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HEARING  
SENATE RULES COMMITTEE  
STATE OF CALIFORNIA



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SENATE RULES COMMITTEE

STATE OF CALIFORNIA

--oOo--

HEARING

STATE CAPITOL

ROOM 113

SACRAMENTO, CALIFORNIA

--oOo--

WEDNESDAY, JANUARY 7, 2009

1:32 P.M.

--oOo--

Reported By: INA C. LeBLANC  
Certified Shorthand Reporter  
CSR No. 6713







# THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO  
DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY  
5708 SOUTH CAMPUS DRIVE  
CHICAGO, ILLINOIS 60637

## MEMORANDUM

TO : [Name]

FROM : [Name]

SUBJECT: [Subject]

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1 PROCEEDINGS

2 CHAIRMAN STEINBERG: Members of the public, we  
3 do have a quorum, but we are going to wait a few minutes  
4 because our Republican colleagues are just leaving  
5 caucus, and we want to, of course, extend to them the  
6 courtesy to get here before we start.

7 (Pause.)

8 CHAIRMAN STEINBERG: Committee on Rules will  
9 come to order.

10 Clerk, please call the roll. Secretary, please  
11 call the roll. Excuse me.

12 MS. BROWN: Senator Cedillo.

13 SENATOR CEDILLO: Here

14 MS. BROWN: Cedillo here.

15 Dutton.

16 SENATOR DUTTON: Here.

17 MS. BROWN: Dutton here.

18 Oropeza.

19 SENATOR OROPEZA: Here.

20 MS. BROWN: Oropeza here.

21 Aanestad.

22 SENATOR AANESTAD:

23 MS. BROWN: Aanestad here.

24 Steinberg.

25 CHAIRMAN STEINBERG: Here.

1 MS. BROWN: Steinberg here.

2 CHAIRMAN STEINBERG: A quorum is present, and  
3 committee membership is present.

4 I'd like to welcome the members and staff, and  
5 members of the public, to the first Rules Committee  
6 hearing of the 2009-2010 session. And thank you to the  
7 staff for excellent materials in preparation, as always.

8 We want to begin today a little out of order  
9 without objection by any of the members and begin here  
10 with Karen Douglas up for confirmation for the  
11 California Energy Commission. This is one scene.

12 Ms. Douglas, welcome to you.

13 MS. DOUGLAS: Thank you very much.

14 Is this on?

15 SERGEANT-AT-ARMS BARNETT: Yes, it is.

16 MS. DOUGLAS: Thank you.

17 CHAIRMAN STEINBERG: I will waive my lengthy  
18 opening statement here.

19 Why don't you begin with an opening statement,  
20 if you would like.

21 MS. DOUGLAS: Absolutely. Thank you very much  
22 Senator, and good afternoon.

23 I had the opportunity to meet most of the  
24 senators on the committee prior to coming in here, and I  
25 was really pleased to have that opportunity.

1           My opening statement will be very brief. I --  
2   It's a tremendous -- It's been a tremendous honor and  
3   privilege and pleasure to serve on the California Energy  
4   Commission at this very important time in state energy  
5   policy.

6           As you may know, I come to the position with a  
7   strong background and interest in both energy and  
8   climate issues, and strongly believe that the California  
9   Energy Commission is going to be a very important  
10   organization in helping the state meet its climate goals  
11   in a way that preserves and maintains the level of  
12   service and reliability for all Californians.

13           We face both tremendous challenges right now  
14   and tremendous opportunities. We need to make strong  
15   and sustained progress towards reducing our greenhouse  
16   gas impacts and other pollution from the electricity and  
17   transportation sectors, and there are tremendous  
18   opportunities to do that in terms of improving  
19   efficiency standards, achieving zero-emission homes,  
20   overcoming barriers to meeting our renewable -- our RPS  
21   goals, both the current statutory goal of 20 percent and  
22   the 33 percent goal that the governor announced and that  
23   Senator Steinberg and others were present at and  
24   supported for 33 percent by 2020.

25           The CEC is going to be a very important player

1 in helping that to happen. We can look at developing  
2 the next generation of energy-efficiency programs,  
3 retrofitting existing buildings that somewhere we  
4 haven't had much progress so far, and looking at load  
5 management and so on.

6 In order to sustain this effort over the long  
7 term, which is really what's needed to meet our climate  
8 goals, we also have to make sure we deliver real  
9 benefits to Californians, including both economic and  
10 environmental benefits, and I think we're in a position  
11 to do that. If we succeed with our policies, we'll both  
12 improve environmental performance and also help bring  
13 jobs to California and help bring real economic benefits  
14 to California, so we're looking hard at how to do all of  
15 that.

16 In my first year, I was very involved in  
17 Executive Order S 1408, which looked at -- not only  
18 declared a 33 percent RPS goal, but also pushed Energy  
19 Commission and DFG to look at everything we could do in  
20 the siting arena to make sure we would remove at least  
21 one section of work barriers to getting to that goal.

22 I've been very involved in the implementation  
23 of AB 118, which is helping the State -- or hopefully  
24 will, as we get it off the ground, help the State  
25 achieve much more in terms of clean alternative-fuel



1 vehicles. And this is another area we're looking at  
2 work force and the economy as part of our statutory  
3 mandate, and then looking at how we review environmental  
4 impacts, particularly greenhouse-gas impacts and  
5 power-plant siting. Those are three important areas  
6 that I've been very active in.

7 I welcome the opportunity to be here today and  
8 welcome any questions you have. Thank you.

9 CHAIRMAN STEINBERG: Thank you very much,  
10 Ms. Douglas, for your service and for your willingness  
11 to continue.

12 I just have a couple areas that I would like to  
13 explore with you, and, of course, I'll open it up to the  
14 members.

15 What is your recommendation, having been  
16 involved in this area for quite some time, about how we  
17 deal with the alphabet soup of energy policy? You've  
18 got the California Energy Commission, you have ALRB, you  
19 have Cal EPA, you have US EPA, all responsible for  
20 various parts of fuel policy, energy policy. So how do  
21 we make the state government's approach to energy more  
22 coherent? What do we need to do legislatively and/or  
23 administratively to either better coordinate the work of  
24 these agencies or, frankly, reorganize some of these  
25 agencies to achieve that coherence? That's one area.

1 I'll just lay out the other, and you can answer both.

2           The other area may seem a little bit unorthodox  
3 for confirmation hearing for an energy commissioner, but  
4 I really want to know your views on California's  
5 high-school dropout problem. And I'm not kidding,  
6 actually. I want to know what your thoughts are around  
7 how we think about the economy that is going to grow  
8 around alternative energy and how we link education and  
9 work-force training and career pathways for young people  
10 to begin thinking about working in the alternative-  
11 energy field and what role the Energy Commission could  
12 play in elevating that issue. Those are my two small  
13 questions. Go ahead.

14           MS. DOUGLAS: Absolutely. Thank you very much.

15           In terms of the alphabet soup and the number of  
16 cooks in the kitchen sometimes on energy policy, I think  
17 there's no question that on most of the important policy  
18 areas in energy, more than one agency is involved in  
19 making important policy decisions and rule making. And  
20 I'll just give a few examples.

21           In -- The Energy Commission produces a  
22 strategic transmission investment plan and is one of the  
23 coordinators of RETI, which is a transmission  
24 stakeholder process. The ISO did its own study last  
25 summer to determine the number and location of needed

1 transmission lines to act as renewables. The PUC has  
2 siting authority over transmission, and this is not  
3 necessarily an impossible situation, but at the same  
4 time the fact that there is significant overlap between  
5 the ISO, the PUC, and the CEC on transmission planning  
6 and siting makes it more difficult sometimes to achieve  
7 a coherent planning policy direction.

8 Both the Energy Commission and the PUC are  
9 going to be engaged in this coming year in an in-depth  
10 look at renewable energy and how we achieve a 33 percent  
11 RPS. We are coordinating. We are participating in  
12 their process. They will send staff to our process,  
13 but, again, it can make it difficult to come out with a  
14 coherent and entirely consistent policy direction, even  
15 though I think the Energy Commission, the PUC and the  
16 ISO are working together quite well right now and are  
17 doing everything we can to improve coordination.

18 As you no doubt know, the governor's office has  
19 been looking at how to achieve more consolidation and  
20 realignment among energy agencies in order to get more  
21 efficiency, and also clear lines of accountability and  
22 policy direction and the ability to have more assurance  
23 that we're going to meet our goals. I don't really know  
24 what the specifics of that are, but I think -- I'm  
25 pleased to hear of your interest, and I think it will

1 certainly be a topic we will be looking at.

2 In terms of your second question, it actually  
3 is, as you no doubt suspected, a very relevant and  
4 important topic for the Energy Commission to be thinking  
5 about. We want to create a domestic renewables  
6 industry. We want to achieve goals that, you know, we  
7 really need people working in California to help us  
8 achieve. I'll give an example.

9 The Energy Commission is in the process of  
10 creating a home energy rating system for evaluating the  
11 energy efficiency and actually rating the energy  
12 efficiency of existing homes. We are in a position,  
13 once we have this in place, which should be in  
14 midsummer, to really launch an effort to get people's  
15 homes rated so that when you're a buyer, for example,  
16 you know how your house you're considering stacks up  
17 against other houses. If you're an owner, you have the  
18 opportunity to understand better what you might do to  
19 improve the energy performance of your house. It's got  
20 great potential for changing the way we think about  
21 retrofits in existing buildings. But to make it happen,  
22 we need people to do the rating; we need people to do  
23 retrofits; we need people to really go out and organize  
24 these types of programs.

25 So we really do need to think about how we



1 create the right work force for the green economy.  
2 We've been working on that probably more actively  
3 through looking at the 118 program, which is fuels and  
4 technology, although we also brought our renewables  
5 staff to those meetings. And we've met recently with  
6 the EDD, the Workforce Investment Board, and others to  
7 talk about how we might coordinate more and think  
8 together more about how to achieve a green energy  
9 economy. They're working on it. We're thinking about  
10 it. But each set of agencies has its own expertise, so  
11 it's been very helpful to talk to them.

12 I think one conclusion we reached from some of  
13 those conversations is that the State right now does not  
14 have a plan or an analysis for what actually is needed  
15 for the green energy economy, so we're talking to them  
16 about how to do some of the underlying analytical work  
17 in terms of what are the job opportunities, what are the  
18 technical skills and fields of education that would be  
19 most useful in order to train people for those  
20 opportunities. In some fields we have a pretty good  
21 idea, but overall we can benefit from learning more  
22 about it.

23 So I think it's a really important area, and  
24 it's something that we're beginning to pick up.

25 CHAIRMAN STEINBERG: All right. Thank you.

1 I'm going to have a specific ask of you at the end on  
2 that subject, but in the meantime let's ask other  
3 members to weigh in.

4 Senator Oropeza.

5 SENATOR OROPEZA: Thank you.

6 I enjoyed our conversation prior to the  
7 hearing, and I'm going to elaborate on some of the  
8 things we talked about and delve a little bit deeper.

9 Let me ask you about your view on something  
10 that is controversial but has been adopted under AB 32  
11 by the ARB, and that's cap-and-trade programs and how  
12 they will ensure that they meet the conditions  
13 specifically about not impacting poor communities as  
14 they do this trading, that it doesn't end up all falling  
15 on poor communities. So it's sort of an environmental-  
16 justice, from my point of view, issue.

17 What is the Commission's view on that, and what  
18 is your view, and how are you working to mitigate  
19 against that happening?

20 MS. DOUGLAS: The Energy Commission and the  
21 PUC actually did a joint proceeding on a climate plan or  
22 climate efforts for the electricity sector, so that  
23 included both looking at cap-and-trade design and also  
24 calling for 33 percent of renewable portfolio standard  
25 and all cost-effective energy efficiency.

1           I think that on cap-and-trade, it's very, very  
2 important to know and understand well the details of the  
3 policy that's being proposed. "Cap-and-trade" is an  
4 umbrella phrase that captures blinding different,  
5 sometimes, design criteria that can create very  
6 different on-the-ground results.

