for those barber poles circulating. That's not necessary. I'd like to be able to get a process going where we could recommend repeal to the Legislature and in a year, you know, carry a bill or something that would do that.

The second thing that is most important and uppermost in my mind is I think the AB 1111 process ought to be...

CHAIRMAN AREIAS: We still have a lot of problems with existing regulations. How do you propose to review all the statutes on the books with the present staff that you have, when we have all the work to do on regulations?

MS. BREWER: Okay, you're anticipating my question. You asked two questions really. I think the way we do that is about a 14 word change in the statute. Rather than go through and continue to review by 1986 all the regulations, we need to anticipate what's going to happen 20 years from now. There's no provision in the statute currently for us to go back, and in my view, and this is substantiated by our looking back at some of the old files, all that were made under AB 1111 were cosmetic changes; changing he to she. OAL has no authority to review the underlying statute. What I would like to see is a change by the Legislature to allow us to review every time a regulation is submitted the underlying regulation to see if that barber pole is still needed in 1984.

CHAIRMAN AREIAS: You mean the statute itself?

MS. BREWER: The underlying regulation. See, the barber pole statute, that 1935 statute, can be adopted today. They can still require by a new regulation that all businesses require the barber pole. I'd like to put us in the position of looking at the underlying regulation -- does it meet the 1984, the 1987

requirement for necessity, for clarity? Right now, we can't do that and so that way we would accomplish a double purpose of recommending legislation that needs changing and also being able to look at the underlying regulations. I could write that for you in about 20 words if you'd like to carry it.

CHAIRMAN AREIAS: I'd like to thank you. We'll give you another minute if you have anything else you'd like to add.

MS. BREWER: Nothing except to thank the committee. I genuinely appreciate all the comments that have been made here today and your continuing interest. I'm looking forward to working with you and seeing you at our hearing.

CHAIRMAN AREIAS: I know at times it's difficult. There's been a lot of constructive criticism that has come forth and I hope you're taking it that way. It's a new agency. We've lived with it for a short time now and I think that the process has great potential. It needs to be streamlined a bit and we'll all work toward that end. Thank you.

MS. BREWER: Thank you.