

1 STATE OF NEW JERSEY OFFICE OF THE GOVERNOR

2 IN RE: RED TAPE REVIEW GROUP HEARING

3 PLACE: ROWAN UNIVERSITY

4 ROOM 221 CHAMBERLAIN STUDENT CENTER

5 210 MULLICA HILL ROAD

6 GLASSBORO, NEW JERSEY 080XX

7 TIME: 2:00 P.M.

8 DATE: MARCH 2, 2010

9 COURT REPORTER: CHARLES A. IULIANO

10 MEMBERS OF THE PANEL:

11 LIEUTENANT GOVERNOR KIMBERLY M. GUADAGNO

12 SENATE MAJORITY LEADER BARBARA BUONO

13 SENATOR STEVE OROTHO

14 ASSEMBLYMAN JOHN BURZICHELLI

15 ASSEMBLYMAN SCOTT RUMANA

16 ACTING COMMUNITY AFFAIRS COMMISSIONER LORI GRIFA

17 ACTING DEP COMMISSIONER ROBERT MARTIN

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1 (2:05 p.m. hearing commences.)

2 LT. GOV. GUADAGNO: It looks like we have
3 a busy afternoon. Can everybody hear me? I can't
4 tell if the mike is on or not. We are waiting for
5 one more member, Scott Rumana. But let me get
6 started. I don't want to get bogged down.

7 My name is Kim Guadagno. I am the
8 Lieutenant Governor of the State of New Jersey. The
9 Governor has assigned me the task of setting up a
10 bipartisan committee called the Red Tape Review
11 Group. And within 90 days of the day we were sworn
12 in we have to report back to the Governor on several
13 different issues. But the long and the short of it
14 is we need to cut red tape in New Jersey.

15 I don't need to tell -- looks like -- many
16 of the people in this room how difficult it is to do
17 business in New Jersey. It's not so much the
18 answer, but so much as how long it takes to get the
19 answer and how many different answers you get on the
20 way to getting a final answer, if you're lucky
21 enough to get one.

22 So the Governor has established a
23 bipartisan committee. And I'm proud to be sitting
24 on a panel with that committee. And hopefully we
25 will be able to -- well, one thing I do know, I will

1 report back to the Governor on April 18 one way or
2 the other. Hopefully we'll be able to make some
3 real changes.

4 To my left here is Senator Buono. Barbara
5 Buono has been a member of the senate for seven
6 years -- correct me if I'm wrong -- and also was in
7 the assembly before that, and has a JD.

8 The senator to my right is Senator Oroho.
9 The Senator is a CPA, Farleigh Dickinson University.

10 SENATOR OROHO: No. Saint Francis
11 University.

12 LT. GOV. GUADAGNO: Saint Francis
13 University. Sorry. That's what happens if you
14 don't look down.

15 Assemblyman Burzichelli, who is a
16 principal of the Hill Studio.

17 We are waiting for Scott Rumana,
18 Assemblyman Scott Rumana.

19 To my left, far left, is the object of all
20 your ire, no question, Bob Martin. He is the Acting
21 Commissioner, soon hopefully to be appointed the
22 full-time commissioner of the department of
23 environmental protection.

24 I also note, in his small defense, that he
25 spent the last 25 or 30 years in the business world.

1 He was a very active member of the governor's policy
2 team. He was one of the architects of the Red Tape
3 Review Committee, and has also spent many, many
4 hours helping me set up the Governor's project
5 involving business and jobs, called the New Jersey
6 Partnership for Action. Thank you for coming today.

7 Over to my right is another object of your
8 ire, I am sure, and that is Acting Commissioner.
9 Lori Grifa is an attorney formerly of Wolff and
10 Sampson, and waiting patiently to be designated, or
11 sworn in, as the head of the DCA.

12 Today's role is really quite simple. We
13 invited a few speakers to kick this off. I want to
14 turn the table over before that to one
15 representative of the republican side of the house
16 and one representative of the democratic side of the
17 house. And ladies first. Senator Buono -- I can
18 say that, right, ladies first?

19 SENATOR BUONO: Thank you, Lieutenant
20 Governor. I am pleased to be here. But in the
21 interest of time we decided that we would designate
22 one of each of us on each political party. So I am
23 going to turn the microphone over at this point to
24 Assemblyman Burzichelli.

25 ASSEMBLYMAN OROHO: Shared services.

1 ASSEMBLYMAN BURZICHELLI: Thank you,
2 Senator. And good afternoon to everyone.
3 Lieutenant Governor, I bring you, also, greetings
4 and a level of support of this commission from both
5 Senator President Sweeney and Assembly Speaker
6 Oliver. I speak personally for myself, and to an
7 extent to my collogue Senator Buono. We are honored
8 and feel privileged to be part of this.

9 The Governor's decision to establish this
10 commission I think has potential to do very, very
11 good things. Every so often one has to look at
12 these regulations and consider what is stale and
13 what has to be purged. The time is right for that.
14 And the legislative process stands ready at the
15 conclusion of this commission's work to do its part
16 to make things better. That is our standing
17 commitment. And it is a privilege to be with you,
18 Lieutenant Governor.

19 SENATOR OROHO: Thank you, Lieutenant
20 Governor. And, as Senator Burzichelli had
21 mentioned, it's an honor to be a part of the group.
22 I want to thank the Governor, Lieutenant Governor,
23 and Senator Tom Kean for asking me to be part of
24 this group. We've had a number of -- a few
25 conversations as a committee already. And I'm very

1 impressed by the ideas.

2 And the most important thing we are here
3 for today is to talk about ways to reduce the cost
4 of government, reduce the cost of doing business in
5 New Jersey, jobs going in New Jersey, reducing cycle
6 times, being more competitive. And I heard a number
7 of ideas already. And I am very grateful for being
8 part of this committee. And the most important is
9 getting to listen to you. Thank you.

10 LT. GOV. GUADAGNO: Okay. The procedure
11 we're going to follow, today's topic is one of three
12 public meetings. The topic today is basically to
13 give us some fundamental understanding of how the
14 rule-making process exists, how it evolved, how it
15 exists, how we might be able to make it a little
16 better.

17 And it's not to limit any of the public
18 discussion today, but I do want you to know that in
19 addition to today we will also be having a meeting
20 on March 9 at Brookdale to talk about unfunded state
21 mandates and also on March 23 at Montclair
22 University, talk about some of the problems we all
23 might be experiencing in trying to do business in
24 New Jersey when it comes to the administrative
25 procedure and the rules.

1 So you will have an opportunity today. We
2 asked some invited speakers to speak for about five
3 minutes. Then the panel will be given an
4 opportunity to ask questions of the invited
5 speakers. And then we will simply open up the floor
6 for people wanting to speak.

7 I'm going to ask you to hold it to three
8 minutes. And I haven't counted them, but these are
9 the number of speakers tonight. I do thank you and
10 encourage you to be as open ended, free, and as
11 transparent as we will be over the next several
12 weeks. It is the beginning, it is the very
13 beginning of what I believe to be an act going in
14 the right way for the right reasons.

15 So that having been said, I don't want to
16 take up any more time of anyone else. The first
17 speaker we invited is Mark Stanton. He is the
18 Manager of the Division of Rules, Office of
19 Administrative Law. Mark, are you here? Thank you,
20 Mark.

21 Mark lives in Hamilton Township. He
22 graduated from Dartmouth with a magna cum laude --
23 congratulations -- and Washington and League
24 University. He's got his JD, a lawyer. He's been
25 in the Office of Administrative Law since 1986, has

1 held numerous positions in that area. And he
2 testified here as an expert in rule making, as I
3 understand it. Mr. Stanton, thank you so much for
4 coming out today.

5 MR. STANTON: You're welcome, Lieutenant
6 Governor, Senators, Assemblymen, Acting
7 Commissioners.

8 What I'm going to do here today is to
9 provide a very bare-bones nutshell of the current
10 rule-making process as it exists under the
11 Administrative Procedure Act here in New Jersey.

12 In order to get the formal ball rolling in
13 our rule-making process an agency would submit to
14 the Office of Administrative Law a notice of
15 proposal. This notice would be submitted to appear
16 in one of 24 annual issues of the New Jersey
17 Register.

18 The Office of Administrative Law produces
19 a submission schedule every October so an agency
20 would know when exactly it would need to get a
21 proposal to us to go into a particular register.

22 The notice of proposal before it comes to
23 us under -- by statute, if it's going to revise any
24 part of the Administrative Code it has to be
25 reviewed by the Smart Growth Ombudsman, who works as

1 an adjunct to the Governor's office.

2 LT. GOV. GUADAGNO: Can I ask you who that
3 is? I'm new to that office.

4 MR. STANTON: Currently, Lieutenant
5 Governor, I'm not sure who the designee is.

6 LT. GOV. GUADAGNO: I don't think we have
7 yet.

8 MR. STANTON: Also, by tradition, for at
9 least the past 18 years cabinet level agencies also
10 had notice of proposals reviewed by council's
11 office. Once those reviews are concluded, the
12 notice of proposal comes over to us. And submission
13 is about a month before the registered publication
14 date.

15 We have a two-week review period for that
16 notice of proposal. We make sure the notice is in
17 compliance with the Administrative Procedure Act,
18 that it actually -- that it correctly reflects the
19 current administrative code. And we, of course,
20 review the notice for grammar, common sense,
21 conflicts, things like that.

22 The notice of proposal consists of the
23 proposed rule text and ten accompanying statements,
24 nine of which are required by statute, one of which
25 is required by Executive Order Number 4 from

1 Governor McGreevy. Those statements are the summary
2 in which the agency narrates how it's going to
3 change its rules.

4 A social impact statement, where the
5 agency discusses the non-dollars and cents issues,
6 include health, include education. An economic
7 impact statement, very simply, what is this going to
8 cost everyone effected; a federal standard
9 statement, which is how does this rule line up with
10 the existing body of federal law. Are there any
11 analogous provisions? And if there are analogous
12 federal provisions that have been exceeded, there
13 must be a policy-and-cost benefit analysis
14 explaining why we are exceeding the federal
15 standards.

16 There's a jobs impact statement about job
17 generation or loss. There's an agriculture industry
18 impact statement. There's a regulatory flexibility
19 statement, which is how is this rule going to affect
20 small business and how are we able to design the
21 rule to minimize the small business impact. There
22 is a small growth impact statement, which is the one
23 statement that survived from an executive order.
24 That is, how is this rule maybe going to affect
25 small growth and the state development and

1 redevelopment plan.

2 There is a housing and affordability
3 impact statement, how is this going to affect
4 affordable housing in New Jersey. And there is a
5 smart growth development impact statement. How is
6 this proposal going to affect housing production in
7 certain planning areas under the state plan.

8 For most notices of proposal there is a
9 60-day comment period from the date of publication.
10 An agency may also have a public hearing on the
11 proposal, which is basically a forum for a dialogue
12 about the proposal between an agency representative
13 and any members of the public.

14 Once the notice of proposal is published
15 we then have a 60-day comment period. After the
16 60-day comment period, if an agency desires to adopt
17 the proposal made they would file a notice of
18 adoption with the OAL by a specific date, based upon
19 our schedule. And when that notice of adoption is
20 published, that's the effective date of the new
21 rules of changes to the current rules.

22 The notice of adoption, very importantly,
23 contains a summary of public comment and agency
24 responses. All the issues raised by the public are
25 summarized. And they are substantively responded to

1 by the agency, accepting this suggestion, rejecting
2 this suggestion. Or, if they are not able to
3 determine a specific answer at that time, explaining
4 specifically what they are going to do to determine
5 that answer.

6 An agency may make certain changes upon
7 adoption, including substantive changes, as long as
8 those changes don't destroy the effect of the
9 original notice. You can't spring any surprises on
10 the public on adoption.

11 Once the notice of adoption is published,
12 two weeks after that update pages to the
13 administrative code are produced and the adoptive
14 rule is incorporated into the administrative code.

15 That's the standard rule-making process in
16 New Jersey.

17 LT. GOV. GUADAGNO: All right. Thank you.
18 Does anybody want to get started?

19 SENATOR OROHO: A question, if I may,
20 Mr. Stanton. Thank you very much. Let me ask you,
21 with respect to the process is -- we talk about all
22 the impact statements and whatnot. Is there
23 collected anywhere an inventory of all these
24 impacts, state versus federal standards, or is that
25 just on papers?

1 MR. STANTON: Senator, if you are
2 referring to is there a public record of the notices
3 of proposal?

4 SENATOR OROHO: Or is there some sort of,
5 quote-unquote, a gatekeeper of all those -- would
6 that be the ombudsman who would be, quote-unquote,
7 the gatekeeper of all these impacts and all these
8 regulations?

9 MR. STANTON: The impact statements are
10 each derived from the 125 rule-making agencies in
11 the executive branch. They're developed into what
12 they say is actually a product only of those
13 agencies.

14 The smart growth ombudsman only addresses
15 how -- what an agency is proposing, impacts smart
16 growth and the state development, redevelopment
17 plan. That's the scope of his review. He reviews
18 the proposal in its entirety and then either
19 approves or disapproves it for publication and the
20 register. That's his or her statutory
21 responsibility.

22 Outside of the agency that is doing the
23 proposal and our own kind of common-sense review of
24 the proposal at the OAL, there is no one else under
25 statute that has a yea or nay for the advocacy of

1 any of those statements.

2 Is that the question, Senator?

3 SENATOR OROHO: Yes. I was also
4 wondering, I guess there is no real repository?
5 It's not systematized, or anything like that, where
6 somebody can go back later on? The regulation is
7 supposed to have like a five-year sunset, right?

8 MR. STANTON: Right, sir. Any chapter of
9 the administrative code has a five-year life span.
10 Then the agencies have to go through a rule-making
11 process to give it another five years.

12 If an individual is interested in these
13 impact statements for any particular rule proposal,
14 the New Jersey Register, where all these statements
15 are published, is available online, going back 15
16 years.

17 SENATOR OROHO: Is that the only place, is
18 the New Jersey register?

19 MR. STANTON: The New Jersey Register is
20 where the statements are published. Agencies under
21 our own rules keep their rule-making records for a
22 minimum of three years. But the New Jersey Register
23 is -- we have full copies, full copies online. The
24 state library has copies. It's a very accessible
25 document.

1 SENATOR OROHO: Okay. So the average
2 person can go actually see the New Jersey Register
3 and not need a subscription, or something like that?

4 MR. STANTON: The average person can go to
5 what's called the public access portal that the
6 register publisher provides and look at any register
7 from the past 15 years for free.

8 SENATOR OROHO: Okay. Thank you.

9 LT. GOV. GUADAGNO: Can we welcome
10 Assemblyman Scott Rumana.

11 ASSEMBLYMAN RUMANA: I apologize,
12 lieutenant governor, for being late. It's a lot
13 further down here than I realized.

14 LT. GOV. GUADAGNO: We're hearing
15 testimony right now. And we are going to take the
16 people, who wish to testify, immediately afterwards.
17 And we started the questions from the senator.
18 Assemblyman, anything?

19 ASSEMBLYMAN BURZICHELLI: Mark, welcome.
20 I have a little bit of advantage because you visited
21 before our regulatory oversight a couple weeks ago,
22 which was very informative. Because there is a
23 learning curve to this Administrative Procedures
24 Act, which is what describes all this.

25 I think it would be helpful for the

1 Commission to get a sense of how large is your
2 department? How many people do you have working?

3 MR. STANTON: The Division of
4 Administrative Rules consists of myself, a
5 colleague, who is also an attorney. We have three
6 editors who work with the publisher in producing
7 both the New Jersey Register and the updates to the
8 New Jersey Administrative Code. And we have one
9 part-time principal clerk/typist.

10 ASSEMBLYMAN BURZICHELLI: So that's five
11 and a half people?

12 MR. STANTON: Yes, sir.

13 ASSEMBLYMAN BURZICHELLI: How many items
14 did you handle last year with regards to review and
15 register for working their way into rules?

16 MR. STANTON: For 2009 we reviewed 1228
17 notices, which included 389 proposals and 396
18 adoptions. The register totaled 4800 pages last
19 year.

20 ASSEMBLYMAN BURZICHELLI: Are there -- in
21 your opinion, because of that sort of workload, are
22 you boxed into the 60-day time frame? I mean,
23 suppose you get a cycle where you have a heavier
24 load than you may have had in the previous
25 publication window?

1 MR. STANTON: Our time frame for review,
2 Assemblyman, is actually ten working days. Very
3 often that does include the weekends.

4 If an agency gets us a document on time,
5 there has never been a situation where we haven't
6 timely reviewed it and been able to process it.

7 If we find issues with the notice of
8 proposal or adoption, that we bring to an agency's
9 attention. If we can't resolve it with the agency,
10 then that document might be held, and in resolution
11 to a future register. But in over 99 percent of the
12 documents we receive, they are reviewed and
13 processed for the register to file for.

14 ASSEMBLYMAN BURZICHELLI: When you
15 mentioned the public comment period, written comment
16 period, and the agency has an opportunity to respond
17 to that, that part of the public document, what is
18 the agency's responsibility in their response to
19 take action based on the information the public may
20 bring to them? Or do they simply answer it and go
21 on and not change their minds? How does that work?

22 MR. STANTON: What the agency would do,
23 the way that we've instructed agencies to respond to
24 comments, and what our basis of review is for this
25 common-sense, if a commenter makes a suggestion, for

1 example, saying your economic impact statement is
2 completely incorrect, we believe the figures are as
3 follows. If the agency believes otherwise they
4 would have to basically lay their cards out on the
5 table in their response. They couldn't simply say
6 we disagree, thank you. They would have to --

7 If there are suggestions being made to
8 revise a proposed rule, if the agency believes that
9 the suggestion is unwarranted, they would have to
10 state that and explain why they believe the change
11 would be inappropriate or the change would not have
12 the effect that the commenter believes it would
13 have. As I mentioned in my summary, these responses
14 are substantive. They must be directly on point and
15 they must be explanatory

16 ASSEMBLYMAN BURZICHELLI: And who is the
17 referee that determines that the response from the
18 agency against the public comment is in fact the
19 correct response?

20 MR. STANTON: Well, if it's -- we review
21 the responses not for correctness, we review the
22 responses for completeness in addressing the issue.
23 If we believe an agency has not substantively
24 responded to a comment we will ask them to revise
25 the comment. And we won't approve the document for

1 publication until we believe the response adequately
2 addresses the comment.

3 ASSEMBLYMAN BURZICHELLI: Past the point
4 of the response -- this will be my last question,
5 because we have a full day in front of us. But past
6 the responses received, if you deem the response to
7 be complete, there is still a difference of opinion
8 between the person who raised the issue and the
9 agency's position, the agency just simply at that
10 point continues on its own pace?

11 MR. STANTON: Right. The agency that has
12 adequately responded to the comment would then move
13 and complete the adoption through the adoption for
14 publication and the rule would become effective.

15 If the individual still believes he or she
16 still has a valid point, that individual would be
17 able under the Administrative Procedure Act to
18 submit a petition for rule making to the proposing
19 agency.

20 Petition for rule making goes through a
21 very statutorily, mandated time frame with notices
22 published in the New Jersey Register about accepting
23 and deliberating on the petition.

24 I don't believe there has been a situation
25 where a commenter on a proposal has had his

1 suggestions rejected, submitted the same suggestion
2 as petitioned for rule making, and had the agency
3 change its mind.

4 ASSEMBLYMAN BURZICHELLI: How often does a
5 petition -- presentation of a petition occur?

6 MR. STANTON: Surprisingly, infrequently.
7 On average we get 30 petitions for rule making a
8 year. And the petition process is very simple for a
9 petitioner; basically, to clearly tell the agency
10 what they want done by means of regulation and what
11 they believe the agency's authority to do that is.
12 And from there it's all on the agency to respond.

13 ASSEMBLYMAN BURZICHELLI: So, as I close,
14 is it safe to say that the decision-making policy is
15 weighted heavily to the agency submitting the
16 regulation with regards to burden of proof? It
17 weighs heavily -- the agency has a great deal of
18 call?

19 MR. STANTON: It is the agency's
20 expertise.

21 ASSEMBLYMAN BURZICHELLI: Thank you.
22 Thank you, Lieutenant Governor.

23 LT. GOV. GUADAGNO: Senator.

24 SENATOR BUONO: Just quickly. I wanted to
25 mention that when I went to law school I originally

1 thought I wanted to practice environmental law. And
2 then I saw that the practice was essentially focused
3 on -- what at the time I thought were overly
4 burdensome and more complex than they needed to be,
5 regulations. So I took a different path.

6 Is it premature to ask you at this point
7 in time whether or not you have an opinion as to
8 what, if any, of these steps could be eliminated,
9 the social impact, the economic? It seems as though
10 it's excessive. Am I wrong?

11 MR. STANTON: I really -- well, I really
12 don't have an opinion one way or the other, Senator.
13 Nine of those are deliberative issues to the
14 Administrative Procedure Act. They are legislative,
15 you know, undertakings.

16 I don't perceive that there is significant
17 redundancy between them. Of course, I can also draw
18 up a list of ten additional possible impact
19 statements.

20 SENATOR BUONO: I'm sorry?

21 MR. STANTON: Of course, I can also draw up
22 a list of ten additional impact statements.

23 (Laughter.) There are even a few pending in the
24 legislature now.

25 SENATOR BUONO: I think we are in

1 agreement on that. We don't want to go in that
2 direction.

3 MR. STANTON: As the reader of them, I'm
4 happy about that, too. There is overlap
5 occasionally between statements. For example,
6 economic impact is discussed both under the economic
7 impact statement and under the regulatory
8 flexibility statement. We do have statements called
9 smart growth impact and smart growth development
10 impact.

11 SENATOR BUONO: I noticed that.

12 MR. STANTON: There is -- those are the
13 names denoted under the executive order and by
14 statute. They don't exactly, completely touch on
15 entirely the same area. The second statutory smart
16 growth development impact is a subset of the smart
17 growth impact statement.