7           Our focus in the Energy Commission proceeding,  
8 which did suggest that if -- What we basically said is  
9 if ARB is able to meet the standards in AB 32, which has  
10 very strict requirements for not disproportionately  
11 impacting people in EJ areas, then we thought that  
12 cap-and-trade was an appropriate mechanism, but that it  
13 has to be designed very carefully.

14           And there are a number of considerations. I  
15 think the most interesting one and the most  
16 controversial one from our proceeding was what you do  
17 about the different starting points of different  
18 California utilities. We've got a number of utilities,  
19 particularly in Southern California, that have less or  
20 no access to hydropower or are in areas with very severe  
21 air-quality problems, and for those reasons and others  
22 ended up with a portfolio where they import much more  
23 coal power. And if you start a cap-and-trade system  
24 right away where, let's say, you auction 100 percent of  
25 allowances, everybody's got to buy allowances, what you



1 find is the distributional impact for the state are  
2 probably not sustainable, probably not fair, and  
3 probably not what you want to do.

4           On the other hand, one of the great values of  
5 the cap-and-trade system is that it does internalize  
6 decision making and -- environmental values and decision  
7 making, and so it helps people, when they think about  
8 the bottom line, think about what they're doing for the  
9 environment. So there are advantages to it, but how you  
10 do it really matters.

11           And we ended up recommending a system that's a  
12 bit complex. I think the mechanism and the dates matter  
13 less than the big-picture description, which is to say  
14 that it started out biased, if anything, towards the  
15 utilities that were more dependent upon coal, and partly  
16 that they needed to invest more and do more to reduce  
17 their carbon footprint than the others, but over time  
18 move to a system that increasingly awarded clean  
19 generation. And that time was, in a way, a transition  
20 pathway. So we made an effort to do that.

21           Now, the level of detail is just not there to  
22 say whether -- You know, right now what we're dealing  
23 with is a framework and possibilities of how things may  
24 go.

25           SENATOR OROPEZA: I think it's really, really

1 important that somehow there's a grappling with some  
2 accountability, you know, some way to create some  
3 accountability around how this all sort of lays out and  
4 who it falls upon. And so if there isn't that now, or  
5 it's kind of gray, or it's fuzzy, I would just urge that  
6 maybe you can light a fire under somebody about -- I  
7 know it's very complex, but it's very critical to the  
8 overall success, which is, you know, quality of life for  
9 every Californian, right?

10 MS. DOUGLAS: Absolutely.

11 SENATOR OROPEZA: Clean air for every  
12 Californian.

13 So my second issue also relates to -- well, it  
14 relates to air quality in my own district. And there  
15 are generation plants that are old, very old, like from  
16 the '20s or something, old, in Manhattan Beach and  
17 El Segundo in my district, and these, we are told, are  
18 going to be needed for a long time, that they eventually  
19 should be swapped out for cleaner, newer facilities,  
20 and, hopefully, those are renewable approaches to energy  
21 generation. But in the meantime, what is the  
22 commission -- what kind of actions or measures is the  
23 commission taking to assure that there's not -- there's  
24 minimal impact, environmental impact and health impact,  
25 on my constituents in those communities?

1 MS. DOUGLAS: This is another area where the  
2 alphabet soup of energy agencies is not necessarily  
3 helping us in achieving our goals. I think everybody,  
4 Energy Commission, PUC, ISO, wants to see these old  
5 facilities probably re-powered, if not retired.  
6 Re-powering facilities means we get more electricity  
7 from them, far less pollution. It's a real win-win.

8 There are issues in doing this. The Energy  
9 Commission has been calling for this for years and years  
10 and years, but we don't really have a legal mechanism to  
11 make anybody do it, make anybody retire/re-power. We  
12 don't have any way of doing that.

13 There are air permit requirements, but  
14 sometimes the way that that is working is that because  
15 these old facilities actually have their permits and are  
16 operating under their permits, they continue to do so,  
17 and it's hard for the new plants to get permits, and  
18 it's hard to facilitate any kind of transfer permits  
19 from the old plants to the new plants. So we sometimes  
20 find ourselves in a place where there are barriers for  
21 getting the re-powers, even though they would be better  
22 for the environment.

23 There are reliability concerns with shutting  
24 down these plants without anything to replace them.  
25 Those reliability concerns are very important. So, you

1 know, there could be mechanisms to require the  
2 retirement and re-power. For example --

3 SENATOR OROPEZA: What about retrofitting? I'm  
4 not an engineer, but what about the notion of making  
5 them cleaner, making them operate cleaner?

6 MS. DOUGLAS: I think making them cleaner would  
7 be nice, but it would be a bigger win to retire/re-power  
8 them.

9 SENATOR OROPEZA: I agree. I agree.

10 MS. DOUGLAS: It could be that there's an  
11 option of just allowing them to continue to run and  
12 making them cleaner. I don't think it's our  
13 preferred --

14 SENATOR OROPEZA: It depends on the timeline.  
15 Certainly, I prefer them to be shut down, but if they're  
16 shut down in 20 years, I would rather have them clean  
17 now, because the kids really can't -- their little lungs  
18 can't wait 20 years. So it's sort of that kind of  
19 question, and I don't know the answer as far as -- All I  
20 know is what I've heard, which is that we're going to  
21 need these plants for a long time to meet future  
22 demands. Is that your understanding as well?

23 MS. DOUGLAS: It depends on where we are. If  
24 we're talking about, for example, the South Coast Air  
25 Basin, we actually find ourselves, because of the



1 lawsuit over the South Coast Priority Reserve Program  
2 and its credits, the South Coast isn't currently able to  
3 issue permits or issue credits right now to permit any  
4 new -- any large, new source. So -- and currently, that  
5 would affect even a re-power.

6 SENATOR OROPEZA: Really?

7 MS. DOUGLAS: So right now we're talking to ARB  
8 and others about how we deal with their situation so  
9 that we can achieve what I think is going to be part of  
10 the solution, which is bringing new generation on line,  
11 either through re-power or in different locations that  
12 allow retirement of these old facilities in order to  
13 maintain reliability and also clean up the air.

14 That's not the only solution. We can look at  
15 more, say, small-scale renewable in the load center; we  
16 can look at ultra clean cogen. There are a number of  
17 options that could happen concurrently, but there are  
18 obstacles, particularly in the South Coast Air Basin,  
19 right now to getting these retirements or re-powered.

20 SENATOR OROPEZA: Doesn't sound very  
21 optimistic, but thank you, Mr. Chair.

22 MS. DOUGLAS: We're trying --

23 CHAIRMAN STEINBERG: Ma'am, one of the things  
24 we expect is once you are confirmed, that the  
25 dialogue/discussion will continue with the members on

1 these important issues.

2 MS. DOUGLAS: That dialogue will continue.

3 CHAIRMAN STEINBERG: Senator Dutton.

4 SENATOR DUTTON: Thank you. Just a little side  
5 note. Coming from Southern California -- actually,  
6 recent studies have indicated 30 percent of the air  
7 quality problem is coming through the jet stream over  
8 China, so the more we chase business to China, frankly,  
9 it's --

10 CHAIRMAN STEINBERG: What about the other  
11 70 percent?

12 SENATOR DUTTON: That's fine, but Californians  
13 shouldn't have to be continuing to clean up the air so  
14 that China could continue to have worse air quality.

15 SENATOR CEDILLO: As soon as we get a budget,  
16 we'll start building.

17 CHAIRMAN STEINBERG: We'll hold that debate for  
18 another --

19 SENATOR DUTTON: I would love to start  
20 building. So far, we've got a lot of roadblocks, which  
21 leads me to my question about the direction that we're  
22 heading with regards to energy, because, obviously, if  
23 we don't have a reliable and sustainable supply of  
24 energy, we're not going to be very competitive for good  
25 paying jobs and things today. Forget about what jobs

1 may be there 20 years from now, but I'm concerned about  
2 the jobs today.

3           Recently, you've been -- you actually were very  
4 supportive of going to the 33 percent by 2020 when it  
5 doesn't even look like we're going to be able to hit the  
6 20 percent by 2010, so -- well, they won't be able to.

7           So you keep making these benchmarks, but I  
8 don't see the road how you get there. I'm not a big fan  
9 of command-and-regulate, because not everybody is on the  
10 same page with us. What I'm seeing happen and what I  
11 fear is going to happen is, once again, you're going to  
12 see some of the jobs disappear from California, moving  
13 to other states that don't have quite the same demands.  
14 So I'm concerned about the common sense part about how  
15 we're going to get there.

16           CHAIRMAN STEINBERG: Briefly. Brief response.  
17 Thank you.

18           MS. DOUGLAS: I think it would not be a good  
19 idea to just increase our target from 20 percent to  
20 33 percent without looking really seriously at the  
21 obstacles that have made it hard for us to achieve our  
22 RPS goals so far and being fairly confident that we've  
23 addressed them and are on a path to addressing them.

24           So I recognize we've had trouble meeting  
25 targets, meeting the 2010 target, for example. Although

1 we're not terribly far away, we're not going to hit it.  
2 Meeting a 33 percent by 2020 target will be challenging.  
3 We really need to get our house in order at the State  
4 and the level of energy in order to make it possible.  
5 I think we can do it, but we need -- there are other  
6 policy issues we need to address.

7 CHAIRMAN STEINBERG: Next question, Senator  
8 Dutton.

9 SENATOR DUTTON: I don't have to ask any  
10 questions. I did have a few more questions along this  
11 line. I wanted to talk about alternative fuel, but you  
12 don't want me to --

13 CHAIRMAN STEINBERG: No. I want you to ask any  
14 and every question that you want. I also want to move  
15 the hearing along.

16 SENATOR DUTTON: Okay. Where was I? You  
17 already covered the alphabet soup of energy and so  
18 forth.

19 Alternative fuels is another area that you're  
20 involved in and so forth. I've always believed in all  
21 policies that the state -- that government should lead  
22 by example. And, of course, we've bought -- have spent  
23 our money buying alternative-fuel vehicles, and, yet,  
24 based on the numbers, State transportation fuel  
25 purchases during last year, the E85 ethanol made up less



1 than  
2 1 percent of our total percentage of gas usage. So it  
3 seems to me some of these rules and regs and things  
4 we're going to be imposing on the private sector, we're  
5 not even doing it ourselves.

6 Do you have any thoughts about what we need to  
7 do -- what we're going to have to do in order to change  
8 that?

9 MS. DOUGLAS: We're looking at that as part of  
10 the 118 program. It's a broader problem. Flexible-fuel  
11 vehicles are capable of operating on 85, and that's a  
12 great thing. Right now, the infrastructure for actually  
13 providing E85 is pretty limited. So in the state  
14 garage, for example, here in Sacramento, there is an  
15 E85 pump, but if you're taking a trip somewhere else and  
16 need to fill up the car, you probably won't find an E85  
17 pump.

18 This issue -- it's described by some as the  
19 chicken-and-egg problem. Do you build the fuel  
20 infrastructure without having vehicles? Do you go ahead  
21 and get the vehicles and then bit by bit build up the  
22 fuel infrastructure, or do you throw your hands up in  
23 the air?

24 I think in the case of the State buying  
25 flex-fuel vehicles, it was done with the understanding

1 and planning for an expansion of the infrastructure,  
2 which we're working on.

3 SENATOR DUTTON: Okay. So you might say we  
4 kind of put the cart before the horse?

5 MS. DOUGLAS: Well, whether you get the horse  
6 first or cart first, eventually it's the cart and horse.

7 SENATOR DUTTON: Okay. Thank you.

8 CHAIRMAN STEINBERG: Thank you, Senator Dutton.  
9 I thought we were talking about fuel, and we're talking  
10 about carts and horses.