18 SENATOR BUONO: That qualifies as
19 redundancy, no?

20 MR. STANTON: Under the smart growth
21 impact statement we don't specifically have to talk
22 about smart growth development in planning areas I
23 and II and designated centers under the state plan.
24 And I'm not sure exactly what that means. You do
25 under the smart growth development.

1 SENATOR BUONO: Okay. Thank you.

2 LT. GOV. GUADAGNO: You don't write it, I
3 know. Assemblyman?

4 ASSEMBLYMAN RUMANA: Just one quick point.
5 Who makes the proposed rules?

6 MR. STANTON: The rules are proposed by
7 the hundred -- approximately 125 executive branch
8 state agencies who by statute are given rule-making
9 authority.

10 SENATOR RUMANA: 125 agencies. But within
11 the agency, it can be anybody who works in the
12 agency?

13 MR. STANTON: The rule-making power is
14 given to either a board commission or authority, if
15 that's the type of agency it is, or to the head of
16 an agency, such as the commissioner of environmental
17 protection or the commissioner of community affairs.
18 That is a specific delegation under the statute.
19 Who does the actual rule writing within each agency,
20 it varies from agency to agency.

21 My division deals with a wide range of
22 people in doing rule making. A significant number
23 of people we deal with day by day are lawyers.
24 That's kind of the nature of the beast. However, we
25 deal with subject matter experts, MPA's health

1 officials, engineers.

2 You know, there's no requirement as to who
3 can actually write the rules. The requirements go
4 to who shall approve them and finally adopt them.

5 ASSEMBLYMAN RUMANA: So if any staff
6 member -- I guess it works up through the chain of
7 command, goes ultimately to the commissioner, the
8 commissioner is going to submit it to you, your
9 office?

10 MR. STANTON: That is my understanding. I
11 know within the department of environmental
12 protection there is an office of legal affairs that
13 kind of is -- are dated a contact with the
14 department regarding the rule-making process.

15 ASSEMBLYMAN RUMANA: Thank you.

16 LT. GOV. GUADAGNO: Mr. DEP, your name has
17 come up several times.

18 COMMISSIONER MARTIN: Exactly. One quick
19 question for you, Mr. Stanton. Right now, after the
20 60-day period, comment period right now, there is a
21 situation where once those comments come back in and
22 the agency wants to make substantial changes to the
23 regulations, right now they can't just revise them
24 and continue forward, they have to resubmit and
25 start over again, is that not correct? Is that how

1 that works? And is there a better way of doing
2 that?

3 MR. STANTON: There is a limit to the
4 degree of change that an agency can do upon
5 adoption. There is -- in New Jersey there is not a
6 statutory bright-line test for changes upon
7 adoption.

8 In the Office of Administrative Law Rules
9 we have a rule on subject to change that has been in
10 effect for about twenty years, which essentially is
11 a balancing test.

12 You can't make a change that is so
13 significant that the value of the original notice is
14 going to be destroyed. You can't significantly
15 increase somebody's burden or reduce somebody's
16 benefit from what you proposed.

17 Having recently observed what other states
18 do in this situation, it seems to hinge upon the
19 degree of which the public could have expected the
20 final rule to look the way the agency wants it to.

21 An interesting thing that a number of
22 other states do is, they have a process whereby if
23 you are still post-proposal but pre-adoption, you
24 can do a notice amending your proposal for a comment
25 period. Then once those comments have come in on

1 the change you want, then proceed to a final
2 adoption.

3 I believe there are five states that have
4 that kind of process. And that can very well be
5 something to look at here in New Jersey, or whatever
6 kind of standard, you know, the legislature might
7 deem fit.

8 LT. GOV. GUADAGNO: Mr. Stanton, did you
9 do a survey? DO you have that in writing? And can
10 you provide it to us?

11 MR. STANTON: The information was provided
12 to the Red Tape Review Group early in February, I
13 believe.

14 LT. GOV. GUADAGNO: All right. That's
15 what I thought. So we'll pull it out, take a look
16 at it. What state were you just referring to?

17 MR. STANTON: The states that had the
18 intermediate process? I can actually identify that.
19 If you allow me, I'll give that to Mr. Hutchinson.

20 LT. GOV. GUADAGNO: Anything else,
21 Commissioner Martin?

22 COMMISSIONER MARTIN: No, I don't.

23 LT. GOV. GUADAGNO: Anything?

24 COMMISSIONER GRIFA: Just a quick
25 question. We've spoken of proposal and drafting

1 comments, adoption, publication, we've spoken of
2 sunset. Between the time a rule is adopted and
3 published and the time it sunsets, was eligible for
4 sunset five years later, is there any additional
5 substantive rule, review of that rule for relevance,
6 applicability, or the need for modification,
7 clarification?

8 MR. STANTON: There is no -- there is no
9 such review mandated until the chapter, again, comes
10 up for re-adoption. However, in many agencies,
11 during that time agencies make incremental changes
12 to the chapters. Sometimes they make very extensive
13 changes to the chapters. The degree to which a
14 chapter is under review or reconsidered would vary
15 with each individual agency and the actual work it's
16 doing in the regulatory rule.

17 COMMISSIONER GRIFA: Thank you.

18 LT. GOV. GUADAGNO: Anything else?

19 SENATOR OROHO: Yes. Mark, if you would,
20 could you comment on the sunset, your experience? I
21 guess we have like almost 26,000 pages of
22 regulations. Do many regulations, sunset, do many
23 ever go away?

24 MR. STANTON: There was an instance with
25 one case. (Laughter) There was a changing of the

1 guard at one agency several years ago where there
2 just wasn't anyone paying attention to it. And a
3 lot of chapters temporarily went away.

4 It is something that agencies are
5 critically aware of. The Office of Administrative
6 Law provides quarterly lists to agencies of their
7 rules that are going to expire within the next year,
8 so they know what's going on.

9 Agencies have from time to time just let
10 the chapter go away. One of the chapters of this
11 new library in Title 15 just did that. It was for a
12 grant program. A grant program hasn't been funded
13 in ten years. Just kind of let it go away.

14 That used to happen more frequently, at
15 least temporarily. But the Administrative Procedure
16 Act was revised in 2001 to allow agencies an
17 additional six-month window to complete the entire
18 adoption process.

19 SENATOR OROHO: So it's pretty rare?

20 MR. STANTON: It is pretty rare, yes.

21 SENATOR OROHO: Thank you.

22 SENATOR BUONO: I did have one quick
23 question.

24 MR. STANTON: Yes.

25 SENATOR BUONO: One question is leading to

1 another. One of the complaints we often hear are
2 that the regulations often conflict with one another
3 or is in contradiction to one another. Is there a
4 process that you oversee, or someone else oversees
5 and directs that, on an ongoing basis, evaluates
6 whether or not regulations conflict with one
7 another, and resolve that?

8 MR. STANTON: Senator, there now is no
9 such process in place, nor has there ever been.

10 SENATOR BUONO: That is an indictment of
11 the process.

12 MR. STANTON: I understand that. For us
13 right now, we very definitely do not have the staff
14 to even do that. Doing something like that I
15 believe would be a full-time job, given the volume
16 of rule makings. Not only are you checking with
17 agency rules, which possibly should be something
18 they're doing, but also checking against the other
19 25,000 pages of code for a possible conflict.

20 SENATOR BUONO: In a perfect world how
21 many full-time employees would you need to do that?
22 What sort of IT upgradings would you need? Or none?
23 It would all be done manually. Which in and of
24 itself doesn't make any sense to me.

25 MR. STANTON: It would most likely be done

1 through some kind of electronic search mechanism.
2 There would have to be specific standards developed
3 for the type of -- what's called bullying research
4 questions you would be asking to try to get the
5 right hits on your search for conflicts like that.

6 Another part of the problem is, if there
7 is a proposed rule making that touches on 200
8 different aspects of a very complicated program,
9 trying to cross-check the universe of regulation and
10 statute to see if there are any potential conflicts
11 would be, quite frankly, a tremendous undertaking of
12 time. I'm not sure how that works.

13 LT. GOV. GUADAGNO: Mr. Stanton, isn't
14 that something we could require the executive
15 department to do?

16 MR. STANTON: Certainly. Certainly.

17 LT. GOV. GUADAGNO: So we wouldn't even
18 have to -- we could make it so it doesn't even get
19 to you until after the executive branch talks to
20 each other?

21 MR. STANTON: Of course, yes. That would
22 be another way to go, sure.

23 ASSEMBLYMAN RUMANA: Just raised a very
24 interesting point. Who resolves the conflict when
25 it arises? Because you know they exist out there.

1 I've seen things evolve on the land use side, being
2 the mayor, and you see the conflict between
3 different rules occur. Who resolves that?

4 MR. STANTON: There is no definitive
5 process. My experience and understanding, when
6 those types of conflicts come up, it's a meeting of
7 the minds between the two agencies, if there can be
8 a meeting of the mind.

9 I'm aware of circumstances in the past
10 where we don't become directly involved in these, we
11 learn about them kind of as they occur. But usually
12 if the agencies can't agree, it's going to be
13 council's office and the governor's office to kind
14 of make the final decision about what should rule.

15 There have been circumstances where an
16 individual, and groups, are adamant about the
17 existence of a conflict and both agencies disagree
18 that a conflict does exist. There is no -- there is
19 no mandatory mechanism for the resolution of those
20 kind of issues.

21 LT. GOV. GUADAGNO: Let me get Mr. Stanton
22 off. Because I do know we have three other
23 speakers, four other speakers that might be speaking
24 to exactly that issue.

25 Mr. Stanton, I want to say thank you very

1 much for coming. I know it was not an easy thing
2 for you to come not knowing what the questions were
3 going to be. But this is one where we are really
4 taking information and learning a lot first. Thank
5 you very much. We will be back to you, I am sure.

6 The next testimony will come from Richard
7 Hluchan, who is the author of the Administrative
8 Adjudications of New Jersey, Why Not Let The ALJ
9 Decide. Thank you, Mr. Hluchan, for coming. I
10 appreciate the time.

11 MR. HLUCHAN: Thank you very much. Good
12 afternoon. My name is Richard Hluchan. I'm a
13 partner with the Hyland Levin Law Firm in Voorhees,
14 Camden County. I'm not here on behalf of any group,
15 I'm here on behalf of myself.

16 I been practicing environmental and land
17 use law for 35 years. I'm a former deputy attorney
18 general where I served as assistant chief of the
19 environmental section and chief of the education and
20 public employment section. I'm also formally chair
21 of the Land Use Section of the New Jersey State Bar
22 Association.

23 When I was a deputy attorney general in
24 the 1970's, administrative hearings were a lot
25 different than they are now. There was a hearing

1 officer within each department who was an employee
2 of the department. So in the case of the DEP, his
3 office was right down the hall from the
4 commissioner's, in the Labor and Industry Building.
5 I'm dating myself.

6 And it was a very informal and some would
7 say a very unfair process because the hearing
8 officer was actually an employee of the DEP. And he
9 would hear the case, write a recommendation, and the
10 commissioner would issue a decision. We deputy AG's
11 rarely lost a case in those days.

12 Subsequently the administrative law judges
13 were created by statute in the late 1970's as an
14 independent corps of qualified judges who are
15 appointed by the governor and confirmed by the
16 senate and are impartial people who hear these
17 cases.

18 However, in my view, that law hasn't gone
19 far enough. Because under the current system and as
20 it's existed since the late '70's the ALJ's hear the
21 cases. They are there to hear the testimony,
22 evaluate the evidence, and write a decision. But
23 their decision is not the final decision. The final
24 decision in the case of the DEP rests with the
25 commissioner. And the commissioner under the law is

1 supposed to review the record of the proceedings,
2 and so forth, and render a final decision.

3 To me it's a matter of fundamental
4 fairness that the ALJ's who hear the cases and who
5 issue decisions should be making the final decision.
6 We should allow them to complete the job. And they
7 are the only independent, impartial people in this
8 entire process. So I think -- I would advocate
9 changing the law to allow them to have final
10 decision-making authority.

11 When the commissioner has final authority
12 under the current system, whether you like it or
13 not, there is nothing you can do about it. There is
14 always built-in institutional bias. And there is no
15 way we can get around that.

16 It's unfair, in my view, to have the
17 supervisor of the people who denied the permit,
18 whose permit now you are challenging, or who
19 assessed the penalty that you are challenging, or
20 who assessed the violation that you are challenging
21 in the first place, it's unfair to have the
22 supervisor of those people make the final decision.

23 It's just like if you were charged with a
24 criminal offense and the assistant prosecutor
25 prosecuted you and the judge found you innocent, and

1 then the prosecutor, the boss of the guy who
2 prosecuted you in the first place, got to reverse
3 that judge. How is that fair? It's not.

4 And I think that in the 21st century we've
5 come far enough that as a matter of fairness we need
6 to change the system, level the playing field
7 between the regulatory people and those of us in the
8 private sector, if we give ALJ's final
9 decision-making authority.

10 And if one side or the other does not like
11 the decision, final decision of the ALJ, they can
12 appeal to the appellate division. But in the
13 appellate division it would be the ALG's decision
14 which would be the final decision under review, not
15 as it is today where it's the commissioner's
16 decision that's the decision under review. The
17 appellate division often pays little or no attention
18 to what the ALJ did. Which, again, is completely
19 unfair.

20 In addition to being a matter of
21 fundamental fairness and due process, the current
22 system is really inefficient. It costs more money
23 than is necessary, it consumes more staff time than
24 is necessary, and it adds additional time, all of
25 which is unnecessary.

1 We have the commissioner essentially doing
2 a redundant review of the ALG's decision. And, of
3 course, when we say the commissioner, we know the
4 commissioner does not personally review every one of
5 these and write a decision and review the
6 transcript, and so forth. It's the staff that we're
7 talking about that do that.

8 So if we eliminate this redundant review
9 you free up staff to do more important things. You
10 don't have the cost of the redundant review and you
11 don't have, from the point of view of both sides,
12 the additional time that's consumed.

13 For example, under the current law the
14 commissioner is supposed to have 45 days to review
15 the ALG's decision and to render a final decision.
16 Very rarely, in my experience, is that done within
17 45 days. There are always extensions of time which
18 are liberally granted.

19 I have had cases that have taken in excess
20 of a year from the time the ALJ rendered the
21 decision until the time that the commissioner
22 rendered a decision. And time is money. And there
23 is just no reason for that, for the commissioner to
24 have that --

25 LT. GOV. GUADAGNO: Well, that can happen

1 with the judge, too.

2 MR. HLUCHAN: Well, you're right. You're
3 right. I have to say, though, under the law the
4 ALJ's are required to render their decision within
5 45 days of the close of the trial.

6 LT. GOV. GUADAGNO: Oh, now, come on. I
7 practice law, too.

8 MR. HLUCHAN: My experience has been
9 pretty good. There are instances where they need
10 more time because of a heavy caseload, or whatever,
11 but I would say more often than not they do it
12 within the 45 days.

13 LT. GOV. GUADAGNO: That's a noble number.
14 We can get that answer.

15 MR. HLUCHAN: Okay. I also want to point
16 out, I came across a law review article that I
17 handed to John Hutchinson earlier --

18 LT. GOV. GUADAGNO: We'll get it.

19 MR. HLUCHAN: -- which summarizes the
20 trends in the law nationwide over the past several
21 years. And it appears that more states are going in
22 the direction of final decision-making authority for
23 administrative law judges.

24 And, in fact, in New Jersey, to a very
25 limited extent, ALJ's already have final-decision

1 making authority in special education cases. And
2 the reason I believe that they have that is because
3 the time frames for decision making under federal
4 law are such that that's the only way that that
5 could be done. But my question is, if we can do it
6 for special education, why can't we do it for DEP,
7 for DCA, for other agencies?

8 And in that article it mentions the
9 various states. For example, in California ALJ
10 decisions are final in developmentally disabled
11 matters. In Maryland ALJ decisions are final in
12 motor vehicle, human resources, personnel, and
13 education cases. In Tennessee ALJ decisions are
14 final in health, environmental, commerce, and
15 insurance cases. In Wisconsin ALJ decisions are
16 final in natural resources, corrections, and social
17 services cases.

18 So the trend seems to be nationwide that
19 we are moving in that direction. And it just seems
20 to make sense at this point.

21 LT. GOV. GUADAGNO: In those cases, and
22 I'll get the law review article from
23 Mr. Hutchinson, does it say whether or not there is
24 a specialized area, these judges?

25 MR. HLUCHAN: No. They have -- all these

1 states, as I understand it, have a central
2 independent, impartial corps of ALJ's that are kind
3 of general.

4 LT. GOV. GUADAGNO: Out of a pool?

5 MR. HLUCHAN: Correct. And hear the
6 cases. You know, very often you hear the argument,
7 well, the agency has the expertise and the judges
8 really don't.

9 It's no different in superior court.
10 Superior court judges hear all kinds of cases,
11 depending upon which area they are assigned to. And
12 it's never really been a problem, and should not be
13 in the administrative context.

14 Let me just finally say, you made
15 reference earlier to my 1996 article. I read that
16 the other day. Everything in there is even more
17 applicable today than it was in 1996. So I thank
18 you for the opportunity to be here. And I'd be
19 delighted to answer any of your questions.

20 LT. GOV. GUADAGNO: Do you want to start
21 over this way? Bob?

22 COMMISSIONER MARTIN: Sure. Just a sense
23 of your question on fairness. Do we have any sense
24 for in the past there's been a lot of cases
25 overturned by commissioners, in the past?

1 MR. HLUCHAN: In my experience, I think I
2 can remember one ALJ decision in 35 years where the
3 ALJ found in favor of the DEP and the commissioner
4 reversed that in favor of my client. Frankly, I was
5 shocked. But that's the only --

6 Typically, in my experience, if the ALJ
7 finds in favor of the DEP, for example, usually the
8 commissioner will affirm that. And I think that, in
9 in my experience, if the ALJ finds in favor of our
10 client, I would probably venture to say that in
11 maybe 60 to 75 percent of the cases the commissioner
12 will reverse. And then we have to go to the
13 appellate division and take our best shot. So
14 that's been my experience, sir.

15 COMMISSIONER MARTIN: Another concern
16 would be the time frame. You mentioned the 45 days.
17 I'm only six weeks into the job here. I'm going to
18 go take a look back historically what we've had,
19 what kind of time frames. That would be in there,
20 how long those kinds of decisions take?

21 MR. HLUCHAN: I think you'll find that
22 they are not very often done within the statutorily
23 mandated 45 days. It's usually at least two or
24 three times that. And it could be longer.

25 COMMISSIONER MARTIN: Thank you very

1 much.

2 ASSEMBLYMAN RUMANA: Let me ask this
3 question. How many times does going through the ALJ
4 process is the decision of the department overturned
5 by the ALJ?

6 MR. HLUCHAN: Well, it's hard to tell. I
7 mean, I can't really generalize. Every case is
8 different on its facts. But, you know, maybe 25
9 percent. I'm only guessing. I haven't done those
10 numbers. I can't even give you an accurate number
11 from my practice.

12 ASSEMBLYMAN RUMANA: It's probably an
13 unfair question at this point. Limited experiences
14 that I've had in this process, I found it to be a
15 very incestuous process between the ALJ and the
16 departments. And maybe that's a misguided position
17 only because, again, of the experiences we have.

18 MR. HLUCHAN: Incestuous between the ALJ's
19 and the departments? I would strenuously disagree.
20 If I understand what you are saying, I would
21 disagree with that. I think the ALJ's do their best
22 to be fair and impartial and to call them as they
23 see them based on the evidence and the testimony.

24 But that being said, I think that you have
25 to appreciate that when an ALJ knows that he's

1 writing a decision, he or she is writing a decision,
2 in a DEP matter and the commissioner has the ability
3 to reverse that, I think we are being impractical if
4 we don't think that that has a bearing on what the
5 decision is going to say.

6 ASSEMBLYMAN RUMANA: That may be why,
7 again --

8 MR. HLUCHAN: I would also say -- I would
9 also add that, in my experience, I believe the
10 deputy attorney generals who handle these cases
11 before ALJ's don't necessarily take them as
12 seriously as they would if the ALJ was making a
13 final decision. Because I think the conventional
14 wisdom is, well, if I screw up and the ALJ rules
15 against me, I'll get the commissioner to reverse
16 that. I can't prove that empirically, but
17 antidotally I think if you talk to anybody who
18 practices before ALJ's and who is involved in this
19 area that they'll probably say the same thing.

20 LT. GOV. GUADAGNO: Senator.

21 SENATOR BUONO: I have nothing, other than
22 I just like a copy of the law review article as
23 well.

24 LT. GOV. GUADAGNO: Okay. Senator?

25 SENATOR OROHO: Thank you very much. Just

1 a question. I will tell you, I've had no
2 involvement with ALJ's. And it took me a lot of
3 practice just being able to say ALJ's.

4 But a quick question. With the process,
5 what does an ALJ use to decide, you know, in their
6 decision with respect to -- is it bias more towards
7 the perspective of government or, say, one of your
8 clients?

9 MR. HLUCHAN: Well, I don't think there is
10 any bias involved. I think that the ALJ's apply --

11 SENATOR OROHO: As far as the information
12 they have?

13 MR. HLUCHAN: They hear both sides. And
14 just like a regular judge in superior court, they
15 apply the appropriate standard of proof, which is
16 usually preponderance of the evidence.

17 So, for example, I recently had a case
18 before an ALJ in which the issue was whether a
19 certain wetland is a home of an endangered bird.
20 Because if it is then we would not be entitled to a
21 general permit, but if it wasn't we were.

22 And, you know, we presented our expert who
23 gave reasons why it was not habitat. The state
24 presented their people. And the judge made a
25 decision based upon who he believed and who

1 presented a more compelling case.

2 SENATOR OROHO: Is there anything in the
3 process that, in your opinion, would be able to --
4 you know, when you get to the ALJ level, obviously,
5 there is a dispute. And when I look at the -- when
6 I read the rule-making manual, and whatnot, to me it
7 seems to be very -- there's a lot of impacts. We
8 heard nine or ten today. Would it make any sense to
9 have part of the rule-making procedure, I would
10 almost call it like a victim impact statement, from
11 the community, the business community, or the sector
12 of government that is going to be affected by the
13 rule as part of one of those decisions that the
14 departments need, or the commissioners need, or the
15 rule-making person needs?

16 MR HLUCHAN: My personal view -- and I
17 been involved in rule-making activities on both the
18 state side and the private side, my personal view is
19 all those statements that Mr. Stanton alluded to
20 that is required as part of the rule making, most of
21 them are honored in the breach. If you actually sat
22 down and read those, they don't tell you anything.

23 LT. GOV. GUADAGNO: You think it's all
24 boiler plate?

25 MR. HLUCHAN: It's all boiler plate and

1 lip service. And that's the way it is. I had a
2 case in the appellate division about ten years ago
3 where we challenged DEP rule-making on the basis
4 that they did not do an adequate -- you know, these
5 various statements. And the courts just said, oh,
6 yeah, they're good enough. Again, that's my view.

7 LT. GOV. GUADAGNO: Assemblyman.

8 ASSEMBLYMAN BURZICHELLI: Just one
9 question. Do you have any idea what the workload
10 is, as far as cases, the administrative law judges
11 are hearing?

12 MR. HLUCHAN: I have no idea. But I
13 suspect that they are handling more cases than is
14 practical. My sense is that there are less ALJ's
15 now than -- I don't know.

16 ASSEMBLYMAN BURZICHELLI: I mean related
17 to potential regulatory disputes, not the other
18 workload that the judges may have. In this area of
19 law, any idea of what they are carrying?

20 MR. HLUCHAN: I honestly don't, sir.

21 ASSEMBLYMAN BURZICHELLI: Do you have any
22 idea of their average turnaround time of
23 decision-rendering?

24 MR. HLUCHAN: In my experience, from the
25 time the trial ends or the time that you submit

1 post-trial briefs, we usually get a decision within
2 45 days or less.

3 ASSEMBLYMAN BURZICHELLI: Very good.
4 Thank you.

5 LT. GOV. GUADAGNO: Commissioner.

6 COMMISSIONER GRIFA: Can you comment over
7 the course of your experience, Mr. Hluchan, as to
8 whether the process has become more or less
9 formalized? I know that you spoke of the '70's,
10 when it was a hearing officer within the department,
11 and now we have the ALJ with a more formalized
12 function. But in terms of papers that must be
13 filed, motion practice, decision-making, etc cetera,
14 are you finding it's more and more like superior
15 court? Because my sense is, if it's becoming an
16 alter ego court, perhaps the 1996 article is,
17 indeed, prescient. And if we're all but doing what
18 the court function is doing, then maybe we ought to
19 formalize it a little more.

20 MR. HLACHAN: Well, back in the '70's
21 when the hearing officer's office was down the hall
22 from the commissioner, these hearings were extremely
23 informal. There was no discovery. We would get
24 together in a conference room and, okay, you tell
25 your story, you tell yours, and then a decision

1 would be written.

2 It is much more formal than that now. And
3 I think that's a good thing. You know, we have
4 judges who wear robes and who conduct themselves
5 according to rules. And, you know, they admit
6 evidence and evaluate credibility, and so forth.
7 It's much more formal.

8 We all know what the rules are and we
9 abide by them just as we do in superior court. I
10 think that's a good thing because it, again,
11 projects that image of fairness and impartiality,
12 the same type of thing you get in superior court.

13 LT. GOV. GUADAGNO: Any other questions?
14 Well, thank you very much.

15 MR. HLUCHAN: Thank you all very much. I
16 appreciate it.

17 LT. GOV. GUADAGNO: Our next witness is
18 Neil Yoskin, partner at Sokol Behot and Fiorenzo.

19 MR. YOSKIN: Thank you, Lieutenant
20 Governor.

21 LT. GOV. GUADAGNO: Thank you for coming
22 today.

23 Mr. YOSKIN: Pardon me?

24 LT. GOV. GUADAGNO: Thank you for coming
25 today.

1 MR. YOSKIN: I'm happy to.

2 LT. GOV. GUADAGNO: Another lawyer. Do
3 you see a pattern here?

4 MR. YOSKIN: Not just another lawyer. My
5 practice is substantially identical to Mr. Hluchan's
6 practice. Staff invited us here today to give you
7 some framework in which to think about these issues.

8 I was asked to talk about three aspects of
9 the Administrative Procedure Act, the rule-making
10 aspect, the administrative law judges' process, and
11 the ability to change rules.

12 Just by way of background -- and, by the
13 way, I know many of you. Those of you who I don't
14 know, it's nice to meet you. Congratulations to the
15 two commissioner designees.

16 LT. GOV. GUADAGNO: You think.

17 MR. YOSKIN: Yes. (laughter) I have a
18 sense of what's in store for Acting Commissioner
19 Martin.

20 From 1978 to 1984 I was a staff attorney
21 at DEP. I was originally the attorney for the
22 coastal management program and eventually became
23 head of the office of legal affairs, which was then
24 and is still the office that is responsible for
25 processing all rule-making and for processing

1 administrative law decisions in and out of -- to the
2 OAL and then back to the OAL.

3 It was a little different back then. At
4 that time there were in-house staff attorneys with
5 DEP which enhanced those functions somewhat. In 19
6 -- I think it was 1980, a decision was made that
7 there couldn't be any civil service titles involving
8 attorneys that were not in the attorney general's
9 office. By statute it's only the attorney general
10 that can render legal advice to state agencies. So
11 all attorneys were required to become deputized or
12 have nonlegal titles.

13 I kind of made a mistake that Senator
14 Buono didn't make. I didn't look at what was ahead
15 of me --

16 SENATOR BUONO: Look where I am.

17 MR. YOSKIN: -- when I became an
18 environmental lawyer. And I will tell you that at
19 least twice in my career I have sat at tables when
20 somebody said, I like to meet the so-and-so that
21 wrote that rule. And I just sat there silently
22 not say anything because it was me.

23 Let me first talk about the rule-making
24 process. The tenor showed different statement
25 requirements that Mr. Stanton described to you, are

1 very instructive. Because they were all imposed on
2 state agencies by the legislature and they were in
3 response to what was perceived as a lack of common
4 sense at rule-making. Each one attempted to inject
5 some common sense in the rule-making process.

6 You can see what happened over time. They
7 became duplicative, they become accumulative. And I
8 would certainly agree with Mr. Hluchan that by and
9 large, their honor in the breach, they receive only
10 lip service.

11 I think it was you, Senator Rumana -- or
12 it might have been you, senator, who asked who
13 writes these and does anybody think about them.
14 One of the debates that is going within DEP for a
15 long time is should DEP have a staff economist,
16 because one of the statements that they are required
17 to make is the economic impact of rule making.

18 So that's been an a issue that's kicked
19 around for a long time. Usually it's resolved by a
20 budgetary decision, which there's not -- it's
21 simply not in the budget. So frequently there is
22 not the expertise available to write those
23 statements.

24 There was a question asked about the role
25 of the smart growth ombudsman. Although fast track

1 was not a popular statute, it was a controversial
2 statute. It is still on the books. And the role of
3 the smart growth ombudsman played one of the most
4 common-sense rules that I've seen in state
5 government recently. And I'll give you an example.

6 We have no rules in New Jersey right now
7 governing the protection of threatened or endangered
8 species habitat in upland areas. We have rules that
9 protect wetlands in the coastal zone, in flood
10 hazard areas. But there is -- we have an endangered
11 species statute, but there are no rules.

12 DEP has had sitting in the wings for a
13 long time a set of proposed rules which are about
14 the size of a telephone book. Twice during Governor
15 McGreevy's administration DEP attempted to propose
16 those rules and to get the smart growth ombudsman to
17 endorse their -- at least the proposal.

18 The problem with the rules was that DEP by
19 its own admission said that a staff of 36 people
20 would be required to implement the rule. And they
21 had a budget for not even one of those 36 positions.

22 So, although I think the goal is well
23 intended of having habitat protection, the ombudsman
24 said, look, we simply cannot -- we cannot adopt a
25 set of rules which are going to act as a further

1 roadblock to development unless we know we can
2 implement them. If we can't implement them I'm not
3 going to let them move forward.

4 There was a question asked, by the way,
5 about petitions for rule making. And Mr. Stanton
6 said they only get about 30 a year. It is one of
7 the favored tools of administrative and
8 environmental lawyers.

9 If I have a particular issue and the
10 problem is that the rule is a bright-line rule that
11 doesn't allow a project to go forward, the best way
12 to do it is to change the rule.

13 And I'll give an example. There is -- if
14 all of you know Stone Harbor, 96th Street in Stone
15 Harbor is the main commercial drag in Stone Harbor,
16 there is a DEP rule that limits impervious cover in
17 new development or redevelopment to 70 percent of
18 the site, 70 percent or the amount of existing
19 impervious cover, whichever is greater.

20 We have a client who wants to develop a
21 site that right now has about 65 percent impervious
22 cover. They want to go to about 75 percent and they
23 can only get 70 percent. And they really can't make
24 use of the property and have a public walkway in the
25 back without getting over this 70 percent.

1 DEP has no discretion under its rule other
2 than to deny this application. They simply had no
3 discretion under the rules. The way the rules are
4 written -- that's a topic for another day -- which
5 is the agencies deprive themselves of the ability to
6 make common-sense decisions. That's not an issue
7 today.

8 But the properties that surround this
9 particular property all have about 90 percent
10 impervious cover. And if you know the area, it's
11 really built up. And it's where you want
12 development. It's downtown.

13 So we are going to file a petition for
14 rule-making on behalf of the Borough of Stone Harbor
15 to change the standard in that particular kind of
16 setting to 90 percent of impervious cover. Because
17 I would be wasting my client's -- I'm sorry.

18 LT. GOV. GUADAGNO: Wouldn't another
19 solution be to have reasonable waiver provisions?

20 MR. YOSKIN: Yes. In a nutshell the
21 answer is this, lots of state agencies, the standard
22 for reasonable waivers is waivers of strict
23 compliance. They're the functional equivalent of
24 variances under the Municipal Land Use Law.

25 The DEP in most of its rule-making has

1 adopted a different standard, which is a hardship
2 waiver. You have to demonstrate that there is an
3 individualized, personalized hardship before a
4 standard can be waived.

5 In many settings that makes no sense. I
6 mean, the most rigorous environmental program we
7 have in the state is the Pinelands Program. The
8 Pinelands standards are waivers of strict
9 compliance. It's a two-fold test.

10 If there is a significant public or
11 private interest that would be served by the waiver
12 and there is no contravention of underlying
13 environmental standards, then the waiver can be
14 granted by the Pinelands Commission. That is the
15 model that the DEP should look to. I agree.

16 Moving to the ALJ process. When the
17 Administrative Procedure Act was amended to create
18 the Office of Administrative Law Decree, the corps
19 of judges, this issue of binding decisions was
20 discussed in front of the legislature. And at the
21 time Jerry English, who became commissioner of
22 environmental protection, was counsel to the
23 governor. And she testified at those hearings that
24 it was the expectation of everybody involved in that
25 legislation that once the state was comfortable with

1 the ALJ process and once the state knew where that
2 process was going, that we would go back and amend
3 the statute to make the decisions of the
4 administrative law judges final and binding.

5 I support the view of most of my
6 colleagues. I think it should be binding. Those of
7 you who have practiced law can imagine or know how
8 difficult it is to go to a client -- a lot of my
9 clients are individuals, they are not necessarily
10 businesses -- and say to somebody, look, this permit
11 is going to be denied, and I'm going to represent
12 you in an administrative law proceeding which is
13 going to cost you a great deal of money, but you
14 have to understand that the decision is not binding,
15 it's going to go back to the commissioner of
16 environmental protection.

17 Acting Commissioner, in response to your
18 question about statistics, we did an analysis some
19 years ago and we found that about 75 percent of the
20 initial administrative law decisions are in favor of
21 the agency. And about 75 percent of the decisions
22 that were not in favor of the agency were
23 overturned, or reversed, by the commissioner of DEP.
24 So we have a very, very small window for success.

25 LT. GOV. GUADAGNO: Could you send those

1 numbers to us?

2 MR. YOSKIN: If I can find them, I'll be
3 happy to. So we have a small window for success.
4 We have historically used the AOL process, quite
5 frankly, for one or two purposes, either to
6 negotiate a settlement or to create a record for the
7 appellate division. Because I never go in having an
8 expectation that I'm going to get a favorable final
9 decision.

10 I mention one more thing that I would urge
11 you to change. This process is full of delays. And
12 the first of them involves the assignment of the
13 case with a deputy attorney general.

14 Right now when you file a hearing request
15 for DEP, or any agency, under the OAL's rules they
16 are supposed to deem that case a contested case and
17 transmit it to the OAL within 21 days to start the
18 OAL process.

19 There has historically been an agreement
20 between the DEP and the attorney general's office
21 that because of the lack of staff at the attorney
22 general's office the case would not be transmitted
23 to the OAL until a deputy was assigned. I have
24 waited two years, two years, before cases have been
25 transmitted to the OAL. I hope that that's a

1 practice that will stop.

2 By the way, there are nine new -- somebody
3 had asked about workload. I think it was you,
4 Assemblyman Burzichelli. There are nine new ALJ's.
5 And I think that everybody hopes that helps.

6 One of the experiences that I have is
7 hearing dates are not infrequently postponed because
8 the judges must hear special ed cases within a
9 particular time frame.

10 Finally, let me turn to the ability to
11 change rules that are between proposal and adoption.
12 Mark Stanton gave you the ground rules for that.
13 Historically the agency was a little more courageous
14 about making decisions, changes in rules, and they
15 would deem them non-substantive. But it's all on the
16 scale.

17 For example, if there is a particular
18 quantitative standard, if there is some discharge
19 limit in a proposed rule, and the comment, the
20 public comment, period is a fight about whether
21 that's the appropriate number or not, I think the
22 agency probably is not comfortable in saying, well,
23 we propose ten milligrams per liter, but we're
24 comfortable with twenty. Because the folks who
25 wanted 10 milligrams are going to say, wait a

1 minute, that's a different rule, you haven't given
2 us adequate notice.

3 Now, the flip side of that is, as
4 Mr. Stanton explained in other states where the
5 litmus test is whether the public would have
6 reasonable notice to know that the rule might
7 change, that this is the range in which it's being
8 talked about, then maybe there is room for that.

9 Let me close and offer, answer any
10 questions you might have. But let me go back. I
11 forgot to suggest one thing about the ALJ process.

12 If there is resistance to amending the
13 Administrative Procedure Act to make the ALG's
14 decisions final, then I think there is a middle
15 ground, which is to amend the act to say that if an
16 agency had -- wants to overrule an administrative
17 law judge the agency head can only do so based on
18 clear and convincing evidence or on a finding that
19 the administrative law judge clearly erred. I don't
20 think it's fair to just go back and revisit what the
21 ALJ did. Otherwise, you are treating the ALJ simply
22 as a hearing officer. So I think that that's a
23 middle ground.

24 LT. GOV. GUADAGNO: That's a good middle
25 ground. Want to start with you, Commissioner?

1 COMMISSIONER GRIFA: No questions.

2 ASSEMBLYMAN BURZICHELLI: Thank you,
3 Lieutenant Governor. Good afternoon. Could you
4 tell us your scope of understanding of what a
5 guidance document is?

6 MR. YOSKIN: Yeah. DEP of necessity uses
7 guidance documents. There is just so much you can
8 put in a rule. The best way to describe it is to
9 mention an appellate division case, the American
10 Cyanimid Case. And it's in a flood hazard context.

11 There are at least five different
12 methodologies for calculating flood hazard areas,
13 depending on the geographic setting. Not every
14 element of those methodologies can be put in a rule,
15 so DEP has a guidance document.

16 In the American Cyanimid, Case, American
17 Cyanimid applied for a permit. It was denied and
18 they went to the appellate division. They argued
19 two things. They said the DEP used the wrong
20 methodology, they wouldn't accept our methodology.
21 And they cited a methodology in their guidance
22 document. And if they are going to do that they
23 need to make a rule. The court said, no, that there
24 is a rule of reason that applies to guidance
25 documents. So I think the American Cyanimid Case

1 sets the four corners of what's guidance.

2 There is an unfortunate penchant to
3 guidance. Guidance by its very name means it's not
4 a strict standard. There is -- a penchant sometimes
5 treats guidelines as standards.

6 Where I see it, for example, is there is a
7 set of guidelines for the design for the Hudson
8 River Walkway that was developed in 1984. And those
9 guidelines say these are just guidelines and they
10 are subject to variation in width and technique
11 where site conditions require that.

12 The staff, current staff -- most of them
13 were in elementary school when the guidelines were
14 written -- they treat the guidelines as bright-line
15 rules. And so that's the flip side of the guideline
16 problem.

17 Does that answer your question?

18 ASSEMBLYMAN BURZICHELLI: It's helpful.
19 Because complaints that are reaching some of us,
20 maybe all of us, in one form or another is the fact
21 that the guidance documents, in fact, become sort of
22 shadow regulations that are allowed to live
23 independent of the regulatory process, the
24 regulatory approval process. And those guidance
25 documents, or guidance outlines, don't appear

1 anywhere.

2 So an applicant finds himself at a
3 disadvantage when you reach a point of process and
4 suddenly someone says, wait a second, there is
5 something else. We didn't see that, we weren't
6 prepared for that, we weren't prepared to address
7 that.

8 MR. YOSKIN: Not only is that the case, it
9 operates on the margins of legality. This has been
10 a problem for many years. And about ten years ago a
11 package of bills was passed that are colloquially
12 known as the Doria Bills. And one of them said if
13 the DEP is going to use guidance manuals, that it
14 must publish them and make them available to the
15 public.

16 Now, DEP does that. But frequently only
17 professionals who work in the field know where to
18 find them and know what they say. Engineers are the
19 most conversant with them.

20 Ironically, when I go to look for the
21 Dorio legislation I frequently can't find it because
22 it was codified in a different place. So I think
23 that illustrates the problem.

24 ASSEMBLYMAN BURZICHELLI: It does. And we
25 would likely, myself and some of my staff, may want

1 to talk to you a little further. Because working
2 with the Lieutenant Governor, that's one of the
3 areas that we may go to legislatively to reclarify
4 where the Dorio stuff, in fact, lives and doesn't
5 live and how it's working. Because there seems to
6 be a real element of unfairness if a person making
7 application finds there is a second set of rules
8 being developed or has been developed. From your
9 experience on guidance documents, how often do they
10 change?

11 MR. YOSKIN: They change all the time.
12 And there is no mechanism to know when they change.
13 I do know, for example, that there is a methodology
14 for testing the verosity of soils for storm water
15 purposes. That method keeps changing. And
16 frequently the engineers, the private practice
17 engineers, don't know until they've submitted the
18 data to the department and they are told that it's
19 changed, they have to do it differently.

20 ASSEMBLYMAN BURZICHELLI: May I close,
21 Lieutenant Governor, with one continuation of
22 thought here. Because this guidance area in fact is
23 something we want to move through quickly.

24 If you have a guidance document, is it not
25 unreasonable to suggest that that should convert to

1 regulation in a reasonable period of time once a
2 particular point of the regulation had to be
3 clarified with a point of guidance?

4 MR. YOSKIN: Yes and know. The problem
5 is, DEP is not -- DEP is the agency that I'm most
6 familiar with. DEP is not insensitive to the need
7 to respond to meaningful comment and change
8 practices and procedures. The problem is, if you
9 adopt all the guidance documents as rules, then
10 making a change is very, very cumbersome.

11 It's not that uncommon that there will be
12 some consensus on an engineering issue that will be
13 changed in the guidance document because members of
14 the regulated community said this needs to be
15 changed. So it's a two-edge sword.

16 ASSEMBLYMAN BURZICHELLI: I'll close with
17 this, the guidance document. There is also another
18 term we used, desk drawer rules. Would that be the
19 same thing?

20 MR. YOSKIN: Yes. I find out about desk
21 drawer rules from time to time.

22 ASSEMBLYMAN BURZICHELLI: So when we say
23 desk drawer rules?

24 MR. YOSKIN: No, it's not the same thing.
25 Guidance documents eventually make their way under

1 the DEP website. Desk drawer rules are practices
2 and procedures that kind of happen without anybody
3 knowing about them.

4 ASSEMBLYMAN BURZICHELLI: I think that's a
5 very significant thing you just said. Can you tell
6 us, of your experience, of desk drawer rules?

7 Because you talked about a shadow set of rules and
8 regulations. That sounds like that's in darkness.

9 MR. YOSKIN: I'm trying to think of one.
10 Frankly, off the top of my head, I can't think of
11 one. What usually happens is -- I mean,
12 historically -- I'll going back a step.

13 Daniel O'Hern, who was a commissioner of
14 DEP and later a supreme court justice, used to
15 describe environmental law as an arena in which law
16 science and public policy compete for primacy. And
17 frequently the public policy and the science get
18 ahead of the law, and so regulators will attempt to
19 implement the standard that they haven't had a
20 chance to incorporate into the law yet. The history
21 of environmental -- the evolution of environmental
22 law is rife with that.

23 So in some cases what you refer to as desk
24 drawer regulations, it's sometimes that. But if I
25 can recall one or I go through my files and find

1 one, I'll let you know.