11 Senators Aanestad or Cedillo, any questions?

12 SENATOR AANESTAD: Yes.

13 CHAIRMAN STEINBERG: Senator Aanestad.

14 SENATOR AANESTAD: Ms. Douglas, I appreciate  
15 the previous conversation we had in my office, and I  
16 wanted to follow up on part of our discussion regarding  
17 the different slots that we have, but first I'm going to  
18 warm you up a little bit with this question, and that  
19 is: In the newspaper this week, we've read that the  
20 Energy Commission is thinking about mandating the  
21 removal of large flat-screen TVs because of their huge  
22 power consumption. That's not something that has come  
23 to your level yet; however, when I hear that the LAO  
24 says that could cost us between 50 and 60 million  
25 dollars a year in state revenue, when I hear from the

1 electronics associations that it can cost tens of  
2 thousands of jobs, and it can cost in the hundreds of  
3 millions of dollars in sales by limiting -- by  
4 prohibiting, not just modifying, but prohibiting the  
5 sale of these flat-screens, I just want to know what  
6 kind of position you would take when that question gets  
7 to you.

8 MS. DOUGLAS: I have not seen the article that  
9 you're referring to, but I know about the issue. The  
10 plasma TVs that have become very popular are very  
11 intensive energy-users compared to older model TVs, and  
12 the Energy Commission does appliance standards. I know  
13 that we are looking at flat-screen TVs.

14 I also understand that there are technologies  
15 that enable these TVs to be built in more energy-  
16 efficient ways. So it's not that all flat-screen TVs  
17 are inevitably very high energy users. Some models are  
18 significantly better than others.

19 So in situations like this, I think it's  
20 actually helpful for the Energy Commission to step in  
21 and consider standards. We have cost effectiveness and  
22 other criteria that we have to meet in order to  
23 promulgate standards, and we also have a history of  
24 working very closely with manufacturers in trying to  
25 understand the technical difficulties, barriers, and

1 costs and timelines.

2 SENATOR AANESTAD: So you're saying you see  
3 that as a legitimate function of government. You don't  
4 believe the cost of energy should be between the  
5 consumer and the seller?

6 MS. DOUGLAS: I think in terms of appliances,  
7 for example, if we are able to, as we have with  
8 appliances -- with other types of appliances, if we are  
9 able to raise the bar so that the average consumer can  
10 walk in the store, pick an appliance up off the shelf  
11 and it will at least be reasonably good in its energy  
12 use, it won't be terrible --

13 SENATOR AANESTAD: You think government should  
14 say what's reasonable and not the consumer?

15 MS. DOUGLAS: I think when government can step  
16 in and help give consumers better products, that's  
17 better. Obviously, you started out the question by  
18 saying "mandate the removal of flat-screen TVs." I  
19 don't think that's what our staff is considering, but I  
20 haven't seen the article.

21 SENATOR AANESTAD: That is. That is, they will  
22 mandate the removal of certain sizes of flat-screen TVs  
23 if they cannot comply with the standards.

24 MS. DOUGLAS: I see.

25 SENATOR AANESTAD: Next question I have, and I



1 hear you talking about renewable energy and that the  
2 Commission is committed to the concept of 33 percent,  
3 et cetera. In my district, in rural California, biomass  
4 is probably the cheapest and simplest form of renewable  
5 energy that we can come up with today, and yet the sad  
6 fact of the matter is in early December I heard from one  
7 of our largest timber producers, lumber producers, that  
8 they're shutting down a plywood plant in Weed,  
9 California -- this is an Oregon-based company, one of  
10 the largest in the nation -- simply because they're  
11 facing lawsuits funded by, in part, the Environmental  
12 Defense people through the Shasta organization and also  
13 other environmental groups who have just routinely  
14 filed lawsuits to stop the biomass generator from being  
15 built.

16           Rather than fight this, they're going to close  
17 the plant. The largest employer in that county is going  
18 to move to Oregon. And yet, how do you square your  
19 role -- your past role as a director and, actually, a  
20 general counsel for the organizations that are now and  
21 have been, even when you were there, stopping the  
22 production of energy through biomass plants or  
23 energy siting facilities.

24           MS. DOUGLAS: I don't think while I was at  
25 Planning and Conservation League or Environmental

1 Defense Fund that we -- certainly not to my knowledge --  
2 had any involvement in trying to stop biomass facilities  
3 from going forward.

4 I think biomass has pros and cons. Renewable  
5 energy resource is base-load, and we really like that.  
6 It's an opportunity to productively use wood waste and  
7 other agricultural waste that might otherwise just be  
8 burned, until we ban that. But for a while, it was just  
9 being burned and creating a big air-quality problem.  
10 And it was a really good thing to generate electricity  
11 in circumstances where you control pollution from those  
12 facilities, and it still has tremendous potential.

13 In the renewables committee, one of the first  
14 actions that I helped the Commission take as presiding  
15 member of the renewables committee was to actually  
16 simplify the rules for our funding program for biomass  
17 facilities. The Energy Commission administers a program  
18 where we give biomass facilities some supplemental  
19 funding because the costs, particularly the cost of  
20 getting fuel, have been high and tend to be higher than  
21 what they have been able to negotiate in their contracts  
22 for electricity.

23 So we've been doing, at the Energy Commission,  
24 what we can to support biomass, although -- and we see  
25 some real benefits. We always reach an issue where you

1 have to look at the cost and look at the benefits of  
2 fuel, but we've made a decision to simplify the rules  
3 and to support these facilities so far.

4 SENATOR AANESTAD: And yet we're going to lose  
5 them to Oregon, whose Energy Commission in Oregon is  
6 actually offering a financial incentive for folks to  
7 create biomass plants and have the timber industry do  
8 their business there, which results in the loss of jobs  
9 exactly the opposite of what I would think the Energy  
10 Commission in California would want to happen.

11 MS. DOUGLAS: One of the issues that the  
12 biomass industry has faced is the closure of mills and  
13 the reduction of timber harvesting in California.  
14 That's definitely a fact. If you look at the map of  
15 where we had biomass facilities and where we have them  
16 now, the facilities that have closed down, many of them  
17 are in areas where we've stopped or cut back timber  
18 production. So there's no doubt a draw for biomass  
19 facilities to be in areas where there are mills.

20 SENATOR AANESTAD: Sure. It's not just where  
21 there's mills, it's where there's forests. In my  
22 district alone, over 150,000 acres last year burned all  
23 at the same time with huge air-quality implications. In  
24 Marysville, I couldn't even see the signal light across  
25 the street. Had we been able to take some of that

1 biomass out previously, not necessarily for timber  
2 production but just to thin and manage our forest, we  
3 wouldn't have that kind of expense and public hazard.  
4 And yet, what I see is the environmental organizations  
5 that you have been professionally a part of over the  
6 last decade doing anything you can to seemingly stop the  
7 kind of energy production we're talking of here.

8           Last question. Just following up on our  
9 conversation in my office regarding the different  
10 slots, there's five different slots that the legislature  
11 has determined. One of them is an attorney slot, which  
12 is the one that you're going for today. The other is an  
13 environmental slot which just recently, in fact,  
14 yesterday, became open. At that time I suggested to  
15 you, and I think you agreed, that you can fit into  
16 either one of those slots. The fact of the matter is  
17 that as an attorney, your entire professional career  
18 really has been either general counsel or a director for  
19 an environmental organization.

20           Don't you feel you would better serve the state  
21 and that we would probably do more what the legislative  
22 intent would be, is to put you in the environmental slot  
23 and try to find somebody who is not biased either  
24 towards the environmental or the -- let's say the  
25 production part of the equation, but an attorney who can



1 just be there for legal questions that come up, which I  
2 understand --

3 CHAIRMAN STEINBERG: If I may, Senator  
4 Aanestad, the witness can answer the question. I think  
5 one thing to point out is our jurisdiction is to review  
6 and confer or not confer a governor's appointment. He  
7 made the appointment to the attorney slot.

8 SENATOR AANESTAD: Yes, he did.

9 CHAIRMAN STEINBERG: So we don't have the  
10 choice to tell Ms. Douglas we'll confirm you in a  
11 different slot than where the governor appointed you.

12 Answer the question. He's asking for your  
13 opinion as to whether or not you wish the governor had  
14 appointed you to a different slot.

15 Is that the question?

16 MS. DOUGLAS: I think -- As I said in Senator  
17 Aanestad's office, I think there's no question in my  
18 mind I'm qualified for the attorney's slot and I'm  
19 qualified for the environmental slot.

20 It happened that when the governor appointed  
21 me, they were looking for an attorney and they appointed  
22 me. The attorney on the Commission works probably --  
23 certainly more closely with the general -- chief  
24 counsel's office and deals with legal issues when they  
25 rise to the Commission level, but we also have a very

1 strong internal counsel's office. So I think I am  
2 working well with the chief counsel and the attorneys  
3 and fulfilling that role.

4 Certainly, if the slot that had been open when  
5 I was appointed was the environmental slot, I would have  
6 applied for it, and I think I would have been certainly  
7 equally qualified for that.

8 SENATOR AANESTAD: And I probably would have  
9 voted for you. Thank you.

10 MS. DOUGLAS: Thank you.

11 CHAIRMAN STEINBERG: All right. Senator  
12 Cedillo, do you have any questions?

13 SENATOR CEDILLO: No, I think I'm fine.

14 I just have to say in Southern California,  
15 there is a concern about the limitations of the  
16 cap-and-trade program, adverse consequences for our  
17 utilities down there. What can you say to us in  
18 Southern California?

19 MS. DOUGLAS: I understand the concern very  
20 well, Senator Cedillo. Early on in the process of doing  
21 our joint procedure with the PUC, I went to L.A.  
22 specifically in order to meet with David Hine and met  
23 with the general managers of Burbank and Anaheim and  
24 have made significant efforts to communicate and reach  
25 out and understand the perspective of some of the

1 Southern California utilities that have the most  
2 at stake. And I do understand the perspective. From  
3 their point of view, SB 1368 has already required that  
4 the long-term coal contract cannot be renewed. It's a  
5 challenge to backfill from those contracts and find  
6 cleaner -- whether it's renewable or natural gas or  
7 other sources to replace those.

8 I think there is a strong commitment among --  
9 certainly many of the municipal utilities to move  
10 forward with renewables, so I think it's really a matter  
11 of -- The fundamental question is: How far, how fast?  
12 How quickly do they reduce their emissions? What's a  
13 reasonable trajectory? What are the practical steps to  
14 take in order to reduce emissions? And a cap-and-trade  
15 system can be designed that accommodates that and that  
16 gives them the time that they need to do that, but also  
17 that holds them accountable for actually meeting those  
18 goals. So I don't think -- I do think it's possible to  
19 design a system that meets the legitimate needs of some  
20 of the utilities that are more coal-dependent.

21 And the debate we're having on this or not  
22 having on this in California is really a microcosm of  
23 the things that can happen nationally if we start  
24 talking about national cap-and-trade bill. The issues  
25 are very similar.

1           So my perspective is it's not about one side  
2 prevailing over the other. It's about how do you get a  
3 reasonable accommodation of needs and interests that  
4 achieves our environmental goals and does so in a way  
5 that works for different resource mixes, because in the  
6 country we have very different resource mixes.

7           CHAIRMAN STEINBERG: Very good. Thank you.

8           Let me -- I understand it's protocol on the  
9 Committee that before we call the witnesses, or at least  
10 before we're done, I want to offer you the opportunity  
11 to introduce any special guests or members of your  
12 family, or just anybody in the audience.

13          MS. DOUGLAS: My family attempted to get here,  
14 but they were unable to do it, so they're going to be  
15 watching a recording.

16          CHAIRMAN STEINBERG: Very good.

17          MS. DOUGLAS: But thank you for that  
18 opportunity.

19          CHAIRMAN STEINBERG: Of course.

20          Can we please hear from the witnesses in  
21 support of the nominee, please. I guess one at a time.  
22 You can pull up a third chair.

23          MS. ROME: Good afternoon. I'm Victoria Rome  
24 with the Natural Resources Defense Council, NRDC, and  
25 also today on behalf of CLCV, the California League of



1 Conservation Voters, and we urge you to confirm Karen  
2 Douglas for the Energy Commission. She has a record of  
3 commitment to public service through her work at the CEC  
4 so far, and she did a brief stint at NRDC and also, as  
5 you know, at Planning and Conservation League and  
6 Environmental Defense Fund.