2 ASSEMBLYMAN BURZICHELLI: I think it's
3 very significant. I appreciate those comments.
4 I'll turn to Acting Commissioner Martin and say,
5 maybe when you get back, ask to open up all the desk
6 drawers, see what you can find. (laughter)

7 LT. GOV. GUADAGNO: Senator.

8 SENATOR OROHO: Thank you. I had a hard
9 enough time trying to find the New Jersey Register
10 without having to pay for it. Forget the desk
11 drawer rules. Just real quick. Now, you've written
12 regulation?

13 MR. YOSKIN: I have.

14 SENATOR OROHO: You also represented
15 clients, you are disputing regulations, and whatnot.
16 In your opinion, is there any -- we are trying to
17 have an efficient process. Is there any state that
18 is known to have a very efficient, good process that
19 we should look to emulate?

20 MR. YOSKIN: Delaware.

21 SENATOR OROHO: Okay. Is there a number
22 two?

23 MR. YOSKIN: You know, we always hear the
24 ones that are difficult. My experience with
25 Delaware has been good. Pennsylvania has some very

1 progressive policies.

2 SENATOR OROHO: So two of our surrounding
3 states?

4 MR. YOSKIN: Yeah. But I think -- I think
5 the general notion, Mr. Hluchan alluded to it in his
6 article, I think the idea -- and Mr. Stanton did as
7 well, it's always a good idea to look to see what
8 other states are doing.

9 SENATOR OROHO: Okay. Thank you.

10 SENATOR BUONO: I just wanted to thank
11 you for your very thoughtful testimony. And it
12 makes me wonder how we ever get anything done here.
13 Then I remembered we don't. (laughter)

14 ASSEMBLYMAN RUMANA: It's a sad
15 commentary. I'll add in, Maryland is a place I
16 heard has been quite successful, or easier to deal
17 with. The one example that I know of is, some
18 people who do a lot of work in commercial real
19 estate in New Jersey spend two years trying to get a
20 particular project in gear, or more, maybe three,
21 and 60 days have approvals in Maryland.

22 MR. YOSKIN: I heard the same thing.

23 SENATOR RUMANA: And that's ultimately, I
24 guess, where we need to go as a board here, trying
25 to get to the place where we streamlined our process

1 so that we can get people through the process far
2 more efficiently than what we have. The suggestions
3 coming out from the presenter here are very good.

4 SENATOR BUONO: What about North Carolina?
5 When I met with business people in particular they
6 always point to North Carolina really speeding up
7 and streamlining, particularly in the research
8 triangle?

9 MR. YOSKIN: For every person you meet who
10 says that North Carolina is accommodating of
11 development and is very efficient, you'll hear
12 somebody say that's because they are not protective
13 of the environment.

14 I don't believe that's the case. I'm not
15 that familiar with it. But my sense is that North
16 Carolina has a pretty thoughtful and mature
17 environmental program. I know one of the leading
18 thinkers in the country in coastals and management
19 came out of North Carolina. So I think it's
20 probably an example to look to.

21 LT. GOV. GUADAGNO: Commissioner, aren't
22 you glad that you have only been here six weeks to
23 the day?

24 COMMISSIONER MARTIN: I'm so thrilled.
25 Mr. Yoskin, I want to thank you for reminding me of

1 the challenge I have ahead for the next few years.

2 What's your sense on whether there are --
3 most of the changes need to made are regulatory,
4 within the process that need to be changed, or they
5 statutory? Do we have to make some substantial
6 changes in the way we create rules or how the DEP
7 does their rules or other things? What's your
8 sense?

9 MR. YOSKIN: I think it's mostly process.
10 Process yields regulations. If you have a
11 convoluted regulatory set of regulations it's
12 because you have a convoluted process.

13 You know, I don't want to be perceived as
14 being overly harsh. One of the challenges we had in
15 New Jersey is we have a body of environmental law
16 that's developed incrementally over decades and
17 decades. And unless you go back and try and revisit
18 everything, which is almost impossible to do, it's a
19 constant evolutionary process.

20 So I think you have to start with the
21 process. And I do see -- I see efforts every day to
22 try and make it easier. But where -- I want to go
23 back to something that the Lieutenant Governor
24 touched on.

25 Where DEP has handcuffed itself is in the

1 manner in which it has written its regulations with
2 respect to waivers. And that being said, I think
3 that was done deliberately. I think that the people
4 who wrote those regulations wanted to make it as
5 difficult as possible to get a waiver from the
6 regulations, because that makes it easy to say no.
7 And unless and until we massage those waiver
8 standards you are going to have an inability to make
9 common-sense decisions.

10 I can't tell you the number of times that
11 all of us who practice in this field have -- agree
12 with staff that this is a common-sense result, but
13 we cannot do it and we have to go to court. So I
14 think that's where the problem was.

15 COMMISSIONER MARTIN: One last quick
16 question. What's your sense, from experience, about
17 certain culture challenges I might have at DEP based
18 on -- in the rule-making area specifically? What's
19 your sense?

20 MR. YOSKIN: Well, I have a suggestion in
21 that regard. You have a very good corps of legal
22 professionals in your department. And I think that
23 one of the things you need to do is find the time
24 for one or more of them to be a centralized rule
25 writer.

1 And I'll just give you the simplest of
2 examples. If you look in the definition section of
3 any set of DEP rules you will find pages and pages
4 of definitions. And a goodly percentage of those
5 are defined terms which are never again used in the
6 rules.

7 Now, we used to try and coach staff when I
8 worked at DEP, you are only going to use the term
9 once or twice, there is no reason to define it.
10 Because then people have to cross-reference. And as
11 soon as you cross-reference it makes it hard to read
12 rules. That's the kind of engineering, word
13 crafting I think that has to go on. You'll have to
14 talk to your staff about that.

15 COMMISSIONER MARTIN: Thank you. That was
16 very helpful. I appreciate your common sense.

17 LT. GOV. GUADAGNO: Now, we did not mean
18 to turn this into a DEP bashing opportunity. If we
19 can make it better, we will. I want to thank you
20 for coming in today, Neil.

21 I'm sorry, we are running behind schedule.
22 So I'm going to move everyone along as quickly as
23 possible. Thank you, Neil, thank you very much for
24 your help. Some more comments as we go through all
25 this.

1 David Hespe, former Commissioner of
2 Education, currently the Intern Superintendent for
3 the Willingboro School District. How are you?

4 MR. HISPEE: I am well. It's good to see
5 you again, Lieutenant Governor. Congratulations.
6 Always good to see you, senators, assemblymen.
7 Clearly, I been running around quite a bit. I was
8 commissioner of education before that. I was in the
9 governor's counsel's office before that, with office
10 of legislative services. So I've seen quite a bit
11 on this front in terms of deregulation and slashing
12 bureaucracy.

13 And I must say, one of the observations
14 that I do have, I am a former administrative agency
15 head, but I don't think my opinion is going to be
16 much different from the last two speakers in terms
17 of we need change. And I would urge this body to
18 think boldly about that change.

19 It's been a long time since the rumblings
20 have occurred regarding deregulation. As a matter
21 of fact, since I was also in legislative services
22 back in the '80's, this has been quite not just
23 below the surface, but above the surface, and
24 occasionally resulting in the review of mandates,
25 trying to determine what's a good mandate date

1 versus what's a bad mandate. Occasionally it boils
2 over to the point of tremendous change.

3 For example, I think it's just yesterday,
4 but when I look in the mirror I'm still thirty. So
5 this was back in 1994 we abolished the department of
6 higher education. And one of the reasons for that,
7 if I remember correctly, and I think I do, the
8 micro-management, the overstepping by the board and
9 the chancellor back then, which got the institutions
10 to the point of saying we have to do something. So.

11 In fact, I think you can liken that to an
12 overthrow of an administrative agency who the people
13 that they were regulating basically said enough is
14 enough, we have to do something, we have to do
15 something drastic.

16 And what I would say is, in order to
17 prevent that type of legislative action, to come up
18 with a new process, a new structure. So let's look
19 beyond the symptoms and look at the root causes of
20 why we see the bureaucracy, the regulations, the
21 micro-management. And I think if we look at those
22 root clauses we can come up with some solutions.

23 I know we are trying to move in a hurry,
24 so I am going to try to just summarize my testimony.
25 You have it in writing. So, certainly, any question

1 you have after today, feel free to ask me. But I'm
2 going to try to move quickly and then get to my
3 recommendations so you can keep moving on.

4 One thing that I would say is that, as you
5 come up with any solutions keep focus on the reasons
6 we have administrative agencies in the first place.
7 We have them because they provide an independence in
8 terms of the political processes. They provide
9 accessibility and openness to the public. They have
10 the expertise. They have an efficiency to them.
11 They can do things quickly.

12 And I think the problems you've seen over
13 time is that agencies haven't lived up to those
14 goals and expectations or they have clashed. And
15 there's been really no one to sort out when those
16 goals, expectations clashed within an agency and
17 among agencies.

18 A second problem that I see structurally
19 is that our system of government is based upon
20 separation of powers. We have an executive branch,
21 a judicial branch, a legislative branch. Sometimes
22 the branches get along famously. Like this
23 afternoon, we have some of our executive/legislative
24 branches present. Sometimes they don't. And that's
25 okay because that's what our checks and balances are

1 all based on.

2 What you have in administrative agencies,
3 however, is a consolidation of all three powers.
4 They rule-make, they have a legislative power, they
5 have an executive power, and they have an
6 adjudicating power all rolled into one agency.

7 Now, we tried to provide minimum checks
8 and balances within that executive branch agency
9 through the Office of Administrative Law. They
10 provided a minimal level of checks and balances.

11 But in the two broad areas of rule-making
12 and controversies and disputes, we see that --
13 structurally, the Office of Administrative Law can't
14 do a lot. I do not want to bash the Office of
15 Administrative Law. I think they do a great job
16 within their role and expectation that they have for
17 that agency. But I do think that within that role
18 and structure we're not seeing the types of checks
19 and balances that we need.

20 So, getting right to my recommendations
21 here, because I'm trying to move along quickly.
22 And, of course, you can ask me questions. And these
23 recommendations are for many sources, over twenty
24 something years in government and academia, in
25 administration.

1 First, the APA has to be streamlined. It
2 has to provide some more flexibility. It has to
3 provide for improved time lines. Right now, and as
4 administrative agency head, goes back a lot longer
5 than sometimes I imagine, back eleven years now,
6 the APA is seen as a process. It's not really seen
7 as a way to improve what you're presenting to the
8 public. It's seen as a process to get through, just
9 because that's the expedient of running an
10 administrative agency. I think it always has. And
11 I think until something changes it always will. And
12 in order to reflect that we need to come up with, I
13 think, certain processes and some greater
14 flexibility.

15 It was mentioned here a few moments ago
16 about meeting. If you get substantive public comment
17 and you want to use that public comment, it
18 disadvantages you as an agency head because you
19 can't get to your goals and objectives as quickly as
20 you want to. And in this day and age that often is
21 deadly for an administrative agency head. So often
22 times comment is not seen as an opportunity to
23 improve, it's seen as something to get past as
24 quickly as possible. And changes to reflect that I
25 think would be desirable.

1 Recently we seen a number of calls that
2 there has to be greater leadership in the executive
3 branch beyond the Office of Administrative Law to be
4 the arbiter of what our administrative agencies are
5 doing, when they are overstepping, when they
6 conflict.

7 We had a decision, I thought it was an
8 excellent panel, between what happens when agencies
9 conflict. They do happen. And without some high
10 level authority in the executive branch to try to
11 call those shots and to provide a double check, that
12 check and balances that's missing, I think we are
13 going to continue to have problematic overstepping
14 and micro-management. And over the last three
15 years, many, many examples of that throughout
16 administrative agencies. And I won't say DEP, I'll
17 say the department of education. Because you seem
18 like a very nice guy and I think you should get off
19 the ropes a little bit.

20 But the department of education in terms
21 of its accountability regulations is a
22 perfect example of what I believe was overstepping
23 and micro-management by a departmental
24 administrative agency with a little practitioner
25 input, little best practices input. And, clearly,

1 right now is a very agitating force out in the
2 school districts.

3 I agree with streamlining controversies
4 and disputes. They are, in my mind -- I can think
5 of maybe just a handful of controversies and
6 disputes when I was commissioner, out of hundreds
7 and hundreds, that I thought really needed to be
8 reviewed at the agency level.

9 I do, however, think that we should
10 develop some expertise in administrative law judges.
11 And that is difficult to do, I know, in terms of
12 scheduling and dockets. But if we want this to work
13 in terms of taking right from the OAL hearing and
14 going into the court system, that expertise, I
15 think, is going to be important.

16 Because when -- right now, under the
17 current structure, when you go into the appellate
18 division, don't forget, their standard of review is
19 different for administrative agency decisions than
20 other decisions.

21 And, finally, I was a professor here in
22 one of our finest state institutions, Rowan
23 University, for a number of years. And I often
24 wondered, and it was after I was administrative
25 agency head, why do we have this huge disconnect

1 between the field of education, academia,
2 scholarship, and what's happening at the department
3 level. And it puzzled me. And it puzzled me long
4 after I stopped being an agency head and started
5 being a professor. And I think to the extent we can
6 strengthen those connections the better off and more
7 meaningful the regulatory process will be.

8 Right now we have a lot of experts that
9 head into administrative agencies. But you know as
10 well as I do, the moment you step into a government
11 agency is the moment you start becoming isolated.
12 And we need to fight that.

13 Okay. I fulfilled my promise that I was
14 going to move through quickly. And I did. At my
15 pleasure.

16 LT. GOV. GUADAGNO: You cut through all
17 the red tape.

18 MR. HISPEE: I try. I try.

19 LT. GOV. GUADAGNO: I had to.

20 MR. HISPEE: That was number two. I think
21 you get three now.

22 LT. GOV. GUADAGNO: Is everything all
23 right? Assemblyman Rumana?

24 ASSEMBLYMAN RUMANA: Nothing.

25 LT. GOV. GUADAGNO: I'm going to you last.

1 I saw that look. Senator? Assemblymen?
2 Commissioner?

3 What we're going to do, David, if you
4 don't mind, is take your testimony, incorporate it
5 into the record so we don't lose the benefit of your
6 help. I thank you very much for coming down. I
7 look forward to having you help us make that
8 connection between the education.

9 MR. HISPEE: Love to. And best of luck
10 with good wishes to you all. And, commissioners,
11 best of luck to you.

12 LT. GOV. GUADAGNO: Thank you very much.
13 The next is Joseph Morano, Assistant to the
14 President for Labor Relations and Legal Affairs,
15 Middlesex County College, former chair of the
16 Administrative Law Section New Jersey State Bar
17 Association. Thank you for coming today.

18 MR. MORANO: Lieutenant Governor,
19 Assemblymen, Senators, Commissioners. I feel like
20 I'm following Arod, Ryan Howard, and everybody, when
21 it comes to attorney practitioners. But even
22 though, now, I'm in college administration, before
23 this I originally started my first job out of law
24 school as a law clerk at the Office of
25 Administrative Law. And for the past twenty years I

1 have for the most part represented towns and school
2 districts at OAL, and primarily special education.
3 So I had the benefit of going to OAL hearing and
4 those being the final decisions, education and civil
5 service. And those are the three areas that I have
6 primarily been in.

7 My experience at DEP was only when I
8 served as a councilman. So I have nothing bad to
9 say. Hope I don't offend you.

10 COMMISSIONER MARTIN: I'm kind of
11 disappointed now. (laughter)

12 MR. MORANO: I can think of something, but
13 never mind. I'll try to move this along.

14 The main item I'm here to talk about is
15 final decision-making power for ALJ's. And that's
16 an action as part of the administrative law section
17 for years. It would come up every once in a while
18 and it would be discussed.

19 What are the issues that drive that? You
20 know, we've had a system in New Jersey, the agency.
21 There's such deference to each agency. ALJ's are
22 professionals, they're vetted. It can take years to
23 become an ALJ. You go through a four-way background
24 check.

25 These are people who write -- if you've

1 ever seen an administrative decision in any of your
2 capacities -- it could be 15, 20 pages of detail,
3 analysis, sitting through a full hearing, listening
4 to all kinds of testimony, applying agency rules,
5 finders of fact, conclusions of law in very complex
6 matters, all through New Jersey history, everything
7 from Abbott decisions all the way through
8 environmental matters. And ALJ's have come up with
9 these great decisions.

10 And I'll say, in my experience, again,
11 DEP, commissioner of ed, depending on the
12 commissioner, there were situations where I tried a
13 full case, ten days, and it was tweaked or changed
14 or sent back, and I had the ability of telling my
15 client, who might be a school board, hey, sorry
16 about that, I know you were there for the ten-day
17 hearing, but the commission made a change on their
18 own.

19 That hasn't been the rule, but that's the
20 frustration of different agencies. Civil service
21 same thing. When you're dealing with employee
22 penalties on discipline, that's something that,
23 again, the judge is in a position to assess the
24 demeanor, the credibility of witnesses. And a lot
25 of times it turns on that. There were also changes.

1 Now, one of the things that I think will
2 be helpful to everybody is some statistics. And I
3 know there were some questions from the elderly
4 gentleman. So I have some. I'm going to provide
5 you with it. It will take a few days -- I'm kind of
6 here on short notice -- to get you some stats. So I
7 think it will kind of put you in a situation of
8 knowing what we are talking about.

9 Each year we do a state administrative
10 law section meeting. It generally was reported that
11 the affirmance rate of all the decisions that go is
12 about 80 to 85 percent. And recent stats have kind
13 of bourne that now.

14 Remember, you are talking about a bunch of
15 different agencies with totally different view
16 points and basically how it's going. But I'll give
17 you some examples here.

18 Recently -- and this stuff is just now
19 from the last couple of days -- looking at a
20 three-year period, actually '06 through '09. And
21 these are decisions that are available under Rutgers
22 Camden Website. If you look back, you can look and
23 see that there is about a 78 percent affirmance rate
24 of all the cases that go up to the agency.

25 Now, that's not counting an additional 14

1 percent partial affirmance rate, where the agency
2 may have sent something back down or may have made a
3 change or disagreed. So you're talking about at
4 least 82 percent. These are general stats.

5 And, like I said, stats are dangerous, as
6 you know. And you can argue one point or the other,
7 but this is what we are finding right now.

8 LT. GOV. GUADAGNO: I'm sorry to
9 interrupt, but I want to be sure I'm clear. This is
10 the affirmance of the?

11 MR. MORANO: The ALJ decisions at the
12 agency level. You can even go further. And we were
13 able to track a little bit of statistics that go up
14 to the appellate division, which is even a higher
15 standard. And you are talking about there things
16 that go all the way up, 61 percent affirmance rate
17 by the appellate division of the ALJ's decision.
18 Plus you add another 12 percent on that. Twelve
19 percent is the decisions where the agency disagreed
20 with the ALJ and the appellate division then
21 reversed it back. So you are still in that 80
22 percent range.

23 Now, again, these statistics I think, and
24 part of the process here, you're going to get more
25 statistics, perhaps, from each agency explaining,

1 well, this is where we think this went, how it went.

2 But I think the overall wisdom, it's been
3 over the last ten years, about that 80 to 85
4 percent. That give everybody, hopefully, a little
5 bit of comfort. And I'll provide that information
6 as a starting point to work with.

7 Some of the other questions that were
8 asked -- excuse me. Last year OAL had about 14,000
9 filings.

10 LT. GOV. GUADAGNO: Fourteen thousand
11 what? I'm sorry.

12 MR. MORANO: Filings, cases that were
13 filed. I'm going to get additional information from
14 the agency so you can have that later.

15 Also, right now there's 46 ALJ's. I think
16 that was mentioned. During the last couple of years
17 OAL has operated with between 30 and 40 judges. So
18 it's been a little short-staffed. Hopefully this
19 will help. That gives you an idea, again, some of
20 the questions you asked. And I don't want to repeat
21 some of the great testimony that you did hear.

22 One of the questions that's always been
23 asked, why, why should this happen? Why should
24 ALJ's have final decision-making power?

25 It's easy to say streamline government.

1 But what was the original reason -- we heard some
2 testimony about it was fully expected at some point
3 ALG's would have that power.

4 Well, you know, each agency has its own
5 thoughts about how it's going to govern, how it's
6 going to set policy. And as to the two
7 commissioners here, you are going to have all these
8 new challenges.

9 But I've always believed that if an agency
10 wants to set standards by which an ALJ should decide
11 cases, not desk drawer rules but real rules, those
12 should be done through the agency rule-making
13 process.

14 Also, the governor, lieutenant governor,
15 legislature, if there is a policy consideration that
16 an ALJ needs to make a decision, that can be done on
17 that level. Then an ALJ as the final decision-maker
18 will have whatever guidance that the
19 governor/legislature/agency head decides.

20 In past, if you look back ten years, as
21 there are changes in administration there are
22 certain policies that change in each agency, how
23 things are going to be handled. That was always
24 easily done by having the agency head review the
25 decision and say, no, we are not going to do that,

1 we're going to have harsher penalties; no, we're
2 going to be good to this. Whatever the decision is.

3 Well, now it, maybe, forces the agency
4 heads to announce that a little bit better. And
5 let the professionals. When I say that, not because
6 I'm trying to curry favor with the OAL because I
7 appear there, but let the professionals decide it.
8 And like any other situation, if there is an issue
9 it goes to the appellate division, they will be held
10 to the standards the appellate division holds them
11 to.

12 And, again, you know, maybe that sounds
13 simplistic. But I can tell you how many times I
14 spent, days of hearings. And, you know, maybe I
15 felt the agency just didn't quite get what happened
16 at the hearing, even though a judge may have
17 announced, may have said the witness was looking
18 down and crying and was very unbelievable. And the
19 agency may not have read that.

20 Again, you are talking about less than 15
21 percent of the time that may be. And in my area,
22 with civil service, I can keep you here for years.

23 But on that end, you have to look at what
24 happens at the agency. And I think the ALJ is the
25 best, most professional person to make the

1 determination.