7 She also has a good track record of building  
8 effective partnerships with diverse stakeholders, and we  
9 think that's an important role for the Energy Commission  
10 at this crucial time, so we believe we need her  
11 leadership there now more than ever. The world is  
12 watching California to see what we do and has already  
13 learned a lot from our strong efficiency policies and  
14 global climate policy. Thank you.

15 CHAIRMAN STEINBERG: Thank you, Ms. Rome.

16 Next witness.

17 MS. BIGELOW: Good afternoon. I'm Melve  
18 Bigelow here on behalf of the Nature Conservancy, and we  
19 also strongly urge you to confirm Karen Douglas for the  
20 CEC. Her integrity, her intelligence, her experience,  
21 are what California needs in this role right now. Thank  
22 you.

23 CHAIRMAN STEINBERG: Ms. Douglas would like you  
24 to repeat those words. Never mind. Thank you.

25 Go ahead.

1 MS. VENTURINI: Rina Venturini on behalf of  
2 Calpine Corporation, and we would also like to encourage  
3 your support of Ms. Douglas.

4 Additionally, Calpine is also very interested  
5 in the work-force-training issue and would like to work  
6 with the CEC on that as well.

7 CHAIRMAN STEINBERG: Thank you very much.

8 Any other witnesses in support? Are there  
9 witnesses in opposition to the nominee? If not, is  
10 there a motion on the bill? Yes. Moved by  
11 Senator Cedillo.

12 Let me make a couple of comments before we cast  
13 a vote. I haven't commended the governor much in the  
14 last 24 hours, so let me take the opportunity to commend  
15 the governor for appointing you to this commission. You  
16 are clearly qualified, you are clearly committed, and  
17 you meet the statutory criteria for the attorney slot  
18 for the commission.

19 One thing I want to ask of you, and then I'll  
20 make a general comment, because this will be the first  
21 of many Energy Commission appointees that we have before  
22 the Rules Committee.

23 My personal request to you is that you go to  
24 school, so to speak, on the dropout rate -- you'll hear  
25 me say this often in this committee -- and not only on

1 the dropout rate, but on the multiple pathway approach  
2 to high-school education and its relationship to  
3 alternative energy. I mean to really go to school and  
4 become an expert and become compassionate about the need  
5 to make those connections as early as ages 14, 15 for  
6 young people who otherwise might be a statistic. That's  
7 my request.

8 In general, as it applies to future appointees,  
9 this committee is going to look very carefully at, of  
10 course, the relationship and mutual respect from the  
11 executive branch and the legislative branch when it  
12 comes to not usurping our statutory authority to make  
13 law.

14 We had some controversy last year with the CPUC  
15 that was pretty well documented, and we want to make  
16 sure that you view us as your partner and not an entity  
17 to try to one-up.

18 We also expect, and this is a frequent  
19 complaint from the legislature, that when we ask for a  
20 report, that we receive the report timely. We can only  
21 make key decisions here if we have the information that  
22 sometimes only you possess. Last year or so, we've been  
23 frustrated by the lack of reporting, despite our  
24 requests, on renewable-energy transmission, energy  
25 de-reg., and the climate-change-training programs, and



1 we'd ask you,  
2 Ms. Douglas, to be not only cognizant but very proactive  
3 about getting the information that we need.

4 MS. DOUGLAS: Thank you. I will certainly do  
5 that.

6 CHAIRMAN STEINBERG: Thank you very, very much.  
7 Is there a motion to approve the nominee? I'm  
8 sorry, Senator Cedillo. I apologize.

9 Let's call the roll.

10 MS. BROWN: Senator Cedillo.

11 SENATOR CEDILLO: Aye.

12 MS. BROWN: Cedillo aye.

13 Dutton.

14 Oropeza.

15 SENATOR OROPEZA: Aye.

16 MS. BROWN: Oropeza aye.

17 Aanestad.

18 SENATOR AANESTAD: No.

19 MS. BROWN: Aanestad no.

20 Steinberg.

21 CHAIRMAN STEINBERG: Aye.

22 MS. BROWN: Steinberg aye.

23 CHAIRMAN STEINBERG: Congratulations. Your  
24 nomination will now move to the floor of the California  
25 State Senate. We appreciate all your time in preparing

1 for the hearing and wish you the very best.

2 MS. DOUGLAS: Thank you, and I appreciate all  
3 of your time as well. Look forward to working with all  
4 of you.

5 CHAIRMAN STEINBERG: You too. Thank you very  
6 much.

7 All right. Next we are going to go to the  
8 governor's appointees for the State Board of Education.

9 I think we're going to ask you to come up  
10 together, if you would. James Aschwanden and  
11 Yvonne Chan nominated to the State Board of Education.

12 MS. CHAN: Thank you.

13 CHAIRMAN STEINBERG: Welcome.

14 Let me -- On the last nominee, I did not make  
15 sort of an opening statement, but I would like to when  
16 it comes to these issues.

17 First of all, I want to welcome you and thank  
18 you for your public service and your willingness to  
19 consider -- your willingness to continue your public  
20 service.

21 Sort of consistent with the last nominee and  
22 some of the comments you just heard me say, I really  
23 want in this hearing to learn more about what the board  
24 is doing not only around the high rate of dropouts in  
25 California, but your views on multiple pathways, career

1 technical education, algebra and how we make sure that  
2 developmentally disabled students succeed. That's the  
3 focus here, at least my focus. Of course, members may  
4 have their own unique focus, and feel free to jump in at  
5 any time. Why don't we begin -- I'm sorry.

6 SENATOR OROPEZA: You take the lead on this  
7 one.

8 CHAIRMAN STEINBERG: Yeah. Well, I know  
9 everybody's passionate about these issues, so why don't  
10 we begin with Ms. Chan.

11 MS. CHAN: Okay. First of all, happy new year.

12 CHAIRMAN STEINBERG: Happy new year to you.

13 MS. CHAN: And thank you for giving me this  
14 opportunity.

15 Most importantly for me is I'm bringing my  
16 field experience into the issue of dropout, into the  
17 issue of raising high standard, into the issue of  
18 instruction, including algebra, et cetera, to the  
19 student of California.

20 So I am a school principal in Pacoima, Alex  
21 Padilla's area, and have been there many, many years, so  
22 I face this particular issue, Senator Steinberg.

23 So first and foremost, I want to thank the  
24 legislature passing all the bills that gave us the tool.  
25 219, very important. Although we have a year to roll it

1 out, but we must start today, and therefore being able  
2 to bring on board strategies to -- not only accounting  
3 to the eighth grader, the ninth grader, five years, six  
4 years, that's an accounting thing. That's fine. But at  
5 the field, I want to make sure there are tools to make  
6 sure that this not even happen to be counted, okay?

7 So, therefore, step one, no question to look at  
8 the score. I'm a principal of preschool through 14 at  
9 four campuses. I take them from three year old at start  
10 all the way to admission to college. So middle school,  
11 I know by sixth grade, seventh grade, I've got to do  
12 something. I already know who are the ones. It's  
13 designated. And that cannot happen.

14 So, therefore, very importantly that we build a  
15 relationship with the parents and the family, and make  
16 sure that the community embrace this child. And also,  
17 intervention and prevention early on, making sure that  
18 the curriculum, the instruction, is very relevant,  
19 assign mentors, and make sure the kids go into advisory  
20 on a daily basis. So middle school starts very  
21 important.

22 Then as we move the students -- understand I  
23 have a high school too. I know Johnie since three years  
24 old. He just may not be the one that's going to go to  
25 U.C., okay? So career tech and multiple path, that is



1 very important. And we cannot wait until they fail in  
2 tenth grade, especially children with disability and  
3 English learners. So, again, map it back where career  
4 tech. Sounds pretty much like kindergarten, okay?

5 So as they go through the grade, kind of take  
6 the student's interests. Make sure the family support.  
7 Make sure that the school embrace this child as a whole  
8 child. Take them through the career tech.

9 In my area, we have construction. I know you  
10 ask a question about green. Some of us, with the help  
11 of joint ventures, are doing recyclable energy at the  
12 tenth grade level. We support. And another class is --  
13 oh, green build. Wonderful. I mean, all the  
14 tradespeople. This Pacoima. My parents are day  
15 laborers. They know this stuff. My kids know this  
16 stuff. They help the parents stacking bricks since they  
17 are six years old. So, really, having to rebuild course  
18 for ninth grader, which is a math class. It's a math  
19 class. Make sure you have the standard. They can read  
20 the manuals.

21 And for those that are interested in the arts,  
22 then we create green media, theater arts and all the  
23 media arts, to give the message in all kinds of  
24 languages.

25 So these are the ways -- and I know the algebra



1 is going to come up, and let me answer that first,  
2 unless, Jim, you want to do that, you want to answer  
3 that. Okay.

4 I hold high standards. And I have to say  
5 California has been very good to me, because I came to  
6 this country age 17 the clothes on my back. Not much  
7 English, but I learned to speak Spanish first, the  
8 language in Fresno, so I got to make sure that the  
9 students reach those standards and achieve wellness.

10 Having said that, my actions speaks more than  
11 my words. At my school, Pacoima, 100 percent  
12 free/reduced lunch, 78 percent English learner,  
13 95 percent walk in kindergarten not a word of English,  
14 okay. And all Hispanic/African-American kids.

15 What I've done in the three years is every  
16 single eighth grader's in algebra. Oh my God! Now  
17 every one of them in there. Took me three years. I  
18 went from 8 percent proficient to 32 percent proficient  
19 now. But it took a lot of time, a lot of effort, a lot  
20 of coordination, a lot of resources to get there.

21 And I know also I keep telling my kids that,  
22 you know, algebra is not in the DNA of Asians. I did  
23 pretty well. Most people said the Asians did well in  
24 math; but no, you know, my kids can learn it. My  
25 students in Pacoima can learn it.

1           So now, as I'm looking at -- I hold high  
2 standards, and I believe my kids can learn over time.  
3 Three years is not going to do it. Six years, maybe ten  
4 years. So what I need to do is looking at the time and  
5 looking at, yeah, resources. We don't have no money  
6 now, so it's hard to take about any green bags, okay?  
7 But resources in terms of human capital.

8           Now I'm a charter school principal, and we have  
9 learned very strategically how to deploy, and I'm so  
10 glad we have flexibility, hopefully, from all of you,  
11 wherever, if charter schools have some of it. Is human  
12 capital-wise, what took me this last three years  
13 invested, yes, with every kid in algebra, is that we map  
14 back the standards back to third grade again, and making  
15 sure the elementary teachers work with my middle school  
16 teachers. They trade the job a day or two while manage  
17 and hold the class down as the principal substitute for  
18 the day, okay?

19           So these are the things that can be done  
20 looking at assessment. Oh my God! My fourth grade  
21 teachers. What do you mean? The kids don't have to  
22 take -- attempt any of the items and still be  
23 proficient. How could that be? We've got to shake that  
24 up, straighten that out.

25           And then, of course, the professional

1 development, the other ideas that we can do in human  
2 capital, recruiting the right people, placing the right  
3 teachers, as well work with the families to kind of put  
4 that standard up.

5 CHAIRMAN STEINBERG: Thank you very much,  
6 Dr. Chan. I appreciate your passion. Love it. See why  
7 you're an educator.

8 Okay. Mr. Aschwanden, welcome.

9 MR. ASCHWANDEN: Thank you.

10 Before I start, I have to give you some of  
11 my background so that you'll understand the context of  
12 my responses to these questions.

13 I'm a product of a high school -- a time when  
14 college-prep kids could take career-tech education, and  
15 I consider myself very fortunate for that experience.  
16 I'm a product of career-tech education. I have been a  
17 high-school-classroom teacher for 17 years. I've served  
18 as executive director of California Ag. Teachers  
19 Association for the past 16.