2 And, finally, I'll say this, with an ALG
3 present here, one of the most important things,
4 ALJ's do not get tenure, unlike any other judges.

5 If there is a problem with an
6 administrative law judge not adhering to agency
7 rules, or a policy, or having inappropriate
8 decisions, or anything, an ALJ can just simply not
9 be renewed after that.

10 Now, I'm not advocating -- it would be
11 great to see them on the same level as worker's comp
12 judges and everything else, but if you are looking
13 at the reality, if you are going to give them
14 decision-making authority, how do you rate them?
15 Well, you can have them not come back. It's as
16 simple as that. I know that sounds harsh, but
17 that's the way it is.

18 LT. GOV. GUADAGNO: Do you know the
19 answer, if I appeal an ALJ's final decision, for
20 whatever reason, to the appellate division, what the
21 standard of review is, or the burden of proof?

22 MR. MORANO: Arbitrary, capricious,
23 unreasonable agency standard. One of the things you
24 also need to look at, I kind of glossed over this,
25 but each agency, by the time the administrative law

1 judge, you know, issues an initial decision, the
2 agency reviews, there's the period of exceptions
3 where one party may say I disagree with the ALJ's
4 decision for the following reason, it can be as
5 simple as one page; or, again, having been an
6 attorney with a large firm, it can be multiple
7 pages. Because I just tried a ten-day case, I'm not
8 just going to put one line down.

9 What does that do? Well, a lot of these
10 cases, we have large firms representing towns,
11 school districts, counties, also private entities.
12 You know, there is an attorney cost to this.
13 Attorneys don't do this for free. If you are going
14 to spend three to four hours, that adds a little
15 additional level there, not even counting the things
16 that we discussed about who at the agency is looking
17 at it, who is reviewing it, that's a whole other
18 level of cost. When it's done, then it goes up to
19 the appellate division and you file those documents.

20 But, also, what that may do is, people may
21 really think and decide whether they want to go to
22 the appellate division. It's more expensive, it's
23 time-intensive, and it takes a long time. So that
24 maybe makes parties on both sides think a little bit
25 about what they are going to do.

1 I don't want to go too much further
2 because I think I covered everything. I don't want
3 to repeat. I'm certainly open up to any questions.

4 LT. GOV. GUADAGNO: Any questions?

5 COMMISSIONER MARTIN: One quick question.
6 How do we avoid a lot of these decisions being
7 forced to go to administrative law judges? There
8 seems to be a lot. It seems to be increasing.

9 MR. MORANO: Well, for your agency I would
10 suggest, from what I know -- and I'm not an expert,
11 certainly, in environmental law -- alternative
12 dispute resolution seems to be something -- I
13 believe it may have been there at one point, when I
14 took the course twenty years ago.

15 COMMISSIONER MARTIN: It was there and
16 they've taken it away.

17 MR. MORANO: Yes. I would suggest
18 something like that. For instance, special ed, even
19 though it's done by federal law, I mean, there is
20 mediation process. Even the judges will -- you will
21 be able to get a judge to act as mediator if you
22 need one. So there's multiple opportunities to
23 resolve the matter with DEP. I would expect that
24 that should be something, that everybody should
25 consider putting that back.

1 I don't have stats on how helpful that was
2 at the time. I'm sure there was some good reason
3 why it was abolished. But it just seems to make a
4 lot of sense. Because there are a lot of
5 negotiation that does go on. You're talking about
6 building and all these other things that, hey, look,
7 people are going to sit down and talk about.

8 ASSEMBLYMAN RUMANA: No questions.

9 LT. GOV. GUADAGNO: See, you are wearing
10 them down.

11 MR. MORANO: Like I said, it may have been
12 like after the cleanup, better to put the other guys
13 on. Really hit it home.

14 LT. GOV. GUADAGNO: Thank you very much,
15 Mr. Morano. We'll look for your statistics.

16 MR. MORANO: I will get you the statistics
17 and just an overview of what I discussed. Thank you
18 very much.

19 LT. GOV. GUADAGNO: This comes to the end
20 of the public-invited speakers portion. And I see
21 I'm twenty minutes behind schedule. That's not too
22 bad.

23 I'm not going to take a break unless
24 somebody screams uncle. Feel free to get up on your
25 own. We'll continue. The court reporter needs a

1 break. We're taking five.

2 (3:58 p.m. until 4:10 p.m. recess.)

3 LT. GOV. GUADAGNO: If you heard
4 everything everybody wants to say and you just want
5 to endorse it, endorsement is good. The short form
6 version. Right now, what we are going to do is
7 three minutes. I'm going to call, first, Mayor
8 McCabe. Thank you, Mayor, for coming out.

9 MAYOR MC CABE: Thank you very much.

10 MR. WENG: My names is Matthew Weng. I'm
11 a staff attorney with the New Jersey State League of
12 Municipalities. And we wanted -- we appreciate you
13 calling this meeting. We've been asking for this
14 type of a forum for some time.

15 We thought our views can best be presented
16 by a member of our legislative committee. And mayor
17 of our host City of Glassboro, he has been mayor
18 about nine years, Leo McCabe.

19 LT. GOV. GUADAGNO: Thank you for hosting
20 us today, Mayor. I appreciate that.

21 MAYOR MC CABE: Thank you. Thank you,
22 Matthew. Lieutenant Governor, senators,
23 assemblymen -- I see John has stepped out --
24 commissioners, it really -- I appreciate the
25 opportunity and speak for the league of

1 municipalities and also for the Borough of
2 Glassboro. And it's a little late in the day, but
3 welcome to Glassboro, the quintessential college
4 town.

5 And I mention that because we have a very
6 extensive downtown redevelopment, three hundred
7 million dollars for 20,000 population. And we have
8 a public/private coordination with Rowan University,
9 ourselves, and we have a contractor manager.

10 I feel as though I'm preaching to the
11 choir because I'm speaking for the mayors. And as a
12 Mayor we have certain feelings. I'm not going to
13 talk about the legislative, the laws, and so forth
14 as such, what we have previously heard from the
15 lawyers.

16 But I do have some background related to
17 DEP. I have a background in research. And I work
18 closely with EPA. And I worked in developing
19 regulations on a technical basis. And so I know
20 what you are going through. But I have a few things
21 to say to you.

22 First of all, you know, we feel that rules
23 and regulations often go beyond the intent of the
24 enabling legislation. Often agencies attempt to
25 legislate through rule-making. Towns are forced to

1 spend time and money challenging rules that likely
2 should not have been proposed initially.

3 Legislation through rule-making can often
4 lead to unpondered mandates. Almost any action a
5 municipality is required to take costs money.

6 In something I would like to emphasize, it
7 was mentioned during the previous speakers, cost of
8 effectiveness should be included in agency
9 rule-making, and I think too often it is not, and
10 the cost effectiveness with respect to the
11 municipalities, what it's going to cost and what are
12 they going to get out of it.

13 I have an example from Glassboro with DEP
14 that illustrates this. The federal standard for
15 sodium in drinking water is 250 parts per million.
16 That's a primary standard. The State of New Jersey
17 in their wisdom had decided that that should be 50
18 parts per mill. That's a big jump.

19 Now, we have had our own water works for
20 more than 50 years and have had no problem. We
21 actually average about 100 parts per million in
22 sodium water content. But we have been told that we
23 must meet, of course, the 50 PPM standard.

24 We can do this by buying from a
25 commercial place or using the wells that we already

1 have in service and putting in what is called
2 reverse osmosis to remove the sulfur, and then a way
3 of taking it away, and the waste water. Well, that
4 is going to cost us about five and a half million
5 dollars. That's a lot of money for a town our size.

6 We applaud Governor Christie's recent
7 executive order increasing these mandates. And we
8 actually feel as though he has taken the right
9 direction looking at further studying, all of the
10 amendments.

11 I don't know if I said it before, but I
12 feel as though I am preaching to the choir. Because
13 what I heard from all of you is just what the
14 municipalities want to hear.

15 Another example is, rule that pushes
16 unfunded mandates onto towns is the DEP's storm
17 water management rules. Towns have discovered
18 various mandates within this rule. But two of the
19 biggest expenses are requiring towns to mark all
20 storm inlets and requiring all municipal trucks to
21 be washed in a facility that prevents runoff waste
22 water from entering into the storm sewers.

23 This means, then, that the municipalities
24 have to go to a special facilities to wash their
25 trucks. And these other things that have to be done

1 add up to thousands of dollars in extra costs.

2 Does this go beyond the federal
3 requirements? We think it does. The storm water
4 rules are good examples of what often are called
5 pass-through mandates. A federal agency may require
6 a state agency to pass rules on a specific subject.

7 To prevent these state agencies from going
8 too far, they should be required to state the
9 difference between the federal mandate and their
10 proposed rule, identify if their proposal exceeds
11 what is required in the federal mandate, and
12 identify whether agencies in other states differ
13 substantially in how they implemented the federal
14 mandate. Requiring an agency to study the
15 implementation actions of other states may show
16 them, and us, less expensive, more refined ways of
17 accomplishing the objective. You talked about that
18 before. And I know you what to do that.

19 Furthermore, rules and regulations require
20 the services of an attorney. Even though proposed
21 rules have a summary section to describe the effects
22 in plain language, it still is written in legalese.
23 And it's something that should be done to clarify
24 things, where municipalities don't have to always
25 run to attorneys to get a reading.

1 With regard to impact statements, we often
2 find that these analyses are unrealistic. So often
3 that is true. I'll go to DCA on this one, the third
4 round of corps regulations, which I know is being
5 looked at now. But let me tell you about the
6 Borough of Glassboro. We met, and we meet, the
7 third round regulations. We were approved by COAH,
8 the DCA for this, but to get there we had to jump
9 through hoops. We.

10 Had to have a planner come in specially to
11 look at this meeting the regulations. We had to
12 hire an outside attorney. So it cost us, a town of
13 20,000 people, more than \$35,000 just to provide
14 this input to the regulations. Again, I applaud
15 Governor Christie for what he's done here.

16 I like to mention something else. I
17 mentioned that we have a downtown redevelopment,
18 putting in a new road. We're bringing Rowan
19 University closer to our downtown. And we want to
20 be the quintessential college town. We appreciate
21 very much our association with Rowan. And we're
22 putting in a new boulevard connecting Rowan
23 University to downtown Glassboro. That's a very
24 large project.

25 Well, as part of this the public/private

1 Rowan Boulevard development project included
2 improvements to US Route 322, which is a federal
3 highway. It comes under the state jurisdiction. A
4 300 million privately-funded developed was put
5 roughly a year and a half behind schedule because of
6 DOT regulatory review, including access review and
7 permits.

8 The access portion would of delayed the
9 project another year beyond the year and a half I
10 talked about. However, the state was convinced to
11 give the county, Gloucester County, the jurisdiction
12 over this. And as a result the review and
13 permitting process was significantly reduced. This
14 should have served as a model for other major
15 projects. I think quite often state agencies would
16 turn things over to the county. It's something to
17 be looked at.

18 DEP again. Another major.

19 ASSEMBLYMAN MARTIN: Sorry, you only get
20 two.

21 MAYOR MC CABE: Okay. That's the second
22 one.

23 LT. GOV. GUADAGNO: I thought you were
24 going to get away with it. (laughter).

25 MAYOR MC CABE: Well, with the new storm

1 water regulation, again, it hit us. While we
2 strongly feel the regulations are necessary to
3 ensure proper drainage, they should not be so
4 restrictive that they threaten the whole
5 development.

6 I'll pause there. Because in our
7 development now, which has been going on for almost
8 a decade, everything we are doing, we are creating
9 jobs. But some of these have to be halted because
10 of the delays caused by some of the regulations,
11 regulatory process.

12 I'm not faulting the commissioner or the
13 people who work for him, but it's just the
14 regulations in which they are written. So many
15 people today have said, let's do something to
16 streamline them.

17 Our developer is having a hard time
18 obtaining bank financing to proceed with the
19 development. And they've already gone a long way
20 toward building the new downtown Glassboro.
21 But with this development, with the storm water
22 case, they have to -- we are building a hundred room
23 Marriott Courtyard Hotel, another building which is
24 going to be associated with the university and the
25 retail and so forth, but we had to slow down on this

1 building.

2 Again, that should have been done a year
3 to two years ago, but because of the regulatory
4 process it isn't. We would have permanent jobs
5 available now if we were able to get through the
6 regulatory process.

7 We are still in the process of negotiating
8 reasonable language with DEP. And the banking
9 institutions have provided what they need -- I don't
10 want to go into detail here -- to allow the project
11 to proceed.

12 LT. GOV. GUADAGNO: Thank you, Mayor,
13 thank you very much. If you would do me favor,
14 because I see a lot of antsy people sitting behind
15 you, and I don't want to lose you any votes here in
16 Glassboro --

17 MAYOR MC CABE: Okay.

18 LT. GOV. GUADAGNO: -- if you would turn
19 that testimony over to us so we can include it in
20 the record, I would appreciate it. Because I know
21 Peter Boyce, who is sitting right behind you, was
22 the very first person here in line. And he has to
23 go pick his child up from school. I hope that child
24 is not standing outside of the school right now.

25 MAYOR MC CABE: My co-person here,

1 Matthew, has his child out in the hallway.

2 LT. GOV. GUADAGNO: Thank you very much
3 for hosting us today, Mayor. Thank you very much.
4 Peter Boyce.

5 MR. BOYCE: Thank you. I'll try and do
6 this quick. My name is Peter Boyce. I'm an
7 inventor. I've lived in New Jersey for 40 years.
8 I'm very happy to be here.

9 You have a copy of what I'm about to say.
10 And you have a report on my invention entitled
11 Giggawattz, Ocean Wave Energy Converting Power
12 Plant. The title of what I'm about to say is, what
13 is the cost of red tape.

14 I'm a member of OREC, the Ocean Renewal
15 Energy Coalition, and the inventor of an ocean wave
16 energy power plant. I began developing this
17 technology as a result of the energy crises of the
18 1970's. In the '70's there was a popular grass
19 roots mandate that America's dependency on foreign
20 energy was simply unacceptable.

21 Legislation was passed on the federal,
22 state, and local levels encouraging the development
23 of alternative energy resources in an effort to make
24 America energy independent.

25 I embraced that mandate and committed all

1 my hours and resources to investing, inventing an
2 efficient means of harnessing and converting the
3 energy of the ocean waves into electricity.

4 I was finally granted a patent on the
5 wave energy power plant, which, one, is capable of
6 generating \$1.3 billion worth of clean renewable
7 energy annually from the modest waves along New
8 Jersey's 140 miles of coast.

9 Two, pay for itself within one to two
10 years. Three, reverse beach erosion, replenishing
11 New Jersey's beaches as a by-product of wave energy
12 extracting, thereby saving many millions of federal
13 and state tax dollars annually spent on beach
14 replenishment projects. Four, secure the
15 tourism-based economies of New Jersey's coastal
16 towns

17 I was only thirty then and so naive as to
18 think the battle had been won. Little did I know
19 that thirty years later I would still be treading
20 water in a sea of red tape.

21 After 30 years of writing, meeting, and
22 presenting to the New Jersey Department of Energy,
23 when there was one, every governor since the Kean
24 administration, assemblymen, senators, congressmen,
25 the army corps of engineers, department of fish and

1 wildlife, the DEP, the bureau of coastal zone
2 management, federal department of energy, city
3 councils.

4 With regards to city councils, I addressed
5 the Cape May City Energy Commission and showed them
6 how their entire municipal budget of \$13 million
7 could be carried by the wave energy along their two
8 and a half miles of coast, thereby eliminating the
9 need for property taxes. But they lacked the
10 authority to move ahead.

11 After thirty years I have still not even
12 been able to get permission to test the system on
13 one of the many stretches of deserted beaches along
14 the Delaware Bay, where towns used to exist, that
15 have long since been consumed by erosion.

16 What is the cost of red tape to the people
17 of New Jersey? I'll answer that question with a few
18 rhetorical questions. What is 30 years times 1.3
19 billion? How many jobs would have been created, not
20 only manufacturing the units from New Jersey, but
21 for export? How many millions of tax dollars have
22 been spent over thirty years on beach replenishment
23 projects?

24 This is my story, but I am only one
25 inventor in New Jersey. There are others. I dare

1 say if Edison were alive today he'd be standing here
2 telling you a similar story about some strange thing
3 called the light bulb, in years of struggle to get
4 permission to set up an electric grid.

5 We've heard about the problem. What is
6 the solution? On behalf of all the inventors in New
7 Jersey and those who belong OREC, Ocean Renewable
8 Energy Coalition, I plead with you.

9 There are presently twelve, thirteen
10 different agencies and departments claiming some
11 jurisdiction over the use of the coastal waters.
12 For such a technology as wave energy conversion,
13 this maze of bureaucracy and apprehension over the
14 unknown by those agencies amounts to an
15 insurmountable obstacle for this promising
16 technology.

17 New Jersey, the home of Thomas Edison, is
18 being left behind in this technology by Portugal,
19 Australia, Ireland, Scotland, and others.

20 Our recommendation from ORIC is to please
21 streamline the process of getting permission to
22 deploy these wave-energy devices. Even if the state
23 were to give no funding, at least don't hamstring
24 the innovation by preventing the deployment, the
25 testing of these devices.

1 Please establish one department, perhaps
2 even restore the New Jersey Department of Energy,
3 and give that department the authority to cut
4 through all this red tape when it comes to
5 harnessing New Jersey's wave energy. There is
6 presently no comprehensive policy provided for the
7 harnessing of that \$1.3 billion worth of wave energy
8 annually.

9 The inventors of New Jersey commend
10 Governor Christie in this Red Tape Review
11 Commission. We are counting on you to let us out of
12 the box that we've been in far too long. Thank you.

13 LT. GOV. GUADAGNO: Thank you, Mr. Boyce.
14 David Fisher from the New Jersey Builders
15 Association. Thank you, Mr. Fisher. Comments?

16 MR. FISHER: Yes.

17 LT. GOV. GUADAGNO: So, we have before us,
18 right now, for the reporter, David Fisher and
19 Michael Karmatz, New Jersey Builders Association.

20 MR. KARMATZ: Yes. Thank you. Please, I
21 will make this very short. We have a written thing.
22 We will also supply you with the regulation
23 citations that are involved. I won't read it. I'll
24 probably do this in a minute.

25 Quite honestly, as you know, I am

1 preaching to you, the system is broken, it's totally
2 broken. You hear -- I agree with all the previous
3 people who have testified. We're clients, we're the
4 investors. Why would anyone want to invest in New
5 Jersey when it takes five, six years to get
6 approvals? All we want is a level playing field.
7 If you are not going to allow it, tell us from the
8 beginning.

9 This is not just residential. This is
10 commercial. The state plan has to be revised and
11 given teeth. And everybody has to know where you
12 want growth. And if you don't want growth we should
13 know that, too. Where you want growth -- and each
14 agency should know that anything they propose has to
15 adhere to a state plan. That's the only way you are
16 going to get out of this morass.

17 I fear for New Jersey. Unless we make
18 these changes, the rest of the country is going to
19 come out of this and New Jersey is not. There is no
20 means to develop in New Jersey in an efficient,
21 costly manner. The cost to go through this process
22 in New Jersey is far more than it cost to build
23 houses. It's ridiculous. And I commend you. You
24 have a very difficult job.

25 If you want a specific example. I'm not

1 here to bash the DEP. I been involved in this for
2 thirty years. It used to take maybe a year and a
3 half or two to get approvals. It takes on average
4 five to six years.

5 An example, if you want development in a
6 city, look at your DOT regulations where they have
7 an LS, that's level of service, of an F. And I defy
8 you to find how many cities that you want to develop
9 can improve what are already existing level of
10 service.

11 Something has to be changed. That's why
12 developers went to the suburbs, because they
13 couldn't meet the regulations in the cities. And
14 it's the same thing with the redevelopment laws. It
15 is impossible to get through them.

16 MR. FISHER: Thank you. My name is David
17 Fisher. I'm a board of directors member of NJBA,
18 but I'm also a professional planner. I'm not an
19 attorney, but I do know most of these guys. And
20 Richard Hluchan was a young DAG at the Pinelands
21 Commission when I first started in the business
22 working with Michael Gross, who I know, who the
23 Lieutenant Governor knows. But I've been working
24 for building companies since the late 1980's. I'm
25 also a licensed professional planner.

1 I feel like an attorney most of the time
2 because that's how we have to look, act acquiring
3 property, as well as securing approvals for
4 development projects.

5 Mike mentioned the state plan, and also
6 for housing act, meaning COAH, which are two areas
7 which have to be, you know, restructured in order to
8 provide a more consistent, you know, playing field
9 for the industry. And we have thoughts and
10 recommendations as to how that might be done.

11 And I think that for the last ten years
12 now the state plan hasn't been updated. And it's
13 really been a hollow document that hasn't provided
14 really any guidance for towns or the regulated
15 community.

16 There needs to be more consistency with
17 state policy. I hear a lot about duplicate reviews.
18 And we get that all the time. And storm water has
19 been cited, which is one which is regulated on a
20 local level by a municipal engineer when you design
21 your project, often by a county, if you impact a
22 county road, by the soil conservation district. So
23 we got three levels right there. On top of that you
24 may have a regional agency, like the Delaware Canal
25 Commission, or the regional group, CAFRA, Pinelands,

1 that regulate storm water from their view point, and
2 then DEP.

3 So it's not unusual to find four or five
4 levels of government, you know, requiring you to
5 comply with their regulations, which often are not
6 consistent and sometimes conflicting, in order to
7 achieve compliance.

8 And we believe that there can be
9 consolidation and delegation of certain programs,
10 like those that regulate storm water or sewer
11 connections or water connections, because they are
12 pretty much perfunctory in terms of the requirements
13 that you need to adhere to. And they can be done on
14 probably a local or county level.