20 The dropout issue is particularly important to  
21 me, because I think there's a lot of misunderstanding  
22 and a lot of misassumptions about the dropout rate. We  
23 know that looking at dropout rates doesn't tell the  
24 whole story. Harvard and other UCLA studies have told  
25 us the vast majority of dropouts are B-minus students.

1 They're not failing. They're walking. They find no  
2 relevance. They're not hooked. They're not engaged.  
3 And so this idea that dropout means failure, these kids  
4 aren't necessarily failing.

5 I think there's been some great steps. 219  
6 actually kind of gets us into looking at how we track  
7 dropouts.

8 CHAIRMAN STEINBERG: Can you explain 219. I  
9 know it, because I authored it, but just --

10 MR. ASCHWANDEN: The bill -- SB 219 I think is  
11 a huge step forward, because it really does a number of  
12 things. First of all, it tracks student data, including  
13 test scores and dropouts, wherever kids go once they're  
14 put into alternative education. That kind of  
15 accountability tracks back, which is really, really  
16 good.

17 CHAIRMAN STEINBERG: To the school of origin.  
18 The school of origin is responsible for the test score  
19 of the kid that gets moved on to alternative education.

20 MR. ASCHWANDEN: It also, for the first time,  
21 takes a look at students who drop out in eight and ninth  
22 grade.

23 CHAIRMAN STEINBERG: In the API.

24 MR. ASCHWANDEN: In the API.

25 CHAIRMAN STEINBERG: I'm just helping you.



1 MS. CHAN: Thank you.

2 MR. ASCHWANDEN: That statistic is easier to  
3 track than the kids that drop out in the eleventh and  
4 twelfth, because as far as SB 219 goes, there's still  
5 some uncharted territory, because a student who drops  
6 out in the eighth or ninth grade is pretty easy to  
7 identify.

8 If they move from a comprehensive high school  
9 into most forms of alternative education, the data will  
10 follow them, which is the design of 219. But there's  
11 still limbo land, because if you drop out or if you move,  
12 from a comprehensive high school to adult education, you  
13 step off the cliff and you become an unknown. And so we  
14 still don't -- We have a dropout rate that very  
15 interestingly went from 24 to 21-1/2 percent in a matter  
16 of a month with the same population of kids, and we  
17 still have a disappearance rate or a gap between those  
18 who entered school and those who graduated of about  
19 33 percent.

20 So as we move forward, as positive as SB 219  
21 was, I think we still have some challenges to play it  
22 straight on what is happening to our kids and what we  
23 can do to reengage them if we know they're walking  
24 because they're not engaged, because school is not  
25 relevant. I think we have a duty to follow up on that



1 and to follow up on all the numbers, not just the ones  
2 that are easiest to track.

3 In terms of career-tech education, I can tell  
4 you I was a passionate supporter of career tech all my  
5 life. It gets pretty easy to offer that up as a  
6 panacea. It is not. The challenge is to engage  
7 students in an education process that engages them and  
8 hooks them.

9 I want to use the green energy example, because  
10 I think it really more mirrors what my experience has  
11 been in career tech.

12 In the ag industry -- In an ag education, we're  
13 not trying to train the next generation of field hands  
14 or production workers. The ag industry and ag education  
15 for the past 30 years has recognized that we need to  
16 attract every kind of student to meet different  
17 employment opportunities across the band. And as we  
18 start talking about the green-energy industry, we ought  
19 not to be talking about the potential dropouts. We  
20 ought to also be talking about the kid who is brilliant  
21 and bright, and who is a 4.0 superachiever who is hooked  
22 at an early age and has access to those programs like  
23 construction technology, that he may not have the same  
24 interests, employment goals, down the line. But we  
25 don't have a way anymore, I believe, of offering

1 adequate access to all kids who wish to engage in career  
2 tech experiences like I did. In my generation, you  
3 could do both. You could be that college-prep kid that  
4 still had time in their curricular mode to access career  
5 tech.

6 The challenge for all of us is: Let's look  
7 beyond the student population going into career tech  
8 that is just the technician-level kid. But these  
9 industries, these jobs, and these careers are going to  
10 need to engage every kind of student, and that's where I  
11 think a career-tech discussion gets very interesting.

12 I'm just going to keep rolling on that  
13 unless --

14 CHAIRMAN STEINBERG: No. That's good. Why  
15 don't we -- you guys -- People who are passionate can  
16 talk forever, but let's get to the questions here. I  
17 want to begin -- I really want to cover three areas.

18 Colleagues, you can follow up or go into your  
19 own areas.

20 I want to talk about algebra; I want to talk  
21 about 219 and its implementation; and I want to talk  
22 about special education in the developmentally disabled.  
23 Okay.

24 I want to begin with algebra, where I know that  
25 two respected board members came down differently on the

1 controversial eighth-grade-algebra requirement that the  
2 State Board of Education passed last year.

3 I suppose my question really is directed to  
4 Dr. Chan, although, Mr. Aschwanden, you can weigh in if  
5 you like as well.

6 I want to ask it this way: What is your view  
7 on the State imposing unfunded mandates? Do you have a  
8 general view of the State imposing unfunded mandates?

9 MS. CHAN: As a school person who has to do  
10 these mandates, of course I scratch my head and say, How  
11 am I going to ever do that? Meanwhile, on my human  
12 side, when I see my kids who has the readiness to learn  
13 algebra and I cannot put them in a class, then I say,  
14 Well, I have to convince the teacher teach that kid, or  
15 I will teach him myself.

16 So, therefore, when you're looking at all kinds  
17 of mandate coming from the State, whether -- for me,  
18 it's head lice. You know, exclude the kid with head  
19 lice. I have plenty of those. I said, Oh my gosh! How  
20 am I going to do that? But in my heart, I will go to  
21 home and clean those head lice.

22 So that is my point of view, is -- Like I said,  
23 I already said it. I believe in high standards, and I  
24 believe eventually all kids will be able to learn the  
25 algebra standard. So many of my kids, I promise, they

1 may not understand why they want to learn, and that's my  
2 fault, because A plus Y and A plus C squared and all  
3 that is, again, for us very early on to let the kids  
4 know you deal with variables. Life is about dealing  
5 with variables.

6 CHAIRMAN STEINBERG: I understand. Let me, if  
7 I may, follow up, because I think what you really  
8 just -- what you really expressed here again is your  
9 passion as a school superintendent, as a principal, as  
10 someone who has demonstrated that you can always  
11 overcome the odds, and every kid can. And I get that.  
12 But we're now talking about your policy making role as a  
13 member of the State Board of Education.

14 Do you believe there's a relationship  
15 between --

16 MS. CHAN: Resources.

17 CHAIRMAN STEINBERG: You're darn right.

18 -- between resources and the policy decisions  
19 you make? Because the criticism, of course, of that  
20 decision is that it may be fine to set that high  
21 standard, but in this fiscal climate, and even outside  
22 this fiscal climate, where is the willingness or push  
23 from the State Board or anyone else to actually fund the  
24 necessary teachers, to train the necessary teachers, to  
25 ensure every child can actually take advantage of that.



1 That disconnect troubles me, I know, as one member of  
2 the Rules Committee.

3 So I guess I'll ask it in a more pointed way.

4 MS. CHAN: Sure.

5 CHAIRMAN STEINBERG: How do you reconcile  
6 voting for that measure, well intended as it may be,  
7 when there's no money to implement it?

8 MS. CHAN: Okay. As I reflect on the  
9 reality -- but I wanted to keep pushing the young fellow  
10 over time. I am puzzled with a three-year or four-year  
11 timeline. However, I personally feel six, ten years  
12 rolled out, starting back in third grade right now --  
13 hopefully third grade doesn't cost me anything right  
14 now -- and move and hope the economy gets better.

15 Right now, basically I can just say sitting on  
16 my hands -- I started that three-year goal with my own  
17 kids. So to back map it is to say, Look, I need the  
18 time. So my policy is still say, Look, time and human  
19 resources, and then fiscal resources.

20 CHAIRMAN STEINBERG: Mr. Aschwanden, why did  
21 you vote against it?

22 MR. ASCHWANDEN: I voted against it because I  
23 didn't believe it was the best interest of students in  
24 California to redefine failure and welcome more students  
25 to experience it.



1           I want kids to be successful when they take  
2 algebra, whenever that is. If they take it in seventh  
3 grade, eighth grade, ninth grade, tenth grade, doesn't  
4 matter much to me. What does matter a lot is that  
5 they're successful at it when they take it, because  
6 algebra really is that gateway math course that sets the  
7 tone for what follows. And you get back to the dropout  
8 rate. The number one indicator for dropping out of high  
9 school is failing Algebra 1.

10           This discussion shouldn't be about algebra in  
11 eighth grade. It ought to be about what they're doing  
12 in fourth, fifth, and sixth. If the end goal is to  
13 really get kids ready for algebra at an earlier age in  
14 California, then that's what the discussion should have  
15 been.

16           This kind of strategy for putting an atomic  
17 bomb in place and daring you to run through the building  
18 before it goes off has got to stop in education. I  
19 think we need to quit beating up on kids and find ways  
20 to move them along earlier and better if we can.

21           I have a niece who took algebra in seventh  
22 grade, geometry, and she's going to take a placement  
23 exam at CSU and get tested on principles that she had in  
24 eighth grade. I don't know if that's any better than  
25 the tenth grade algebra class that my brother took,

1 because that's when he was ready for it, who is now a  
2 very successful businessman and has a master's in ag  
3 economics from Fresno State University.

4           There isn't one universal path to enlightenment  
5 that every kid steps on at the same time, and that's why  
6 I voted "No," Senator.

7           CHAIRMAN STEINBERG: I'm going to allow my  
8 colleagues to pick up on this. You'll get a chance.  
9 Let me move to the other two areas, and then we'll take  
10 it around the circle and members can pick up on any of  
11 these topics.

12           Back to 219. The law says now that the State  
13 Board of Education is empowered with the authority to  
14 determine what percentage of the API, beginning in 2011,  
15 should a four-year-graduation rate constitute as part of  
16 the API, and for eighth and ninth graders, what  
17 percentage of the API should be the eighth- and ninth-  
18 grade dropout rates.

19           It would be easy, and, frankly, it is my fear  
20 that the board will take the position that testing is so  
21 important that therefore this issue of who is staying in  
22 school and actually moving forward will be a 1 percenter  
23 or a 2 percenter as opposed to a more significant  
24 percentage.

25           Can you give me some assurances here that this

1 isn't going to be treated in sort of a diminimus way so  
2 that the law, once it's actually implemented in 2011,  
3 won't mean anything.

4 MS. CHAN: The law stated that 60 percent  
5 will be in test scores, and I have taken quite a bit of  
6 initiative to bring to the board and discuss with my  
7 fellow board member, who are all here, who are all  
8 here -- please stand. They're there. They're all  
9 here so -- about the API issue. So putting currently  
10 100 percent in test score is almost, hate to say, like  
11 the old Roman empire, "Do or die," you know, "Up or  
12 down," on a one-time test score.

13 CHAIRMAN STEINBERG: Where does graduation  
14 rank, in your view?

15 MS. CHAN: In my view, at least at 5 percent or  
16 more, because 40 percent you have attendance in there,  
17 which you're still working on. There's a very important  
18 issue from the Committee of English Learners about the  
19 test scores, because right now they get no credit on  
20 moving the kids into, you know, English proficiency.

21 Definitely, the whole notion in special  
22 education -- I believe that is going to be a big  
23 conversation -- it should not take years, within this  
24 short window, on exactly the 40 percent -- what I'm  
25 saying is we have 40 percent to play with.

1           CHAIRMAN STEINBERG: I'm not sure 5 percent is  
2 enough, but I appreciate your --

3           MS. CHAN: What would you like?

4           CHAIRMAN STEINBERG: I don't know exactly. I  
5 just want to make sure that what counts matters, and I  
6 want to make sure it counts.

7           MS. CHAN: I think we want to make sure the  
8 validity and reliability is there. You can try for  
9 more. And who said you cannot increase that?

10          CHAIRMAN STEINBERG: Mr. Aschwanden, same  
11 question.

12          MR. ASCHWANDEN: Senator, we actually had a  
13 pretty robust discussion this morning and an overview of  
14 this whole evolution of what the API has been in the  
15 past, what it is now, and what it's going to be in the  
16 future. And I feel a lot better after hearing the  
17 discussion today, because I think there's a genuine  
18 interest among the vast majority of the board to really  
19 design something that's better than what we've had,  
20 including --

21                 We have a lot of really good questions about  
22 access issues, and measuring what kind of programs  
23 schools offer, and looking at that. And so I think  
24 there's genuine interest among the board in terms of --  
25 You know, what a percentage might look like, I can't



1 answer that right now; but I can tell you that there is  
2 legitimate interest.

3 CHAIRMAN STEINBERG: Okay. Last area. The  
4 special ed. area, and this one bothers me, and I'm sure  
5 it bothers others as well, because right now we go  
6 through this annual dance here in the legislature where  
7 there are bills that try to waive the CAHSEE requirement  
8 for special ed. students. There's a local waiver  
9 process that's a hassle for parents and kids, and it's  
10 real undefined. And I know in my district, I go to  
11 McClatchy High School, and I meet with the students and  
12 teachers. You know, people are trying so darned hard to  
13 succeed, and there's dedicated teachers, and, you know,  
14 there's a lot of frustration.

15 At the same time, the law allows the State  
16 Board of Education to develop alternative assessments,  
17 and alternative to the CAHSEE for students who may not  
18 be able to take a written test but would still  
19 demonstrate proficiency in the subjects, and nobody, it  
20 seems to me, either has the will or whatever to actually  
21 put such an assessment into place so we don't have to go  
22 through this every year.

23 So you're now on the hot seat here. Why isn't  
24 that happening, and what are you going to do to make it  
25 happen?



1           MR. ASCHWANDEN: I'll respond first. I share  
2 your frustration, because I've always thought it was  
3 important to know what kids can do is what they know,  
4 and that when you deal with authentic assessment and  
5 having a real glimpse of what students can do and what  
6 they know, it's a challenge when you have an instrument  
7 like the high-school exit exam standing in the middle of  
8 all that.

9           On one hand, I understand the frustration. I  
10 think it's shared by members of the board. There is a  
11 process that's evolving for special ed. students who can  
12 take the test with modifications, and we have supported  
13 that. And there's also a process now in place, probably  
14 not happening fast enough, but there is a panel that  
15 will come to us this year to identify a process by which  
16 special ed. students who have met every other  
17 requirement, but they can't -- In other words, they've  
18 taken all their course work, they've gotten all their  
19 credits, they still can't pass CAHSEE, even using the  
20 combinations that have been in their educational plan.  
21 There is going to be an alternative assessment process.  
22 I don't know what that looks like yet, Senator.

23           CHAIRMAN STEINBERG: When?

24           MR. ASCHWANDEN: The panel is supposed to make  
25 recommendations to us in October '09.

1           CHAIRMAN STEINBERG: Another year, another  
2 graduating class, another hassle here in the legislature  
3 around what we do for and with these kids.

4           MR. ASCHWANDEN: I understand the frustration.  
5 My only response is -- I'll share the response that has  
6 been given to us. The testing gurus that will respond  
7 to that will say it's very important to ensure that  
8 these alternative assessments are designed in a way that  
9 create the same validity across the measures and that  
10 that takes time and it takes money, and the time element  
11 is frustrating to all of us. I don't know how else to  
12 respond to that, Senator.

13           CHAIRMAN STEINBERG: Fair enough.

14           MS. CHAN: Being a teacher of special education  
15 for many, many years myself, I certainly understand --  
16 you know, I certainly -- actually know a number of ways  
17 to provide this alternative and find out if the kids are  
18 doing well or not.

19           Though the law right now -- The Fabian bill  
20 gives a year and a half, but right now, they already  
21 contracted to identify these kids.

22           My understanding is about 5 percent of the  
23 special ed. kids are on track. The only thing standing  
24 in their way is CAHSEE. They have all the other  
25 classes. The other one, they don't have the credits.

1 They're not at that stage.

2           So when we focus on this 5 percent, the panel  
3 is rolling out and I recommended to CE just today before  
4 we walk over here, Let's not rehash. We had a committee  
5 a year and a half ago, and we already came in with  
6 special ed. commission with nine different ways beyond  
7 the accommodation and modification.

8           Example, this child failed language arts but  
9 make math. Can you do a composite score? Can they take  
10 portion of it and then make it cumulative instead of  
11 going through the whole seating? There are nine  
12 different ways right there. Let's don't rehash  
13 everything, because many of these are already  
14 research-based.

15           Meanwhile, a glimpse now, Senator, is it took  
16 us two years. Right now we do have a California  
17 modified assessment of children with disabilities, okay?  
18 So we rolled it out last year in third grade, third  
19 grade through fifth grade. This coming year will be all  
20 middle school, including eighth grade and tenth -- not  
21 tenth grade. And then we roll out to the high school.

22           Now this modified assessment that's already in  
23 place, valid, piloted, already in API this year, already  
24 in API this year, can very well -- portion of it can  
25 very well be that alternative in the future, but my

1 worry is we say, "Let's create a new one." New one  
2 sometimes takes so long, because the feds said that  
3 whatever alternative you have, the students still held  
4 to the standard. It's the same standard. It's a  
5 different way of showing it.

6 CHAIRMAN STEINBERG: Okay. Thank you very  
7 much.

8 Before we take questions, Ina, are you doing  
9 okay? Do you need a break?

10 THE REPORTER: (Nods head.)

11 CHAIRMAN STEINBERG: It's been an hour and a  
12 half. Let's take a break. Let's take ten minutes --  
13 and we'll take questions from the members -- and we'll  
14 come right back, okay? Thank you.

15 (Recess taken.)

16 CHAIRMAN STEINBERG: Why don't we begin with --  
17 good. We're back. Rules Committee is back in session.

18 Why don't we begin with Senator Aanestad. Do  
19 you have any questions?

20 SENATOR AANESTAD: (Shakes head.)

21 CHAIRMAN STEINBERG: No questions.

22 Senator Oropeza.

23 SENATOR OROPEZA: Yes. I'd just like to ask a  
24 little bit about what is my passion and deep concern in  
25 education, and that is the achievement gap, the gap



1 between people who have the same brain, have the same  
2 brain matter. One of them is African-American, one of  
3 them is Hispanic, one of them is Asian, one of them is  
4 Anglo, and somehow they are, according to our  
5 assessments, not achieving at the same level. There are  
6 gaps in that achievement.

7 I'd like to ask you, each of you, what you  
8 think are the elements or the contributing factors to  
9 that achievement gap.

10 MS. CHAN: I start?

11 MR. ASCHWANDEN: Sorry.

12 MS. CHAN: (To the reporter): Slow it down. I  
13 will. Okay.

14 So spanning of 40 years as teacher and  
15 administrator, and also I'm in Pacoima, okay, so I am  
16 looking at -- definitely lot of my kids, either they  
17 lack the preschool education or they just do not have  
18 the readiness to accelerate like everybody else. I'm  
19 talking about a population from Pacoima. For example,  
20 I'm 100 percent free and reduced lunch; I'm 99 percent  
21 English learner --

22 SENATOR OROPEZA: Of those factors, which are  
23 the ones that you think contribute to the gap?

24 MS. CHAN: Lack of preschool and school  
25 readiness. That's one.



1           SENATOR OROPEZA:   Okay.

2           MS. CHAN:   Second is lack of the full range of  
3 support services for these students.  And I know people  
4 say, "Well, let's focus on something."  There's  
5 healthcare, dental care, and for me there's a head lice  
6 problem, so all of the other human services that must  
7 link to support the whole child.  So that's second.

8           Third, the third reason is the quality of  
9 instruction in some of the schools.  And I'm very  
10 honest, you know, because I'm always in that kind of  
11 area where I have a difficult time in delivering quality  
12 instruction, because I may not have a quality staff,  
13 including quality administration.

14          SENATOR OROPEZA:   So that's what you mean by  
15 lack of quality instruction?

16          MS. CHAN:   Um-hmm.

17          SENATOR OROPEZA:   It's not the people power to  
18 do it.  Yes?

19          MS. CHAN:   Correct.  It's not a credential  
20 thing.  It's just that I don't have the culture or the  
21 mission, the urgency, and we happen to be the same  
22 school that's serving the once most disenfranchised.

23          SENATOR OROPEZA:   Okay.

24          MS. CHAN:   The last thing is definitely lack of  
25 articulation from preschool to 16.  That is why the

1 pre-16 commission has seen -- some of the statistics are  
2 in, that is crucial, because we keep on dropping the  
3 ball.

4 SENATOR OROPEZA: Could you elaborate a little  
5 bit on that last point, the lack of articulation between  
6 K-5 and then middle school and high school?

7 MS. CHAN: Let's start with preschool. You  
8 have State preschool money, Head Start, great preschool  
9 programs. When they get into kindergarten, scratch  
10 their head. There was no communication. Bam. Okay.  
11 So especially come from preschool that articulate or  
12 even house in elementary. That is a given. Especially  
13 student with disability or student who are English  
14 learner. They're the crying kindergartners. Let's move  
15 them into kindergarten on the same site. Instead we  
16 start all over all the time.

17 SENATOR OROPEZA: I'd rather talk about the  
18 regular kid --

19 MS. CHAN: I'm getting to next.

20 SENATOR OROPEZA: -- regular Hispanic kid and  
21 the regular Asian kid, not somebody with a developmental  
22 disability.

23 MS. CHAN: When they finish elementary, fourth,  
24 fifth, at that time some of them are already not meeting  
25 grade-level standards. That become a double whammy.

1 Class size go up. Teachers teach in strict -- more  
2 lecture style.

3 SENATOR OROPEZA: And we're doing social  
4 promotion, or what category --

5 MS. CHAN: Yes, social promotion. Not that I  
6 believe in retention, Senator. I believe in the  
7 intervention and the prevention early on.

8 So now when you get into the middle school, all  
9 heck breaks loose. That's where dropout starts, and  
10 it's impossible to go back and mend all those years.

11 Therefore, really, a K-12 or P-16 -- For me, I  
12 solved them. I'm the principal of all ages. I taught  
13 the kids from three-year-old all the way up to community  
14 college, and I have the relationship with the parents.  
15 I think that's the design. Los Angeles Unified is doing  
16 one. The Ambassador Hotel site, they're going to do  
17 K-12.

18 SENATOR OROPEZA: I was going to say, do you  
19 think that's what we should do is K-12, and there's not  
20 an articulation issue because you've got the same people  
21 dealing with the kids all along?

22 MS. CHAN: That's right. I move my  
23 kindergarten teacher to first grade and move the sixth  
24 grade to ninth grade.

25 SENATOR OROPEZA: Okay. Thank you.

1           MR. ASCHWANDEN: Yes, Senator. I've always  
2       tried to approach this and tried to explain to people  
3       what --

4           The achievement gap is reflective, in my mind,  
5       of a very clear opportunity gap that exists for students  
6       to have the same resources, the same support, and access  
7       to high-quality educational experiences. In too many  
8       cases the achievement gap is almost related to a zip  
9       code, and it's easy to fall into the trap that it's just  
10      a matter of where the school is --

11          SENATOR OROPEZA: If you can be as specific as  
12      you can. When you say "resources," what does that mean?

13          MR. ASCHWANDEN: In the case of students who  
14      are experiencing this opportunity gap -- I was at a  
15      hearing in Richmond, and all the board spoke for a  
16      couple hours, and as they all left to take early flights  
17      home, the kids started talking about why they were  
18      disengaged in school, and student after student came up  
19      and said, "We have no electives here. There's no school  
20      newspaper that is supported on a reasonable basis." And  
21      kid after kid talked about the lack of experiences that  
22      many California students take for granted. The ability  
23      to come to school and have teachers that have a lot of  
24      years of experience. When you find an achievement gap,  
25      you will invariably find teachers who tend to have not



1 as much experience, who tend to want to leave those  
2 schools as quickly as possible.