15 And I think, lastly, there needs to be
16 greater use of general permits by DEP and other
17 agencies, and DOT, where you fall under a certain
18 category of activity that's minor or diminimis in
19 nature, and those can be issued in a shorter time
20 frame.

21 Right now DEP's wetlands regulations are
22 going in the other direction. They just recently
23 adopted requirements to limit the amount of general
24 permits and place more requirements on them. So I
25 think those are some areas that you'll find in our

1 7-page paper that will give you some good
2 information.

3 Mike, did you want to talk about
4 legislative intent?

5 MR. KARMATZ: Well, just reality. The
6 reality is each agency -- you have a legislature to
7 pass rules. Each agency determines what they want
8 to do. They go beyond the legislative intent. And,
9 as was explained before, they make their own rules.
10 And they are closed-drawer rules.

11 Again, I've been doing this for a long
12 time and can tell you hundreds of examples of
13 preparing plans only to have an agency say, you know
14 what, we are thinking of this rule and we're not
15 going to give you a decision because we want to give
16 ourselves time to get this rule passed. And then
17 you start over.

18 Well, again, many companies will not come
19 into this state. And many are leaving because they
20 can't expand and they have no assurance that when
21 they come into this state they are going to be able
22 to build. And that's ratables.

23 LT. GOV. GUADAGNO: Right. That's the
24 time the decision is won. I know the legislature is
25 taking it on local. I know the Governor signed an

1 executive order making it the law of the land going
2 forward. And we're going to have to look at what's
3 on the books right now.

4 SENATOR BUONO: Quick question. And I
5 know we are trying to hurry along. Just very quick.
6 You had mentioned that we have to change, we should
7 change the state plan to state where we want those,
8 where we don't.

9 And maybe this is not an easy question --
10 I know it's not an easy question to answer. It's
11 really the global issue. We tried this in the past.
12 I remember with Brad Campbell, he was DEP
13 commissioner. Remember the big map? What derailed
14 that?

15 MR. KARMAZ: I coined the red map.

16 SENATOR BUONO: What happened there that
17 we could avoid, perhaps?

18 MR. FISHER: I'll tell you exactly what
19 happened. I was on the state planning commission
20 for five years, I was a member. And I was on it
21 when that happened.

22 I was the only one that voted against
23 re-adoption of the plan in 2001 because I knew that
24 it failed to do what it should have done, which is,
25 you know, create meaningful opportunities for

1 development and redevelopment in places where it
2 needed to happen. And it allowed too much interplay
3 and interference from those agencies thwarting those
4 development objectives, where they were designed to
5 take place. The original plan suggested 600
6 senators. We ended up with less than a hundred
7 after two plans.

8 SENATOR BUONO: And how many are approved
9 now?

10 MR. FISHER: Very few. I think most have
11 been rescinded. So we need to come back to a
12 balanced system where the commission has authority
13 over all of the departments that feed into the
14 information that makes up the state plan.

15 SENATOR BUONO: Where's the commission?
16 What commission is that?

17 MR. FISHER: The state planning
18 commission. I think the State Planning Act needs to
19 be amended to restructure that. And I wouldn't be
20 opposed to putting it under the lieutenant governor
21 so that it takes on almost a cabinet level
22 authority. And so that, you know, if it needs to
23 broker or make decisions regarding conflicting
24 agency rules, there's the power to do that. Because
25 I think without that it tends to get co-op'ed by

1 whatever agency, you know, lends greater influence.
2 And, frankly, it's been DEP through its mapping, and
3 GIS mapping. It's taken over the process, and
4 that's not good.

5 SENATOR BUONO: Centralized management
6 and leadership over it?

7 MR. FISHER: Yes. Have a dedicated staff.
8 The staff is almost down to nothing. And it needs
9 the authority to -- in the paper you'll see the
10 number of requirements.

11 LT. GOV. GUADAGNO: Let me interrupt you
12 right there. By the paper, you mean the document we
13 have in front of us called Red Tape Review Group,
14 NJEA recommendations, dated May 2, 2010?

15 MR. FISHER: Yes.

16 LT. GOV. GUADAGNO: I just want to be
17 sure.

18 MR. FISHER: And we hit on a lot of the
19 ruling-making process, things that were mentioned
20 before, like the waiver process, also the prevailing
21 wage requirements that hurt redevelopment projects,
22 creating state COAH working groups so that we can
23 work together with the departments before they adopt
24 a major set of new rules.

25 You know, the Assemblyman mentioned

1 reference documents, implementation guidelines.
2 They need to be published with the rule. They may
3 not need to be regulations, but they need to be
4 published so that the regulating community is aware
5 of them. And delaying effective dates of new rules
6 so that we can get an idea as to how we are going to
7 be regulated before they adopt it on a date. And
8 everything from there forward needs to comply. And
9 pilot programs, or phased implementations of
10 regulations. It's all in there.

11 The last thing I wanted to mention was the
12 fact that I think -- and this can be done through a
13 better state planning process. We need to get a
14 better hold on all of the functional plans that are
15 out there, that have taken on their own identify.

16 We got the Highlands Plan in North Jersey,
17 Pinelands, of course, CAFRA, the energy master plan,
18 the open space master plan, water supply master
19 plan, but they don't speak the same language.

20 MR. KARMAZ: And nor do they address the
21 same areas.

22 MR. FISHER: Yes. I think to the extent
23 that a revitalized state planning process can make
24 those more consistent, we'll all be better off.
25 Because, again, for just one example, we have enough

1 water in this state. That's a misnomer. It's just
2 getting it to the right places.

3 The water supply, you know, if it's
4 available, and it is, without either impacting
5 surface water to a negative degree, or ground water,
6 there needs to be proper transmission of it. And
7 this, I think, becomes obvious when you look at the
8 master plan.

9 So those types of things I think would all
10 go a long way toward assisting this industry. And,
11 as you know, we've been hit hard by the economy.
12 Thank you.

13 LT. GOV. GUADAGNO: Thank you very much.
14 I appreciate it. Thank you very much. Tom -- boy,
15 your handwriting is worse than mine. Tom Budd from
16 the Barnsboro Inn, New Jersey Restaurant
17 Association. You three just want to give us your
18 name and then we'll get started.

19 MS. DOWDELL: Lieutenant Governor, members
20 of the committee, my name is Deborah Dowdell. I'm
21 the President of the New Jersey Restaurant
22 Association. Thank you very much for the
23 opportunity to present some general comments today
24 to the Red Tape Commission.

25 You know, we have taken a great deal of

1 time to analyze a myriad of observations and
2 complaints that our members have made about the
3 varying agencies that they do business with so that
4 they can employ people and generate \$12 billion
5 per year in sales and sales taxes, as the largest
6 private sector employer in the state with over
7 300,000 employees.

8 As you can imagine, we have a lot of
9 interaction with many different agencies. But
10 pinning our members down on, you know, the detail
11 and getting them to really quantify and qualify what
12 is indeed the frustration of doing business in New
13 Jersey was quite a task. And as an overriding theme
14 we noted because the net profit in a restaurant is 3
15 percent. That means 3 cents on every dollar that
16 comes through their doors that they realize in
17 profit, if that.

18 We are particularly sensitive to red tape.
19 Red tape is not an obscure reference. It's dollars
20 and cents to restaurants. So I just wanted you to,
21 you know, establish that as a point of departure.

22 With that as well, in our summary of the
23 various frustrations that we observed in doing
24 business in New Jersey, we noted issues in the
25 department of community affairs, most recently with

1 the division of fire safety. And Nick Manuso, who
2 is a member of the association, owner of the 45th
3 Street Pub, is here today to make a few remarks
4 regarding his experiences there with the department
5 of law and public safety, division of alcoholic
6 beverages control. We have a great deal of issues
7 regarding liquor licenses.

8 Further, with the department of health.
9 And if I can just underscore with the department of
10 health as well as the division of alcohol beverage
11 control. I realize that public safety is always an
12 overriding theme, and the division of fire safety as
13 well.

14 Certainly we are not overlooking the need
15 to be careful and considerate of the safety of our
16 citizens. By the same token, we have issues with
17 regard to red tape when dealing with those agencies,
18 certainly the department of labor.

19 And I'm here today, also, with Tom Budd,
20 who owns the Barnsboro Inn in Sewell, who will make
21 some comments regarding the frustration we have not
22 only with unemployment appeals, new hire directory,
23 but, generally speaking, issues regarding the
24 department of labor. So that's just a short list of
25 the various agencies that we do business with.

1 And we do have some testimony. I'm not
2 certain who we should submit it to. But we did
3 bring some testimony. And included in the testimony
4 is a summation, summary of the citations that
5 specifically deal with some of the areas that we are
6 here to review with you.

7 So with that as an opening remark on
8 behalf of the New Jersey Restaurant Association, I
9 do want to say thank you for holding today's
10 hearing. Thank you for giving us a moment to
11 express some of our concerns. We look forward to
12 working with all of you in the administration and
13 legislature, set a right course so that we can make
14 New Jersey more affordable, a place for us to create
15 jobs. Thank you very much. Tom.

16 MR. BUDD: Thank you. I apologize for my
17 poor handwriting. Thank you for the opportunity to
18 address these issues. As a local business owner my
19 ability to remain in business will be substantially
20 effected by how successful this administration is in
21 dealing with these issues.

22 Every year that we fail to take
23 significant steps to fix this problem, it just
24 compounds. More regulations are piled upon those
25 that aren't needed or don't work properly. And the

1 mess gets larger.

2 I'm encouraged by this effort so early in
3 the new administration. Please don't lose your
4 will. And please don't be swayed -- or unduly
5 swayed by the bureaucratic complaints that I know
6 you're going to get when you deal with these
7 regulations.

8 This is going to be a little different
9 than what we heard so far, a lot of the terms and
10 the 26,000 pages of regs. I'm just a restaurant and
11 bar owner. I'm here to talk about all that stuff
12 that we were talking about earlier. When that hits
13 the fan I have to walk through the mess. And it's
14 deep sometimes.

15 So I think that -- I got two examples.
16 The first example of unnecessary and costly red tape
17 deals with the department of labor's unemployment
18 insurance office.

19 Yesterday I received two separate notices
20 dealing with the same new insurance claim. One
21 notifies me of the claim being filed and asks for
22 basic separation information. The other notifies me
23 that a fact-finding proceeding will take place and
24 asks for basically the same information as the first
25 notice.

1 Although I'm certain you will hear when
2 you look into this -- hopefully someone will look
3 into it. I'm certain you will hear that those
4 notices are different and must be separate.

5 A reasonable person must conclude that
6 these notices could and should be combined. The
7 result will be one less response that I have to deal
8 with, which is very important to me because I do
9 everything in my place. And it's one less notice
10 the state has to generate and pay for.

11 Just so you don't underestimate the
12 dollars involved. I calculated just the postage by
13 using the United States Department of Labor's
14 statistics. The first seven weeks New Jersians
15 filed 104,744 new claims for unemployment, first
16 seven weeks of this year. If you annualize that,
17 the postage savings alone is \$342,000 to just
18 combine those two notices. If you add another 80
19 cents or so, which I suspect it costs to generate
20 that second notice, it's over a million dollars.
21 You can probably find two hundred of these. Now
22 we're talking real money. Even on the state's
23 deficit level, that's real money. And then we don't
24 have to deal with all these things.

25 Last on this point, in 2010 it is

1 bordering upon ridiculous that employers can't file
2 responses online. We can't. It would be so easy
3 for us if we can just go online and fill in the
4 information and then it would be done with. Nope.
5 We have to do it the old fashioned way. And we have
6 to fill in -- you can't even generate this
7 online and mail it in. We have to fill in this --
8 it looks like it was filled out by a typewriter, the
9 form that was sent.

10 In my second example of government red
11 tape, business, involves the state's failure to
12 create standards that extend to all counties and
13 municipalities.

14 I can't see any viable reason that each
15 jurisdiction should add or otherwise rewrite regs
16 that have been properly enacted on the state level.
17 I understand local option and we all want to be free
18 and we all want to have decisions made locally, but
19 it cost -- the cost of it is too high. It's
20 tremendous over regulation because each government
21 agency at each level creates their own way of
22 looking at things.

23 I only have one restaurant. God forbid, I
24 have enough trouble managing that. But if I had it
25 in several regulations -- several jurisdictions, I'd

1 have to follow different regulations. It just
2 creates extra expense and the need for more public
3 employees and adds hurdles to a business succeeding.

4 Barnsboro Inn occupies a building
5 originally built as a log cabin 1720. As you can
6 imagine, we have a rather large repair and
7 maintenance budget. We've been licensed as a tavern
8 since 1776.

9 The regulations require me to go to
10 expense far beyond what is reasonable. If I replace
11 a 3-foot section of sheet rock in a 10-foot wall, I
12 need a building permit. Three foot section of sheet
13 rock I need a building permit because it's more than
14 25 percent of the wall, it's no longer a repair.

15 If I replace an old and deteriorating tile
16 with new state of the art vinyl that looks like real
17 wood, I need a building permit because there is
18 something called a ADA slip quotient that has to be
19 measured.

20 I don't want my customers to slip. I
21 poured water on the stuff before I bought it. And I
22 can't slip, so it was okay with me. That's common
23 sense. I don't really need a building inspector to
24 tell me that's a good tile or that's a bad tile.

25 You have to hire a licensed electrician to

1 move an outlet. I need a building permit for that,
2 too. Even though I've hired a licensed contractor,
3 I must pay someone else to assure it's properly
4 done. Same with plumbing.

5 It seems like it's just too much. Why do
6 we have all of those levels? If the state -- I
7 think it's the state licenses, the electricians and
8 the plumbers, why can't they decide whether moving
9 an outlet is up to code or not? Why do I need to
10 get a permit, pay the fee, and then have the
11 building inspector come in and say, yes, he did it
12 right? It's just moving the outlet, it's not
13 building the whole building.

14 There are so many things in that area that
15 you could look into that would make it easier for
16 businesses to succeed. Government cannot manage
17 every aspect of our lives and every aspect of my
18 business. That's why our tax burden is so high and
19 it's why it's so hard to succeed in business today.

20 I advocate using a much more common-sense,
21 far less intrusive approach to regulating business.
22 Anything you can do to get closer to that would be
23 very much appreciated. And I thank you for letting
24 me speak.

25 LT. GOV. GUADAGNO: Thank you.

1 MR. MANUSO: Good afternoon. As Deborah
2 said, my name is Nick Manuso. I own three
3 restaurants in New Jersey, two of which are called
4 45th Street Pub. The two restaurants are 12 miles
5 apart on Route 130. They are identical in terms of
6 their menu and operation. The only difference is
7 that one of the restaurants happens to be over 5000
8 square feet, which is the second of the two 45th
9 Street Pubs.

10 We purchased the restaurant in January.
11 Our report says 2009. It was actually 2008. We
12 purchased the restaurant in January of 2008. And
13 the building was in need of a total renovation.

14 When we submitted our plans to the
15 township five months after purchasing the property,
16 I got a phone call from the local fire inspector
17 stating that due to our square footage we were
18 classified as a night club.

19 I later learned that due to a night club
20 fire in Rhode Island some years ago, New Jersey
21 changed their fire code regulations to make it more
22 strict on night clubs. And my response initially to
23 the local inspector was, well, that shouldn't effect
24 me because I'm not a night club. He said, well, no,
25 the code states that you are based on the layout of

1 the building.

2 I actually was getting some conflicting
3 information from the township, so I hired an
4 architect to do code interpretation just to make
5 sure that what I was being told was accurate. And
6 the architect, his investigation resulted in him
7 suggesting that due to the way the code was written
8 and the makeup of our building, it would fall under
9 that category. And I asked a lot of questions.

10 And at that point the local officials had
11 arranged a meeting with the state fire inspector.
12 And all along I was being told that these
13 regulations were intended to apply to night clubs.

14 And the state fire inspector came out,
15 looked at our plans, and agreed that we were in fact
16 a night club and had to install an automatic fire
17 suppression system, a fire alarm that would raise
18 any dimmed lights, that would lower, turn off any
19 music, should a fire occur.

20 As I said, we just bought the property. I
21 asked the fire inspector, if this was the case, I'm
22 interested to know why the seller wasn't made to
23 bring the property up to code before it was sold to
24 me. And he just agreed that, yeah, I was in a tough
25 spot.

1 A lot of the renovations that we did were
2 due to a SPA construction loan that we received. It
3 took 14 months to get our construction loan
4 approved. The last year the loaners didn't want to
5 hear anything about increased funds needed. So we
6 had to scale back our plans to the renovations. We
7 had to invest more capital because the fire code
8 regulations actually cost us a little over \$70,000
9 by the time we did everything we had to do.

10 As I said, two restaurants, same road,
11 same exact concept, 12 miles apart. Only because
12 the one building happens to be bigger than the other
13 did I have to go through those changes.

14 That's all I have to say. My only
15 recommendation would be -- as Deborah stated, again,
16 public safety is absolutely a concern of ours. But
17 if the intention of the regulation was to apply to
18 night clubs, there needs to be either a more finite
19 definition of what a night club or perhaps an
20 inspector that will come out and look at the
21 restaurants on a case-by-case basis and assure that
22 the wrong type of establishment is being effected.

23 LT. GOV. GUADAGNO: Thank you very much.
24 Coming in I have Eric DeGesero, the fuel merchants.
25 Paul Riggins.

1 MR. DE GESERO: Hello, Lieutenant
2 Governor, honorable members of the committee. Thank
3 you. My name is Eric Gesero. I'm the Executive
4 Vice President of the Fuel Merchants Association of
5 New Jersey. We are a statewide trade organization
6 that represents gas station owners, home heating oil
7 dealers in the state that distribute gasoline,
8 heating oil, diesel fuel. Our members also sell,
9 install, and service central heating and
10 air-conditioning units. And a growing number of our
11 members are now performing home energy audits and
12 improvements under the state's clean energy program.

13 I apologize for the lateness of the
14 comments being circulated. I was at a meeting on
15 Executive Order Number One at the DEP and US Tee
16 Regulations, which caused me to be late getting down
17 here.

18 LT. GOV. GUADAGNO: Special exception.

19 MR. JUZARRO DE GESERO: Thank you. In the
20 areas of industry specific comment, and then a
21 couple broader comments.

22 LT. GOV. GUADAGNO: This is the
23 three-minute rule. Because, turn around. I'm going
24 to hold everybody. I'm going to start interrupting.
25 I'm going to be mean. I'll bring that title of

1 prosecutor out of me. Because I'm not leaving until
2 we get all these done. Right?

3 MR. DE GESERO: Okay. Number one,
4 proposal to lower the sulfur content of home heating
5 oil, frozen by Executive Order Number One. The fuel
6 merchants think it's a great regulation. And, if
7 anything, it's too weak. The implementation of the
8 regulation to produce sulfur needs to be implemented
9 much faster.

10 Additionally, we think the legislature
11 should not only codify it statutory, but require a
12 blend of removable bio-fuel being --

13 LT. GOV. GUADAGNO: That doesn't mean to
14 kill the court reporter as we go.

15 MR. DE GESERO: I'll try to strike an
16 appropriate balance. So, legislation to effectuate
17 that had been introduced.

18 The second thing, and this is a regulation
19 that is a little outside of the DEP's purview, in
20 that we were mandated, the state was mandated by the
21 EPA, to put in stage two vapor recovery at gas
22 stations. That's the funny hose you see on a gas
23 station dispenser in New Jersey. Some of them that
24 don't have funny hoses also have just a different
25 technology.

1 We were required because of our air
2 non-attainment to be mandated to have this until
3 such time as cars had this little gizmo on them
4 called an onboard cannister, which can take the
5 vapor from the refueling process and do away with it
6 in another manner.

7 Right now other states in the northeast
8 that were mandated to have it, such as
9 Massachusetts, are looking at backing away from it.
10 And we would like the DEP's help. It will take EPA,
11 actually, but we would like the DEP to be our
12 partner in helping us repeal that.

13 Mr. Riggins, who had to leave to run his
14 business, would comment specifically to, you know,
15 the fines that he has received because of a
16 redundant regulation, that actually cost small
17 business owners money to annually test. That also
18 can be redundant, not only redundant, but could
19 actually counterbalance increased air emissions. So
20 it's a regulation, it's a poster child of
21 regulations whose time has come and gone.

22 The third is a proposal to change the
23 point of collection in the New Jersey Motor Fuels
24 tax. It's something that was recommended in the
25 governor's transition, transportation, transition

1 report interesting enough, the division of taxation
2 in November started implementing some of the changes
3 by changing a form even though the law hasn't been
4 changed. So I think there is a recognition that
5 this needs to change. We worked collaborately with
6 others over the last number of years to make that
7 happen. And, for whatever reason, I think there was
8 too much of a fear politically, that if you said how
9 you were going to change how the tax was
10 administered, that would equate into a tax increase.
11 And nobody wanted to touch it.

12 To the DEP specifically. In the
13 mid-'90's there was a law passed that said that all
14 DEP regulations had to afford small business owners
15 a grace period to comply if they were out of
16 compliance. The DEP turned the legislative intent
17 of this regulation on its head and went through and
18 codified every regulation as minor or non-minor, and
19 hammered small business owners with exorbitant fees,
20 \$15000 fines, that they quickly mitigate to \$7500.

21 And we have an example of a small business
22 owner that was penalized for having a redundant
23 safety system at their service station. Because
24 they didn't test the redundant aspects, they were
25 fined \$15000 for it. Was said -- immediately the

1 department said we'll cut it to 7500. We're in the
2 process of actually having the department
3 recognizing the mistake. We like to work with the
4 department to get this man's \$7500 back, much to the
5 chagrin to those of you on the budget committee.

6 LT. GOV. GUADAGNO: If we are balancing
7 the budget on the backs of gas owners with \$7500, we
8 got a bigger problem than that.