3 We know some of the symptoms of the problem.  
4 What we're struggling with, quite frankly, Senator, is  
5 how to effectively address it. I think as a school  
6 board, we've done some things that are very positive.  
7 We have an English language advisory committee in place  
8 now. This morning we approved an African-American  
9 advisory committee specifically to come back to us. And  
10 we didn't create a subcommittee of the board to listen  
11 to them. They are charged to come back to the full  
12 State board with ideas and goals and methods for us to  
13 really get to this issue of what is it going to take to  
14 close this achievement gap. And we know on a big scale,  
15 it's the -- it's what we need to do to listen to the  
16 people in the trenches and to listen to the success  
17 stories, the best practices.

18 There are some schools and educators succeeding  
19 in closing the achievement gap. We have a lot of work  
20 to do to find out what it is they're doing and how to do  
21 it across the board a lot more effectively. And we're  
22 there. I applaud the superintendent for really being a  
23 champion of this issue. It is not going to die.

24 CHAIRMAN STEINBERG: It's everything --

25 SENATOR OROPEZA: It is the core. It is the



1 essence. I get troubled when I hear that the reason for  
2 the achievement gap are at a macro level of a whole  
3 school. I want to know why is there in a given school  
4 an achievement gap between brown and white kids? Why is  
5 that? That can't have to do with the school that you're  
6 going to if it's the same school. It can't have to do  
7 with the community that you're from, because you're from  
8 the same community.

9           So what is it that we -- you know, I have a  
10 theory. I have part of a theory. My part of the theory  
11 is that we're not taking education to where the kids  
12 are. We are -- Teachers, principals, administrators,  
13 are taking the education where they think it ought to  
14 be, or where they think the kids should come in prepared  
15 for instead of taking the education where the kids are  
16 culturally, not just linguistically, although that's  
17 important, but culturally, and in all kinds of ways.

18           You know, look. There are not nuclear  
19 families, so to fight against it -- There is no parental  
20 involvement when there aren't parents, is begging the  
21 question.

22           So I guess what I'm asking you to ponder and  
23 reflect on -- and do something; let's come up with some  
24 statewide solutions -- is look at the schools that are  
25 doing well, that have the kids that are all different

1 colors, shapes, and sizes, and are all achieving at  
2 basically the same level. And I don't believe that I  
3 have less brain matter than you do, because I'm brown.  
4 I don't believe it.

5 MR. ASCHWANDEN: Senator, I will leave you with  
6 this thought.

7 SENATOR OROPEZA: I don't believe it.

8 MR. ASCHWANDEN: On a positive note, I think  
9 there is general recognition from all of us on the State  
10 Board that the key to success is not doing more of what  
11 we've been doing and doing it louder. We need to do it  
12 better.

13 SENATOR OROPEZA: Yes.

14 CHAIRMAN STEINBERG: Very good. Thank you very  
15 much.

16 SENATOR OROPEZA: I'd love to keep the dialogue  
17 on that one.

18 CHAIRMAN STEINBERG: Let's ask for -- I know  
19 Senator Dutton, you're okay, and Senator Cedillo is out  
20 of the room at the moment.

21 Let's bring up the witnesses in support, and,  
22 again, if you want to introduce any members of your  
23 family. Anybody else? Okay.

24 MS. CHAN: All the board members were here, but  
25 they had to go back because there was no quorum.

1           CHAIRMAN STEINBERG: I should have welcomed  
2 them publicly. Let me welcome them in absentia.

3           Okay. Witnesses in support.

4           MR. JONES: Senators, Fred Jones on behalf of  
5 the California Business Education Association. I'm here  
6 to speak in support of Jim Aschwanden. I worked with  
7 Jim for a number of years. You'll never find someone  
8 with more integrity, and, truly, he has the interest of  
9 students at heart. Thank you.

10          CHAIRMAN STEINBERG: Very good. Thank you very  
11 much.

12          MR. MARTIN: Mr. Chair and Members, Rand Martin  
13 on behalf of California Charter Schools Association in  
14 support of Dr. Chan's confirmation back to the State  
15 Board of Education.

16          Clearly what you've heard is that she has vast  
17 experience. She has told us 1968 is when she started as  
18 a teacher. She is clearly an innovator, a superb  
19 innovator. All you have to do is look at the  
20 programming in Los Angeles to know that. And she brings  
21 a passion that she demonstrates so well in this room,  
22 not only for all kids but especially for kids who are  
23 economically disadvantaged. We urge her confirmation.  
24 Thank you.

25          CHAIRMAN STEINBERG: Thank you.

1 MS. GRIFFITH: Sherry Griffith with the  
2 Association of California School Administrators. We're  
3 in support of both candidates today. We've had the  
4 privilege of working with them for the last two years on  
5 the board, and I can say about Ms. Chan with 40 years of  
6 experience and on-the-ground administrative  
7 understanding, our members really, really appreciate her  
8 openness and her ability to be very informed as a board  
9 member. She's probably one of the most informed members  
10 that they have. And we appreciate her passion. And we  
11 are hoping that she may close the achievement gap in  
12 particular.

13 Mr. Aschwanden is passionate, he's independent,  
14 he's committed to career-tech education, and he keeps in  
15 front of all the members the importance of diversity and  
16 support for students wherever they are. And the need  
17 for readiness. So we support both.

18 CHAIRMAN STEINBERG: Thank you very much.

19 MR. WALKER: Mr. Chair and members of the  
20 committee, Chris Walker on behalf of three clients  
21 today, the California Association of Sheetmetal Air  
22 Conditioning Contractors, the California Automotive  
23 Business Coalition, and the California Industrial and  
24 Technology Education Association, all proud and pleased  
25 to lend their support for the confirmation of Jim



1 Aschwanden.

2           You've heard today his commitment to all kids.  
3 It is a surprise to some that the career-technical  
4 education, student access to these programs, despite all  
5 the attention by the legislature and this governor, in  
6 the last eight years has actually gone down. There's  
7 less student access today than there was eight years  
8 ago, due to a variety of complex reasons. And we are  
9 pleased to have Mr. Aschwanden on the State board and to  
10 help navigate through the complexity of the reasons and  
11 extended problems that we're facing in our system today.  
12 Thank you.

13           CHAIRMAN STEINBERG: Thank you, Mr. Walker.

14           MR. HINES: Good afternoon. Greg Hines,  
15 California Manufacturers and Technology Association. I  
16 don't think that I can say it much better, but echo the  
17 appreciation and the urge to confirm Mr. Aschwanden.  
18 His leadership and experience on the front line of  
19 education, in particular his passion for career-  
20 technical education, is something near and dear to our  
21 heart, and we urge the confirmation. Thank you.

22           CHAIRMAN STEINBERG: Thank you.

23           MR. DIAZ: Mr. Chair and Members, Cesar Diaz on  
24 behalf of the State Building and Construction Trades  
25 Council also echoing my colleagues in support of



1 Jim Aschwanden's reappointment and confirmation to the  
2 State Board of Education.

3 We have long had a partnership with high  
4 schools and community colleges, and our industry ability  
5 to have access to a highly skilled workforce depends on  
6 a well-rounded education, which includes careers in  
7 technical ed., and we strongly support him and  
8 respectfully urge his confirmation.

9 CHAIRMAN STEINBERG: Any other witnesses? Any  
10 witnesses in opposition to these nominees?

11 SENATOR DUTTON: Move approval.

12 CHAIRMAN STEINBERG: Moved by Senator Dutton.  
13 Let me make a comment, if I might.

14 We ask hard questions, I hope, difficult  
15 questions.

16 SENATOR OROPEZA: Well intended, not mean,  
17 right? Well intended?

18 CHAIRMAN STEINBERG: They were all excellent  
19 questions.

20 SENATOR OROPEZA: Nobody got upset by me.

21 CHAIRMAN STEINBERG: You know, it would be easy  
22 for me to spend my time or make my decision or  
23 conclusion on these nominees by reiterating my  
24 frustrations over some specific actions, that the  
25 algebra issue I think was a mistake, my view, not that

1 the intent wasn't the right intent; but as  
2 Mr. Aschwanden said, you don't throw a bomb in the room  
3 and hope it all works out. It has to be coupled with a  
4 plan to actually achieve the goal.

5 I could base my vote on the fact that I'm  
6 frustrated that thousands of special ed. kids really are  
7 not being accounted for. I think you're doing fine on  
8 219 and implementation. I know you set out a timeline  
9 today a year ahead of time, and I appreciate that, and I  
10 want to make sure that works aggressively. But the  
11 bottom line for me, these are two outstanding people.  
12 These are two outstanding professionals who have devoted  
13 their lives to kids.

14 And, you know, you used the term "want" before,  
15 Mr. Aschwanden. I know you weren't referring to us.

16 It's our right and our role and our  
17 responsibility to second-guess, just as the public has  
18 every right to second-guess decisions that we make, and  
19 it's certainly our right to reject nominees if we feel  
20 that they're out of the mainstream or if they've made  
21 decisions that lack integrity or are otherwise not  
22 performing their duties. That can't be said in any way  
23 for either of the two of you.

24 So we urge you, as we move forward these  
25 nominations, as I'm confident that we will, to see us

1 again as partners, to have an open mind and open door  
2 not only to us but to members of the public. And I  
3 think that was one of the criticisms of the algebra  
4 decision. It just kind of happened without much public  
5 dialogue, and that shouldn't happen again.

6 But you're outstanding people, and you  
7 deserve -- you deserve confirmation and to continue in  
8 your roles as public servants.

9 So do we have a motion?

10 SENATOR OROPEZA: Move appointment.

11 CHAIRMAN STEINBERG: Moved by Senator Dutton  
12 already.

13 SENATOR OROPEZA: Of both.

14 CHAIRMAN STEINBERG: Of both nominees, correct.

15 Do we need to take them one at a time or can we  
16 take them together? I'm just asking.

17 MS. SABELHAUS: Together.

18 CHAIRMAN STEINBERG: Together is fine. I'm new  
19 to this job. Protocol.

20 All right. Please call the roll.

21 MS. BROWN: Senator Cedillo.

22 SENATOR CEDILLO: Aye.

23 MS. BROWN: Cedillo aye.

24 Dutton.

25 SENATOR DUTTON: Aye.

1 MS. BROWN: Dutton aye.  
2 Oropeza.  
3 SENATOR OROPEZA: Aye.  
4 MS. BROWN: Oropeza aye.  
5 Aanestad.  
6 SENATOR AANESTAD: Aye.  
7 MS. BROWN: Aanestad aye.  
8 Steinberg.  
9 CHAIRMAN STEINBERG: Aye.  
10 MS. BROWN: Steinberg aye.  
11 CHAIRMAN STEINBERG: Congratulations. Your  
12 nomination will go to the Senate. It takes 27 votes, so  
13 work the members, as they say.  
14 Okay. Thank you very much.  
15 MS. CHAN: Thank you.  
16 MR. ASCHWANDEN: Thank you.  
17 CHAIRMAN STEINBERG: All right. We have one  
18 more item here before we go to the -- We have other  
19 items of business, but one more nominee is appearing  
20 before us today, and that is Candice Traeger, who is  
21 seeking reappointment as a member of the Occupational  
22 Safety and Health Appeals Board.  
23 Ms. Traeger, welcome to you.  
24 MS. TRAEGER: Thank you.  
25 CHAIRMAN STEINBERG: Thank you for your public



1 service, and if you would like to make a brief opening  
2 comment, I'd appreciate it.

3 MS. TRAEGER: Certainly. Senator Pro Tem and  
4 Members of the Senate Rules Committee, it really is an  
5 honor to be before you today and testifying and to get  
6 the opportunity to represent myself.

7 I come before you today to ask for your vote  
8 for confirmation on my appointment as a member of the  
9 Occupational Safety and Health Appeals Board.