9 MR. DE GESERO: Great. Well, thank you.
10 I like to shift gears for a second to a couple
11 larger issues relative to the DCA. And one of them,
12 one of the most vexing issues for contractors in the
13 state is, the only thing uniform about the uniform
14 construction code is the title of it.

15 Specifically, as it relates to permits and
16 fees that need to be required to simply change an
17 air-conditioner or a furnace, I put an example in my
18 testimony of how divergent fees can be for replacing
19 the same piece of equipment in neighboring towns and
20 how you might need to get different inspections, a
21 mechanical inspection, a fire inspection, a fungal
22 inspection, varying by towns with various fees.

23 While we are on the issue of land use, or
24 DCA issues, one of the great issues of consummation
25 is how municipal land use law is such a hammer.

1 When a gas station owner wants to go in and make a
2 change at their property, that the way that the
3 local land use board can use unrelated -- say they
4 want to rip down their store and build a new store.
5 But that then can become a wedge to make the owner
6 change hours of operation and things of that sort.
7 That might be a little outside the purview of red
8 tape review, but it's still something that is
9 harmful to small business owners.

10 Another issue --

11 LT. GOV. GUADAGNO: Mr. De Gesero, your
12 testimony is in this file?

13 MR. DE GESERO: I am concluded, madam.
14 Yes, it is.

15 LT. GOV. GUADAGNO: Is there anything
16 that's not in the file? Because we are reading all
17 of this verbatim. It's all being very carefully
18 picked through by every one of us.

19 MR. DE GESERO: There are two things
20 here -- there are three things. Number one, back to
21 the DEP. I think the process that we are going
22 through on underground tank regulations, looking at
23 Executive Order Number One, we would like to see
24 some of that same stuff happen for air compliance
25 issues, this issue of stage two incompatibility.

1 I'm sure there are other small business owners that
2 have their air quality issues as well. And I don't
3 know that that is something that's happened as part
4 of the EO1 review, as formally in that program as it
5 has been in the USP program.

6 LT. GOV. GUADAGNO: It wasn't pending. It
7 wasn't reviewed.

8 MR. DE GESERO: It was pending. Okay.
9 And this was not pending, but it's something that in
10 terms of an issue for small business owners is one
11 we would like to work with, commissioner.

12 Relative to the Administrative Procedures
13 Act and changes upon adoption, that discussion we
14 had earlier, that's something that actually was
15 discussed at the meeting we had at the department
16 earlier today.

17 And as someone who has been a recipient of
18 the comment, the boiler plate comment, thank you for
19 your comment, but it's outside the purview and you
20 can't do it at this time. I certainly appreciate
21 the frustration of that as a commenter. But I also,
22 in trying to balance it, if the department was to do
23 something adverse to my interest, I'd be greatly
24 concerned if I wasn't afforded the opportunity upon
25 adoption to have an opportunity to comment on a

1 change.

2 And the other is relative to the process
3 on having the public hearing on regulations. It has
4 generally been my experience that when an
5 administrative agency, primarily the DEP, has a
6 public hearing on a rule proposal there is generally
7 a hearing officer and a bunch of members of the
8 public representing first interest. The hearing,
9 it's nothing more at some level than an oral
10 submission of comment, if you will. There's very
11 little give and take. And I think that's a huge
12 waste.

13 I think it would be a lot more
14 instructive, especially as the rule process is still
15 open, for there to be questions in a back-and-forth
16 with the hearing officer because it might help
17 inform both parties prior to adopting a regulations
18 file.

19 LT. GOV. GUADAGNO: And I think EO-2,
20 common sense principles speak, sit down, examines
21 this.

22 COMMISSIONER MARTIN: We already started
23 that process, three of those processes right now.

24 MR. DE GESERO: And we are part of two of
25 them. And I thank you. But it's something I like

1 to see going forward.

2 LT. GOV. GUADAGNO: Thank you. I
3 apologize for rushing you. Chris Stark from the
4 NJGCM. Any takers?

5 MR. STARK: And I, too, apologize for the
6 delay in handing in the comments. Lieutenant
7 Guadagno, my name is Christopher Stark. I take care
8 of the government affairs and regulatory analysis
9 for the New Jersey Gasoline Convenience and
10 Automotive Association. Thank you for holding the
11 Red Tape Review today.

12 I want to echo Eric's call on one specific
13 item, and that is the grace periods. There has to
14 be an attitude adjustment within our department of
15 environmental protection. I think that our new
16 commissioner understands that. But it can no longer
17 be the Scotch mentality where our enforcement agents
18 will go in and spend hours, they will not leave
19 unless they find a violation, and will snoop through
20 absolutely everything to do so. And when they do
21 find a broken hose or a test from four years ago
22 that was not completes but did not result in leaks,
23 release, they will still fine these small business
24 owners.

25 In the packet, highlighted is one

1 particular example. One of our members was fined
2 \$31,000 for a set of tests that would have cost
3 about \$600 to perform. And in November there was no
4 release detected.

5 One of the proposals that I would ask, as
6 we move forward and we look at the Water Pollution
7 Control Act and how we are going to revisit that
8 statute and its regulatory affects, is that we
9 re-analyze all the factors that go into protecting
10 the environment.

11 Set up, in terms of tests, what the
12 average would be for those tests. Fine people three
13 times the amount of what it would have been had they
14 timely tested these tanks. But don't go after them
15 and try to raid their children's college education
16 funds when there was no release to the environment.
17 It is a fine and delegate balance. So we have to
18 ensure that we find between protecting our
19 environment and protecting our small businesses.

20 And to that point I ask all of our
21 department commissions that they commit themselves
22 to the rules of the Regulatory Flexibility Act and
23 the expansion that was passed this year so that we
24 should -- every single regulation is at least going
25 through the cost-benefit analysis.

1 At least we have judicial review, where we
2 didn't in the past. Because believe me when I say
3 that if you challenge the agency under agency
4 review, the agency would simply say that they did
5 it, and deal with the regulations that they have.

6 Finally, I would like to add that, we have
7 a lot of work to do ahead of us. It's not just
8 gasoline service stations that are facing
9 regulations under the underground storage tank or
10 Erron (Phonetic) vapor recovery systems, but it's
11 also the new rules that are coming down the pike,
12 that have already been adopted, concerning
13 chlorinated sulfurs -- PERC specifically -- that
14 will be used as spray cleaners and other items in
15 our automotive repair facilities.

16 To the commissioner, I would ask that we
17 do not initialize the ban that is set for 2011 until
18 we are certain that there are other viable options
19 for our small businesses to use. Because if we
20 started banning these solvents it can also impact
21 the safety, the effectiveness, and the efficiency of
22 the repairs that are necessary to our cars on the
23 road today.

24 I'm going to conclude there. I do ask
25 that you review this thoroughly. There are a lot of

1 other details contained in the packet. But keep in
2 mind the small businesses that DEP has gone after
3 time and time again. And balance the fact of
4 release or nonrelease. And take it to be something
5 more than just a minor or major infraction, because
6 to these small businesses it's not just a minor
7 infraction when they have to shell out \$31,000 in
8 fines.

9 LT. GOV. GUADAGNO: Thank you, Mr. Stark.
10 Thank you. Ron Yarborough.

11 MR. YARBOROUGH: Good afternoon. My name
12 is Ron Yarborough. I own and operate a painting
13 company, Prospect Painting Company, based in
14 Vineland, New Jersey. The company's been
15 established for thirty years. We worked in several
16 Mid-Atlantic states and worked on a national level.
17 We completed numerous very large construction
18 painting projects, which include NFL stadiums,
19 baseball parks, arenas, and convention centers.

20 Since 1997 we've been a New Jersey lead
21 abatement contractor. We are an industrial
22 contractor. And we are also certified in deleading
23 with steel structures.

24 We a couple of years ago began to get
25 several phone calls a week for lead abatement work

1 in New Jersey. There was not a lot of participation
2 in the state by lead abatement contractors.

3 The company began to pursue lead abatement
4 work in residential and public buildings. That work
5 is regulated under the regulations NJAC 517, Lead
6 Hazard Evaluation and Abatement Code.

7 That regulation came about in the early
8 days of that abatement, shortly after HUD began
9 regulating lead abatement and New Jersey adopted its
10 own regulations.

11 That regulation is a 36-page document that
12 was prepared in the early days of lead abatement.
13 And that lead abatement -- or that document
14 regulates lead abatement contractors, how they
15 become lead abatement, and then regulates the
16 procedures, the tasks, the work practices in lead
17 abatement.

18 Prior to coming here today I did a lookup
19 on the web. And there are basically 36 lead
20 abatement contractors in the State of New Jersey, of
21 which 26 of them have listed themselves as
22 interested in doing lead abatement work on housing
23 and public buildings.

24 There are many lead abatement contractors
25 that have been put out of business due to fines and

1 just unreasonable and unfair actions by the
2 violations, people in the State of New Jersey.

3 More important for my visit today is the
4 Lead Hazard Control Assistance Act and the Lead
5 Hazard Control Fund, and those monies that have been
6 loaned to people at no interest for lead abatement.

7 We have performed several projects that
8 were financed by the Lead Hazard Control Fund. In
9 those cases the individuals who are in the interior
10 environments, that are putting together those loans,
11 we find that delays in getting change-order
12 responses have taken upwards of two weeks, sometimes
13 two to three months.

14 We have individuals that own a property
15 that have a vacancy they are not renting, and these
16 vacancies are going on for months. Sometimes
17 they're -- a person who has borrowed money is
18 staying at a hotel sometimes for weeks at a time.

19 As a contractor who is very familiar with
20 the contracting process, change orders, of the
21 administrative process, we have submitted change
22 orders, we moved the projects along, and we are just
23 frustrated beyond belief.

24 As a result of that we have written two of
25 the regulators of the State of New Jersey. In fact,

1 we've written one time on behalf of our customer who
2 sought additional lead abatement work to be covered
3 by their loan. They were denied.

4 We contacted the interior environments.
5 They basically stonewalled us. So we wrote a letter
6 to the commissioner. And for that we -- basically,
7 we were fined substantially for, you know, that
8 project that had been completed several months
9 earlier.

10 LT. GOV. GUADAGNO: Do you have all that
11 material with you?

12 MR. YARBOROUGH: Yes, we do. Since then
13 we've gone -- and we copied that letter to the
14 commissioner. Most recently we completed three lead
15 abatement projects. The projects were done,
16 completed, accepted, cleared by the local building
17 official.

18 Some time, several weeks after the project
19 was done, unilateral deducts were made from our
20 contracts -- and we haven't be paid for those
21 projects -- unilateral deducts from the customer's
22 loan.

23 As the abatement contractor, that only
24 gives us the remedy to litigate with our customer,
25 because the Abatement Control Fund is simply

1 providing funds.

2 Now, under the rules, the control of the
3 Hazard Control Fund is basically the bank. The
4 requirement is that the contractor enter into a
5 contract with the customer. We use a standard form
6 contract. We provide schedules and specific
7 details --

8 LT. GOV. GUADAGNO: Mr. Yarborough, I hate
9 to interrupt you. I'm personally not familiar
10 enough with that program to be able to help. Oh,
11 the DCA. Look at this silent arm over there.
12 (laughter)

13 Can we take that information? Let us
14 look into it for you. Because that's very specific
15 information on very specific projects.

16 MR. YARBOROUGH: Okay. I just want to
17 follow that there are no standard construction
18 specifications, there are no standard documents.
19 Then, as a contractor when you bring this up you are
20 fined. So it's a problem. And it's costing --

21 The actions by some of the people are
22 immorally reprehensible on how they responded to the
23 need. There are some good people up there, but
24 there are some real problems. And no lead abatement
25 contractor will speak up. No one will. I'm the one

1 that has spoken up. And I have paid a lot of money
2 and a price for that.

3 LT. GOV. GUADAGNO: And I thank you for
4 doing it here today.

5 MR. YARBOROUGH: Thank you.

6 SENATOR BUONO: Do you have any materials
7 with you? I'll be happy to take them with me today.
8 Do you have an extra set for me?

9 MR. YARBOROUGH: I actually became aware
10 of this late last night.

11 SENATOR BUONO: Okay.

12 MR. YARBOROUGH: So I rushed this morning
13 to get this. Thank you for hearing me out. But I
14 will send it to you.

15 SENATOR BUONO: I wish you would.

16 MR. YARBOROUGH: Thank you.

17 LT. GOV. GUADAGNO: Joe Tyrrell.

18 MR. TYRRELL: Thank you very much. I
19 appreciate the time and patience of this forum, Red
20 Tape Forum, for today. Thank you.

21 Again, my name Joseph Tyrrell. I'm
22 Regional Vice President for Government Relations for
23 Harrah's Entertainment Casinos. I'm based here in
24 New Jersey. I actually live in Caldwell, Essex
25 county.

1 Harrah's represents four casinos in
2 Atlantic City, harrah's Resort and Marina, Caesar's
3 on the Boardwalk. Next to Caesar's we have the Wild
4 West Casino, Bally's, the Clairage, as well as the
5 Showboat, the north end of the boardwalk.

6 Harrah's in Atlantic City, actually, we
7 employ over 13,000 people in New Jersey. We
8 actually do business in all 21 counties in New
9 Jersey, all our vendors, every county in the state.

10 I didn't come here to talk about casino
11 regulations. We can go on for days about that. But
12 there are some regulations with regard -- with the
13 DCA and DEP that impact our business and how it
14 affects operations on a daily basis.

15 In particular, we've had some --
16 actually, the one point the mayor of Glassboro made.
17 His redevelopment project was funded by CRDA funds,
18 which is funded by our company.

19 The one regulation I point out is with the
20 the DEP. It's actually with regard to our beach
21 bars, and explaining the current competitive fight
22 we have with the neighboring states that have
23 gaming, that we didn't have 30 years ago, New York
24 and Pennsylvania.

25 The one thing that Atlantic City is not

1 taking on is promoting the city as a better tourist
2 destination. The one thing we offer in New Jersey,
3 in Atlantic City, that New York and Pennsylvania can
4 not, is beach bars. Promoting the beach, using it
5 as a tourist destination, using the background as a
6 leverage to drive customers to Atlantic City is a
7 very important part of our business.

8 Over the last six years we've been going
9 back and forth with DEP about having this beach
10 bars. Other properties have as well, as well as
11 Hilton, as well as Trump.

12 We had three beach bars. We are down to
13 one now, in part because of this regularly
14 environment. The DEP will give us a temporary
15 permit to allow a structure on the floor, some
16 utility, and actually bring out food and beverage
17 out to the beach bar.

18 Every year we have to take that down and
19 put it back up again. It's become a burden in such
20 a way where it's almost coming up to a million
21 dollars a year to put it up and take it down.

22 Looking for some winterization efforts to
23 kind of reduce the cost for putting them up and down
24 also makes that a business decision, because we know
25 the current economic crises we're in. We have

1 declining revenues. We're trying to make, I guess,
2 realtime business decisions about what is --

3 LT. GOV. GUADAGNO: Mr. Tyrrell, I promise
4 you we'll look at beach bars.

5 MR. TYRRELL: Okay. I understand.

6 COMMISSIONER MARTIN: We are already
7 working on it now.

8 MR. TYRRELL: I understand.

9 LT. GOV. GUADAGNO: I don't mean to make
10 light. We hear you.

11 COMMISSIONER MARTIN: We are actually
12 looking to raising the L rate, several times.

13 LT. GOV. GUADAGNO: I know you have some
14 issues about pending rules and regulations, which we
15 are also looking at.

16 MR. TYRRELL: Right. And we appreciate
17 all these executive orders, including number six.
18 Just real briefly on the DCA issues with regard to
19 the fire code. There has to be some uniformity
20 between the state rules and the local city rules.

21 One, the DCA rule will allow us to put in
22 certain signage. Obviously, the safety of our
23 customers is very important, our employees. But
24 when the DCA makes a change -- or actually makes a
25 standard of having fire safety rules, and then the

1 city will come and kind of change it based on the
2 fire commissioner's level.

3 I would imagine a lot of mayors who are in
4 this room understand that fight between state and
5 local government, who has jurisdiction. And it
6 comes down to, well, obviously if you on a casino
7 floor you're going to notice there is an exit sign.
8 Such as the one behind you. Sometimes the local
9 fire marshals will say, no, that sign has to be six
10 inches lower or much larger.

11 COMMISSIONER GRIFA: I'm here and I'm in
12 charge. I'm going to take care of this.

13 LT. GOV. GUADAGNO: There you go.

14 MR. TYRRELL: Thank you. But in operation
15 costs, of what it really means to how it impacts our
16 employees and certain operation-cost revenue, which
17 I want to highlight that in this red tape review. I
18 thank you for your time. I just wanted to highlight
19 those two points.

20 LT. GOV. GUADAGNO: I appreciate that,
21 Mr. Tyrrell. Thank you. Christina Genovese, from
22 the chamber of commerce.

23 MS. GENOVESE: Good evening. Good
24 afternoon, Lieutenant Governor and members of the
25 commission. My name is Christina Genovese and I'm

1 the Director of Government Relations for the Chamber
2 of Commerce, Southern New Jersey.

3 I appreciate you holding this hearing here
4 in South Jersey. It was nice enough to drive too
5 far today to talk to you a little bit about the
6 administrative rule-making process here in New
7 Jersey.

8 Notice anyone with 125 rule-making
9 agencies, which is something I just learned from
10 Mr. Burzichelli's committee last week. We certainly
11 can use some simplification of the process here in
12 New Jersey. I did provide written testimony so I'm
13 not going to go on very long.

14 Just, really, four main points, one of
15 which you heard a little bit about from Acting
16 Commissioner Martin earlier and several other
17 people, is streamlining the process for stakeholders
18 in the state. The rule-making process is just
19 simply not conducive to really taking stakeholder
20 order suggestions and comments and being able to
21 enforce change in a regulatory process.

22 Similarly, it's not conducive to the
23 regulators to be able to have an open mind to the
24 suggestions that the stakeholders are providing. So
25 we encourage looking at streamlining that process,

1 whether it is getting the stakeholder draft
2 regulations before they are actually proposed, or
3 whatever the alternative would be. It is definitely
4 something that we hear a lot about here in the
5 business community.

6 Another issue, very briefly, is looking
7 at -- and this is actually something Assemblyman
8 Burzichelli, I believe, is looking at in his
9 committee on Thursday, looking into prohibiting
10 state regulations that go above and beyond federal
11 regulations. We hear about this quite a bit at DEP.
12 And we'll pick on DEP. In a refreshing twist, I
13 will pick on labor, in a second, as something
14 different.

15 But we see that a lot at DEP, we see that
16 a lot at labor. So it's something that I know that,
17 as I said, the Assemblymen will be looking at.
18 We'll be interested to hear how that conversation
19 goes on Thursday.

20 And an example of this is something I
21 talked about in my written testimony -- and it goes
22 hand-in-hand with another suggestion that we have --
23 is looking at internal policies that really -- not
24 just internal policies, but different
25 interpretations of regulations.

1 We hear a lot from business that there is
2 a problem with taking a regulation and, for whatever
3 the reason, an agency sort of interpreting it
4 differently and not, you know, as the previous
5 administration did, and not letting stakeholders
6 know that the change in mentality has happened at
7 the agency.

8 And one example I'll point to, picking
9 again on the department of labor, and not DEP, is
10 the practice of time-clock rounding. There is
11 something the business community has been faced
12 with, really, over the past year. We seen a shift
13 in how the department -- it's wage and hour
14 specifically -- looks at the time-clock rounding
15 policies.

16 Prior to last year we followed several
17 regulations, which was employers had the ability to
18 sort of average time clock -- clocking in, clocking
19 out. And as long as there wasn't a net loss of
20 employee time, it was okay to just average out that
21 time. And if it did end up the employee lost time
22 in the end, then would make it up on the back end of
23 it.

24 Last year the department of labor decided
25 to switch their interpretation of the regulation to

1 basically say that the employer has to keep
2 to-the-minute records. And if there is any
3 time-clock rounding, it has to be in the benefit of
4 the employer. Which is obviously very costly.

5 So what we've seen over the past year is,
6 hospitals especially, but other businesses as well,
7 have been sanctioned by the department of labor.
8 Again, this is something that is new. And this is
9 just something that, over the course of the past
10 year it was just a switch in mentality. So as far
11 as red tape and bureaucracy and regulatory
12 confusion, this is a good example of just something
13 that maybe is in process.

14 LT. GOV. GUADAGNO: Is that in your
15 testimony?

16 MS. GENOVESE: It is.

17 LT. GOV. GUADAGNO: Send it over to the
18 department of labor.

19 MS. GENOVESE: It is. Actually,
20 Lieutenant Governor, we have sent you, chamber, we
21 are part of a coalition that sent you some other
22 information on it over the past week or two.

23 And just last but not least, I went into
24 the Regulatory Flexibility Act, which I'm sure the
25 legislatures on the commission are familiar with.

1 It's a bill that, you know, the business community
2 has supported over quite some time. I understand
3 there are some legal issues attached to it.

4 But it did pass the legislature at the end
5 of the 13th session. It was pocket metered by
6 Governor Corzine. It has been re-introduced for
7 this session. So this bill will give, you know,
8 small businesses a little more regulatory
9 flexibility. And we'd encourage the legislature to
10 take that up again.

11 And that's it. If there's any questions
12 from anyone?

13 LT. GOV. GUADAGNO: We are going to pull
14 it out and look at it. Do you know what the bill
15 is?

16 MS. GENOVESE: It's also in my testimony.
17 But it's S-1336 and A-2129.

18 LT. GOV. GUADAGNO: Thank you very much.
19 I appreciate it. Tim Mangold.

20 MR. MANGOLD: Hello, everyone. My name is
21 Tim Mangold. I don't have prepared testimony or
22 notes to hand over.

23 I am not here on behalf my company, but as
24 a pending LSRP, which is a licensed Site Mediation
25 Professional, awaiting DEP response to my

1 application. I want to try to do one 30-second
2 story and then my recommendation for improving the
3 process.

4 I recently attended DEP training. And a
5 question was posed as to whether or not the
6 department would assist a responsible party in
7 getting off-site access to investigate their release
8 on a neighbor's property. And the DEP response was,
9 well, certainly we could if we are talking about a
10 real impact.

11 And what I took away from that was if we
12 are not talking about real impacts, why are we
13 forcing a responsible party to go through that
14 process and investigate something that's not a real
15 impact.

16 There's several examples I could discuss
17 later at length. I'll be happy to supply that
18 information. But I have some suggestions to help
19 fix the problem.

20 Where there's a conflict in the
21 regulations, whether it's between different agencies
22 or one agency, let the LSRP or other user of the
23 regulation choose which regulation he wants to
24 follow. And then the other one he can put aside.
25 If that's a problem with the authorities, then they

1 can remove the one that he choose through the
2 process, but if it's valid they should be able to
3 choose and run with it.

4 And, secondly, the confusion and cost
5 savings. The DEP has a history of telling people to
6 clean up their sites. And if they don't, eventually
7 the DEP will do it themselves and then recover the
8 costs.

9 If you put the ability in the user's hands
10 to decide which of the conflicting regulations or
11 which of the confusing regulations they want to
12 interpret themselves, then that's going to give them
13 an incentive to solve the problems of the
14 department. I want to keep it short because it's
15 late.

16 LT. GOV. GUADAGNO: Thank you very much.

17 MR. MANGOLD: Thank you for letting me
18 participate.

19 LT. GOV. GUADAGNO: Frank Capece, down
20 from Westfield.

21 MR. CAECE: Lieutenant Governor, I'm going
22 to be even briefer. What I did today, I just want
23 to give you a little perspective on the
24 administrative law from me. I was counsel to the
25 secretary of state when Governor Burns enacted the

1 law which set it up. Over the following years I
2 watched the office. And by my best estimate I have
3 presented some 250 matters before the OAL in a range
4 covering ABC matters, personnel matters, DEP,
5 education, and PERS. I been there a few times. The
6 idea of permitting the OAL to be the final
7 decision-making agency is, in my judgment, an
8 appropriate progression.

9 A couple of key points. I don't want you
10 to be left with the perspective that it's just DEP
11 that goes to OAL. In fact, based on my experience,
12 you are a small player at the OAL. There's a whole
13 lot of other things. Mayors will tell you a lot
14 about personnel matters that come up constantly and
15 the amount of time that's spent.

16 From the OAL perspective, as I see it,
17 they aggressively try to settle cases. They can be
18 painful when they do that, but they do try to do
19 that. They do provide the protection of discovery,
20 disclosure. And, most important, everybody gets a
21 fair shot and gets a hearing.

22 The difference when we talk about the
23 superior court is, the rules of evidence are relaxed
24 and the judges go out of their way to get to the
25 real truth. They don't stand on procedural issues.

1 And I commend them for that.

2 Let me leave you with the point that, this
3 is what I would call giving the OAL the final
4 rule-making -- I'm sorry, the final decision-making
5 process a natural progression.

6 One final point. An education
7 commissioner talked about developing expertise. I
8 firmly disagree with that. I believe these OAL
9 judges have that. I see judges who deal with FAE,
10 which is free and appropriate education. They're
11 experts in that. There are utility judges who deal
12 with BPU matters up there, who have developed
13 considerable expertise in the area.

14 What I'm telling you is, not only is it a
15 natural progression, I believe it's time you gave
16 the keys to the car to the OAL judges. I believe
17 they are ready. It will cut back significantly on
18 wasting time. And everybody would have a fair shot.
19 I thank you.

20 LT. GOV. GUADAGNO: Thank you for that.
21 D. William Subin.

22 MR. SUBIN: Thank you very much.
23 Lieutenant Governor, honored members of the
24 committee, I realize time is important. I want to
25 echo the comments of previous speakers, and tell you

1 the focus of my remarks is on the need to reform the
2 process and allow final decision-making power for
3 the administrative law judges.

4 I practiced law for almost 43 years. The
5 bulk of my practice represents public safety and
6 other public employees, police, firemen, sheriff
7 officers, corrections officers, and the like.

8 I have gone through repeated difficult
9 processes that are redundant, inefficient. And when
10 we finally get to the fair process of the
11 administrative law judge, in various circumstances
12 we face the prospect of warning the client,
13 notwithstanding the well-reasoned opinion of the
14 administrative law judge, we still face a reversal
15 by the administrative head of the agency who can
16 decide -- sometimes, I respectfully suggest --
17 arbitrarily and capriciously and without foundation
18 to reverse a decision of the judge.

19 LT. GOV. GUADAGNO: Present company
20 accepted. I have your testimony, right, Mr. Subin?
21 I want to make sure I have three things, your
22 resume, remarks.

23 MR. SUBIN: Just two, resume and remarks.
24 And I'm not going to belabor. I'm also -- my
25 background is, I was former assistant U.S. attorney,

1 an assistant prosecutor, and an adjunct professor at
2 criminal justice at Stockton. I'm also chair of the
3 Criminal Justice Committee of the New Jersey State
4 Bar.

5 The reason I mention that is to point out
6 to you that those that enforce the laws and are out
7 there putting their lives on the line are at least
8 entitled to the basic due process for the members
9 who put their lives on the line as those who are
10 accused of crimes. And we have had very difficult
11 circumstances. And let me resort to being a
12 professor for a few bullet points.

13 What you want in the adjudicative part of
14 the process -- and I'm not addressing rule making.
15 I'm focusing my remarks on the need for the
16 quasi-judicial function of the administrative
17 agencies to be fair, to be efficient, to be
18 consistent, and, of course, to deal with public
19 safety, which is the bulk of the cases I handle.
20 The administrative law judges do that.

21 Let me give you several examples of why
22 the boards themselves do not, with due respect. In
23 many instances -- many instances I've gotten very
24 fair hearings. But take the case of an accidental
25 disability, a police officer doing his job,

1 incurring a traumatic event that brings about his
2 inability to consider to continue his performance.

3 We submit two independent medical
4 examinations to the pension board. We fill out the
5 application, we go before the board. The board does
6 not allow me to see the independent medical exam
7 that they have before them.

8 LT. GOV. GUADAGNO: Mr. Subin, I don't
9 want to interrupt you, but if I don't I'm going to
10 get --

11 MR. SUBIN: I'll be very quick.

12 LT. GOV. GUADAGNO: My board will never
13 come back again. We have two more of these
14 hearings. But I do see that specific example is set
15 out fully in your testimony on March 2. And I
16 understand your point is one that people made here,
17 that we need some finality of ALG decisions. Is
18 there something else you like to add?

19 MR. SUBIN: Yes. I think that, just the
20 other area you should look at is the multiplicity of
21 disciplinary hearings. You have uninformed
22 department levels where they can appoint even a
23 non-lawyer or a non-police officer to hear the case.

24 You then go to the ALJ, repeat the whole
25 process. And then you go to the civil service

1 commission board. We don't even have an opportunity
2 to be heard. All we do is file briefs. And that
3 can reverse the decision.

4 And in response to what the Lieutenant
5 Governor had asked before, the standard on review by
6 the appellate division is -- and I've seen this time
7 and time again in the decisions. We write it a
8 little differently, but we have to defer to the
9 expertise of the agency, unless it's capricious,
10 arbitrarily, or unreasonable. That's a very high
11 standard to overcome. And for years of litigation,
12 it's simply unfair to make our public go through
13 that.

14 I beg you to allow the administrative law
15 judges to make the final decision and assure
16 fairness to the public. Thank you very much.

17 LT. GOV. GUADAGNO: Joe Kelly, Atlantic
18 City Chamber of Commerce. I thank everybody in the
19 room for their patience. And I really appreciate
20 that you are still here. I really do.

21 MR. KELLY: Out of respect for your time.

22 LT. GOV. GUADAGNO: It's not my time. I'm
23 worried about your time. I'm here.

24 MR. KELLY: Everyone's time. I do have
25 some comments that I'll provide. Our offer from the

1 chamber today is one of help. And I think listening
2 to the testimony, it was said early on that there is
3 a learning curve and this is the starting point.

4 We organized a group of about 40 or 50 of
5 our key business leaders. It's called the chairs
6 council. And I just want to offer of that group,
7 because I think one segment that needs to be heard
8 is the small businesses and from the business
9 community. I'm not an attorney, I'm not a planner,
10 but I know I have access to business folks that are
11 deeply impacted that have a lot of good ideas.

12 My degree is in human relations and
13 psychology. I feel, you know, I can use some grief
14 counseling all around. It's not that. I certainly
15 can tee up business folks. And I wanted to make
16 that offer and I wanted you to know who we were
17 today and pretty much leave it at that based on
18 time.

19 So please know that you have an offer from
20 the Greater Atlantic City Chamber to provide
21 business folks to talk about these issues, the
22 formal recommendations based on how it impacts them.
23 Thank you very much for your time.

24 LT. GOV. GUADAGNO: Thank you, Mr. Kelly.
25 And I apologize to the board if you think I'm being

1 too pushy. You guys aren't shy, I know you'll slow
2 me down if I'm cutting this off a little bit too
3 much. Assembly Burzichelli is here all night long.

4 Robert Brown, NJ Association Builders and
5 Contractors. Did we hear from the NJ Builders
6 Association already? I know I have testimony from
7 them. Craig Alper, ABCNJ. A patient man.

8 MR. ALPER: I don't know about that. Good
9 evening. My name is Craig Alper, I'm a roofing
10 contractor from Moorestown, New Jersey. And I'm the
11 Chairman of the Association Builders and Contractors
12 of New Jersey.

13 I have four, possibly three if I run out
14 of time, concrete suggestions cutting red tape and
15 cost of doing business in the State of New Jersey
16 and cost to the State of New Jersey.

17 The first one has to do with public works
18 contracts bid. At the present time for a contractor
19 to bid on public works in the State of New Jersey,
20 on a school district, for example, you have at
21 minimum eight different forms that have to be filled
22 out, licenses that have to be obtained. Business
23 registration certificate from the department of the
24 treasury; corporate business tax, department of the
25 treasury; sales tax certificate of authority,

1 department of the treasury; notice of
2 classification, department of the treasury; small
3 business certificate, department of the treasury;
4 certificate of employee information, department of
5 the treasury; public works contract registration,
6 department of labor; contractor prequalification,
7 SDA.

8 There is no reason. It's all the same
9 questions over and over. The forms could all be
10 summarized in one single form.

11 LT. GOV. GUADAGNO: Or carry the
12 information all the way through.

13 MR. ALPER: One form. The State of New
14 Jersey has gotten to the point where four pieces of
15 paper are all it takes, maybe five, depending on the
16 project, to bid a job for the State of New Jersey.
17 The local governmental jurisdictions do not -- I
18 just filled out a form yesterday for a county
19 school. Thirty odd pages in triplicate. There is
20 no reason for it, all these forms. Everything can
21 be done through the state on a website. There is no
22 reason for it, except I believe to keep attorneys --

23 LT. GOV. GUADAGNO: The attorneys
24 unemployment act.

25 MR. ALPER: That's the first one.

1 Second, the State of New Jersey and all the local
2 jurisdictions would save a tremendous amount of
3 money if the prevailing wage thresholds were raised,
4 especially for school districts. It's at \$2000.
5 It's been that way for over 30 years.

6 If we were to figure out what it was worth
7 at that time, \$2000 perhaps bought a nice house,
8 something to that effect. We should be raising the
9 prevailing wage thresholds, 100,000 at least. But
10 your school districts -- the municipalities at
11 least have 14,000. School districts are stuck at
12 \$2000. It's absurd. There is a lot of cost
13 savings there, and paperwork.

14 Third, can someone please explain to me
15 why the SDA exists? We lost billions and billions
16 of dollars. It's been, I believe, through its third
17 change in name, but it's still the same
18 organization. It does nothing, it serves no
19 purpose. All it does is obstruct progress and
20 construction of schools in New Jersey, that don't
21 get built.

22 And, finally, the SDA as of December 31
23 was supposed to have ended its mandate on PLA's.
24 However, SDA continues to insert project labor
25 agreements into their specifications. It was

1 supposed to have ended on 12/31. We asked the
2 governor to do something about that.

3 My fourth one, if there is still enough
4 time, is -- to carry on the unemployment claims that
5 the gentleman brought up before, he's correct. I
6 actually have two forms that we just received. It's
7 the same forms over and over on the same claim from
8 an individual from a different office at the
9 department of labor.

10 LT. GOV. GUADAGNO: The same agency?

11 MR. ALPER: No reason for it. It can all
12 be done online. That is all I have. Thank you very
13 much.

14 LT. GOV. GUADAGNO: Thank you very much.
15 Thank you for waiting, too. I appreciate it. Mike
16 Egerton, state chamber.

17 MR. EGENTON: Thank you, Lieutenant
18 Governor. My colleague, Dave Brogan, had to leave
19 for a JBI meeting. I know he was before you in
20 December. He also brought the environmental
21 transitional reports. So he'll get you further
22 comments.

23 As far as the DCA, commissioner, I spent
24 some time over with Marsha Carol, as far as COAH, so
25 I won't rehash that.

1 Real quick. I would say, I started back
2 at the state chamber back in 1993. Back in '92 I
3 worked up at NJIT. And then Senator Bob Littell
4 commissioned a report, NJIT on Environmental Rules
5 and Regulations. I certainly don't want to
6 re-invent the wheel.

7 I would highly suggest and encourage that
8 the committee look at the some of the great reports
9 there are out there, that hopefully are not
10 collecting dust, but every once in a while people go
11 back and look at them.

12 During the Tom Kean administration there
13 was the Star Report. I worked on the NJIT report.
14 There were a lot of great recommendations in there.

15 My colleague who hired me at the state
16 chamber, Bill Healey, back in the day, 1993, I
17 worked on the Star Report. A lot of great
18 recommendations in there as well.

19 Just as a plug for what Bill Healey did
20 and his colleague, Bill McGinnes, who is now at
21 NIHOP, we had then State Secretary Lonna Hooks, had
22 an office in the business ombudsman. Great idea.
23 Helped with the bureaucracy, helped move things
24 along. I would encourage revisiting that to see if
25 that can help in expediting permits and getting yes

1 answers and complementing the departments and the
2 work that they do.

3 Now, just on a positive note on DEP,
4 commissioner.

5 COMMISSIONER MARTIN: Took you four hours
6 to get there.

7 LT. GOV. GUADAGNO: Wait a minute. Your
8 time is up. (laughter).

9 MR. EGENTON: We commissioned a
10 bench-marking study several years ago to look at the
11 site mediation program. We consulted with a
12 Washington firm. We did the study cross. It was a
13 bench-marking study. Looked at other states,
14 Pennsylvania, Connecticut, and Massachusetts. Study
15 looked at the license site, professional program.
16 We had the license site, mediation program. Works
17 well.

18 I have to give kudos to your assistant
19 commissioner Irene Kroppe. She's got a great work
20 ethic, gets it, worked with all the stakeholders. I
21 would encourage, too, to continue that stakeholder
22 process in all the areas. We have it in the air
23 program. I would say if you can develop it in the
24 water program.

25 That dialogue back and forth with the

1 departments and talking about what are you working
2 on, what are we working on, what are you working on,
3 the legislature, so nobody is blindsided, I think is
4 encouraging.

5 We had a little bit of that at BPU. I
6 think a lot of the main departments should continue
7 that effort and have that dialogue. It's very, very
8 important.

9 So when you're looking at other states --
10 you mentioned Maryland, North Carolina, certainly
11 Pennsylvania. I commend you, Lieutenant Governor,
12 for looking at Ed Randell because he does pick up
13 the phone, he does call our CEO's, tries to get them
14 to come over to their state. We need for you and
15 the governor to play that role.

16 LT. GOV. GUADAGNO: And you know we are.

17 MR. EGENTON: I know you are. That's so
18 encouraging. And that should be the role of you and
19 the governor, because we think it's so critical and
20 so important.

21 We hear key words a lot of times from
22 members, transparency, predictability, and finality.
23 They want to know, give me a yes or no answer, they
24 want to know at the end I've did everything, I've
25 done my due diligence, get me that no-further action

1 letter, let me know that I've gone through the
2 process.

3 Couple of other items of note. As far as
4 the Administrative Procedures Act, we believe it
5 should be revised to simplify the rule-making
6 process, especially when you're looking at
7 re-adoption for minor amendments.

8 Senator Oroho, we certainly support the
9 bill that you and Senator Sweeney are jointly
10 sponsoring, Senate Bill 343, that looks at the
11 socio-economic impact and the impact to the
12 regulated community when it comes to the
13 Administrative Procedures Act. I know there is an
14 identical bill by Assemblywoman McHose, Assembly
15 Bill 156.

16 Certainly encourage the legislatures here
17 and your colleagues to bring that up and have a
18 hearing on that because I think that's surely
19 needed.

20 SENATOR OROHO: Thank you for that
21 comment.

22 MR. EGENTON: I'm done. I'll just say,
23 there are great reports out there. Highly
24 encourage. Whatever I can do to help. That's
25 always been my mantra, whatever I can do to help

1 you, Lieutenant Governor, the legislatures, in
2 bettering the state and keeping business here.

3 LT. GOV. GUADAGNO: Thank you very much.
4 Appreciate that. Gerard Thiers, ASAH.

5 MR. THIERS: Thank you. I'll be brief.
6 ASAH is formally known as the Association of Schools
7 and Agencies for the Handicap. We're a nonprofit
8 organization of 130 private special ed schools and
9 agencies in New Jersey.

10 Most of our members serve approximately
11 12,000 students. And most of them have severe
12 disabilities. Most of our members are small
13 businesses as defined in the New Jersey Regulatory
14 Flexibility Law. Some are sponsored by religious
15 orders, some are operated by former teachers, some
16 are -- you know, were founded -- never seen by
17 parents, some were started by entrepreneurs.

18 Because private special ed schools receive
19 students from school districts, they are approved
20 and monitored by the department of education. The
21 schools are highly regulated. And one constant
22 problem we have is the lack of regulatory
23 flexibility.

24 In many cases rules are prepared without
25 thought to respect for our schools. Then they are

1 applied when adopted, or retroactively applied. So
2 we constantly have this problem.

3 Also, another point, we have inconsistent
4 county standards. State -- county rules require
5 private special ed schools to reflect the full cost
6 of services, while the tuition rates charged by
7 public providers are all set by federal, state, and
8 county funds, state instruction grants. This
9 practice causes private school tuition to appear
10 greater than comparable public school programs.

11 I have attached -- I have here a copy of
12 our cost study, which uses department of education
13 data, to show that private schools are less costly
14 to New Jersey taxpayers in comparable public
15 programs. This is not to say anything against the
16 public schools. It's just that the standards should
17 be consistent so that you can compare apples with
18 apples.

19 The other two points I wanted to make is,
20 on a more global scale, we recommend that the
21 commissioner of education suspend efforts to meet
22 like arbitrary unnecessary and illegal placement
23 goals.

24 Special education placement decisions --
25 I'm sorry, I lost my place. Right now the

1 department of ed is urging districts to bring
2 students, many with significant disabilities, back
3 into general education school classrooms, against
4 the wishes in many cases of parents, and just as
5 often without adequate planning or appropriate
6 services in place. The result for students here can
7 be disastrous.

8 Again, we don't really disagree with
9 trying to move kids back into the district. It's
10 more a case of doing it the right way so that the
11 kids have the services. That's not really happening
12 in a lot of cases right now. There are hundreds of
13 angry parents that we have spoken to about this over
14 the past year.

15 Also, the department of ed -- I'll
16 conclude with this -- is urging districts -- is
17 urging districts -- well, finally, we recommend that
18 the Governor move to repeal Section 2.7 of the
19 Fiscal Accountability Rules, which Dave Hesse
20 mentioned earlier.

21 Our concern is mainly with Section 2.7,
22 which deals with the role of the executive county
23 superintendent. They are allowed to have a role in
24 special education placement decisions when local
25 school district IP teams place a student in and out

1 of a district program. This level of bureaucratic
2 oversight is contrary to federal law and is not
3 required by the court bill or SFRA, the State
4 Finance Review Act.

5 With more than 23,000 students in such
6 out-of-district settings, this unfunded mandate is a
7 resource consuming administrative log jam. So we
8 recommend that that be reviewed. Thank you very
9 much for your time.

10 LT. GOV. GUADAGNO: Thank you very much,
11 Mr. Thiers. Is there anyone else who I missed, who
12 expects to testify before the Red Tape Review Group
13 right now?

14 All right. Then what I want to do right
15 now is close very quickly. I want to thank I the
16 staff and the governor's office. And looking up at
17 the back of the room, Liz Mckay, John Hutchinson
18 from the Red Tape Review, Amanda DePalma, Theresa
19 Vaccaro from the governor's office, inner-governor
20 affairs unit, John Raue from my office, Kevin
21 Roberts, Paul Mattey. Thank you for setting this up
22 and making it happen. I appreciate it.

23 Panel, we will see each other again.
24 Anybody else like to make any closing remarks?

25 (5:50 p.m. hearing concludes.)

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C E R T I F I C A T I O N

I, Charles A. Iuliano, a Certified Court Reporter, Registered Professional Reporter, and Notary Public for the State of New Jersey, Identification Number 30492, do hereby certify the foregoing is a true and accurate transcript of the hearing by me, taken on the date and place hereinbefore set forth.

I FURTHER CERTIFY that I am neither attorney, nor counsel for, nor related to or employed by any of the parties in which this hearing was taken, and further that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in the outcome of this hearing.



Charles A. Iuliano

CHARLES A. IULIANO, C.C.R., R.P.R.
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DATED: MARCH 9, 2010
My Notary Commission expires September 2, 2011

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