10 I've served as a member and a chairperson for  
11 the board since November of 2004. The board serves a  
12 vital mission of promoting and encouraging workplace  
13 safety through a consistent application of statutes and  
14 regulations while resolving appeals from the Division of  
15 Occupational Safety and Health citations.

16 Prior to my state service, I think it's  
17 important to know a little bit that I had a career of  
18 25 years where I worked my way through law school as a  
19 part-time employee at UPS and a full-time Teamster. For  
20 the nine years I was a Teamster, I had an opportunity to  
21 serve as a union steward, and I represented my brethren  
22 in all respects, including health and safety issues.

23 I was a UPS loader, a UPS driver, a UPS center  
24 manager, and went on as an industrial engineer. I had  
25 an opportunity to supervise the drivers and had several



1 other assignments in New York and Washington, D.C.; but  
2 my background was really put to the test as chairperson  
3 of the appeals board when I came, because we had a  
4 backlog of about 4,000 appeals. We also had a federal  
5 complaint against the state action plan, which is often  
6 called a CASPA, and that threatens, of course, our  
7 ability to continue on as a state plan.

8 The CASPA alleged that we were not resolving  
9 appeals on a timely manner, and we were resolving in  
10 about 24 months, about two years, on average. However,  
11 the CASPA noted several cases that hadn't been resolved  
12 for three to six years.

13 Through working with our people and  
14 implementing many of their ideas, we are now in the  
15 national average for our resolution rate, which the  
16 national average is eight to ten, and we're resolving  
17 appeals in nine months.

18 The good thing about that is that people are  
19 still working at the same place. The DOSH inspector,  
20 the people that gave the citations, are usually still  
21 there, construction industries that are transient are  
22 still in place, and we're actually able to get to the  
23 citations and the appeals at such a time when people  
24 actually get an opportunity to take the case to hearing,  
25 should they desire to do so.

1           We have eliminated the backlog. We're down to  
2 87 cases, which translates into about 197 appeals, and,  
3 like I said, the wonderful thing about eliminating the  
4 backlog has been the opportunity to really not only  
5 maintain the quality and find that sweet spot between  
6 quality and production, but we've had incredible  
7 teamwork and professionalism at the same time.

8           Another thing that I'm really excited about,  
9 should I be confirmed today, is that we've turned the  
10 corner, and 2009 where we're not looking at a backlog,  
11 we're actually able to embark on customer service. And  
12 it's a goal of mine, having come from a business where  
13 customer service is really important to us, to turn that  
14 corner and look at our internal and our external  
15 customers, which would be our people, through doing  
16 surveys on their satisfaction, and also our external  
17 people, which, you know, at first we may not hear what  
18 we want to hear, but the nice thing about that is you  
19 hear what you don't want to hear. And so you're able to  
20 not only set a benchmark, but you're also able to move  
21 forward in a positive direction. There's no place to go  
22 but up.

23           We are holding our first ever advisory  
24 committee in about three weeks, and we're excited about  
25 that. The board has never done an advisory committee

1 before, and we'll take recommendations to refine the  
2 pilot project, and we'll expedite abatement appeals.  
3 And we're pretty excited about that notion, because it  
4 obviously -- it may be a small percent, but you know  
5 what? It's a very important percent of appeals that are  
6 staid and abatement does not occur, and I know that and  
7 know that well.

8           It is true to credit some people at the board,  
9 that they believe so strongly in our mission of  
10 promoting and encouraging workplace safety that they're  
11 willing to work harder, more efficiently, but, most  
12 important, more effectively than we have. The people  
13 have achieved an amazing result and will continue to do  
14 so, because we share a vision of a safer and a healthier  
15 workplace for everybody in California.

16           It really is my sincere desire to lead the  
17 appeals board into a new era where there is no backlog,  
18 and we provide an increasing level of customer service  
19 and satisfaction.

20           So I again ask for your vote for my  
21 confirmation, and I really thank you for the opportunity  
22 to testify before you today. And should you have any  
23 questions?

24           CHAIRMAN STEINBERG: Thank you, Ms. Traeger.  
25 Thank you very much. We've known each other for years,

1 and I know you to be a person -- a hard-working person  
2 of integrity, and I appreciate your public service.

3           There are a few issues of concern that I want  
4 to get right into, if we might, and then the members  
5 can, again, take it from there. They're in the  
6 following categories. One is the way hearings are  
7 conducted before the board. There have been some  
8 concerns. Secondly, there is the issue of the amount of  
9 penalties for non-farm-worker cases. And then there is  
10 the concern which was written about in the *Sacramento*  
11 *Bee* less than a month ago about the fines relating to  
12 the heat-stroke cases. So let's go one by one here.

13           Apparently, one of the things you have done,  
14 which is actually laudable, is that you have attempted  
15 to reduce the backlog, right? And that's a good thing,  
16 right, because you don't want litigants to have to wait  
17 for a long time or forever to be able to have their  
18 cases heard. But there is some concern that maybe the  
19 pendulum has swung a little too far in that multiple  
20 cases are set on the same day, continuances are not  
21 necessarily adjudicated, or you don't say whether the  
22 party can have a continuance until the night before a  
23 hearing, and that everything is being -- and that the  
24 purpose actually behind consolidating all these hearings  
25 at once, leaving less time for hearings, is that you're



1 trying to settle as many cases as you can to reduce the  
2 backlog.

3 One, is that the motive? And, two, how do you  
4 respond to some critics who would say that folks are  
5 being encouraged too strongly to not have their cases  
6 heard and instead to settle?

7 MS. TRAEGER: Okay. I guess what I would first  
8 point out is one of the things I did in the past was  
9 industrial engineer, and industrial engineers are crazy  
10 about numbers.

11 And so one of the things I did is I looked back  
12 to the inception of the board and tracked numbers about  
13 settlement rates. And party agreement or party  
14 settlement I think is probably part of any adjudicatory  
15 process, the decision whether to move forward or not,  
16 whether there's adequate evidence, whether your  
17 witnesses are present, and so on, when they can make  
18 your case.

19 But we benchmarked -- The very first thing we  
20 did is we wanted to see what other people were doing  
21 relative to their hearings, and so we looked at other  
22 agencies, other court processes and such, and we found  
23 out that our holding of one hearing a day for the four  
24 years previous to when I came produced -- with a  
25 settlement rate of around 80 percent was producing, for



1 instance, ten judges with eight of them having nothing  
2 to do because there were no hearings, and then two of  
3 them being able to hold hearings.

4 So the number of the settlement rate at the  
5 board prior to any hearing has always been anywhere from  
6 about 73 percent to 85, and one year 90.

7 CHAIRMAN STEINBERG: The settlement rate has  
8 not varied after you adopted the multiple hearings in  
9 one day --

10 MS. TRAEGER: We actually picked up about 4  
11 percent. So the average prior was about -- all over the  
12 years was 80 percent, and it's now 84.

13 CHAIRMAN STEINBERG: Have you heard the  
14 complaint from advocates or representatives or litigants  
15 themselves that they're feeling pressured into settle  
16 because they have less time to be able to prepare and/or  
17 to actually have their case heard?

18 MS. TRAEGER: I think the nature of moving --  
19 keeping up with an ever increasing appeal rate and  
20 addressing backlog certainly is that setting a hearing  
21 for a case puts a certain kind of impetus on parties,  
22 and one of those things is to review the file to prepare  
23 for a prehearing. And, remember, they're preparing now  
24 much sooner than they used to. It used to be two years.  
25 They can wait one year or --

1 SENATOR OROPEZA: They who? They who?

2 CHAIRMAN STEINBERG: The party.

3 MS. TRAEGER: I mean anybody. It could be  
4 OSHA or --

5 SENATOR OROPEZA: That's what I'm wondering.  
6 When you say "they," I'm just not sure who --

7 CHAIRMAN STEINBERG: You're saying it's a --  
8 You're saying it's a one-year wait now to have your case  
9 heard, and it used to be a two-year wait. Is that what  
10 you're saying?

11 MS. TRAEGER: It's nine months now for the  
12 entire case resolution. It used to be, on average, two  
13 years for that case resolution, and it was one year  
14 before the prehearing came. So what would happen --  
15 What we believe happened is that people tended -- those  
16 cases got a little bit stale, witnesses disappeared,  
17 people were no longer with the same companies, and so...

18 CHAIRMAN STEINBERG: Okay. You know, because I  
19 was an administrative law judge for years and doing  
20 personnel cases, I used to pride myself on settling  
21 cases at about the same kind of percentage rate; but  
22 once in a while I would have to catch myself and say,  
23 You know what? I'm trying too hard to settle this case.  
24 I'm trying too hard, you know, because this one, the  
25 parties actually ought to have the case heard. It needs

1 to be heard. And my desire to sort of get the case off  
2 the docket isn't as important as having their case  
3 heard.

4 So I want to ask you to be sensitive to that.  
5 Okay?

6 MS. TRAEGER: Absolutely.

7 CHAIRMAN STEINBERG: Second, fines. Concern --  
8 I'll get my notes here just for a moment.

9 There's some concern expressed by advocates  
10 that the board is actually, in some instances, issuing  
11 penalties less than \$1,000 for an employer's failure to  
12 report workplace accidents to OSHA. The Labor Code  
13 section states that the minimum mandatory penalty for  
14 such violations is \$5,000. What's the story?

15 MS. TRAEGER: The story is the board laid out a  
16 precedential decision in 2006 on a case called *Bill*  
17 *Calloway*, and that case -- our legislative -- our legal  
18 staff, we don't have legislators, but our legal staff  
19 looked into the various code sections that were specific  
20 to the board, that were specific to the division, or,  
21 you know, anyone else for that matter.

22 At any rate, we received recommendations from  
23 our legal department. We followed those  
24 recommendations. And part of the concern of the legal  
25 department was that if you were to treat people that

1 didn't report at all the same as people that reported an  
2 injury late, we believed there would be no motivation to  
3 report once that time period, the eight hours, had  
4 passed.

5 We did not want to drive people underground to  
6 not reporting because they couldn't make it eight hours.  
7 Rather, we wanted to create a system where people  
8 believed that reporting was the thing to do, even if  
9 they were late; and they were going to take their  
10 punishment, but the punishment fit what they did.

11 CHAIRMAN STEINBERG: Okay. Trying to encourage  
12 people to come forth voluntarily.

13 What about the heat cases which have gotten so  
14 much publicity and, you know, tragic, tragic  
15 circumstances. You've issued original penalties of  
16 about a million dollars, or more than a million dollars,  
17 and you end up settling the cases, according to the  
18 *Sacramento Bee*, by two-thirds so that the fines ended up  
19 being paid are \$336,000.

20 How does that send a message to agricultural  
21 employers or farm labor contractors that they need to  
22 absolutely provide adequate shade and water for people  
23 working in the fields?

24 MS. TRAEGER: We're very concerned about this  
25 very serious problem. We went back and tracked how many



1 of these heat-illness cases had been appealed, and we  
2 found that since 2006, 303 cases had been appealed.

3 During that -- Of those cases, the appeals  
4 board held hearings on six cases. Those are six cases  
5 where we looked at, you know, the decision and decided  
6 whether to affirm, modify, or rescind. The rest were  
7 all settled by party agreement.

8 CHAIRMAN STEINBERG: And the six, what did you  
9 do with the proposed settlement?

10 MS. TRAEGER: I knew you were going to ask  
11 that.

12 CHAIRMAN STEINBERG: Yes.

13 MS. TRAEGER: I don't have the exact numbers on  
14 that. It kind of came up -- One of my last-minute  
15 requests was: What did we do on those six?

16 I can tell you that the board -- between what  
17 the parties usually agree on, which is about a  
18 64 percent reduction over what the initial citation  
19 says, the appeals board, through our hearing system,  
20 reduces an average of 6 percent.

21 So oftentimes, because we look at an ALJ  
22 decision does not mean that we are going to reduce a  
23 fine. What we're going to do is see if the parties can  
24 prove their case --

25 CHAIRMAN STEINBERG: But did you reduce a fine



1 in those six instances?

2 MS. TRAEGER: Oh, well, certainly where there  
3 was evidence presented that carried the burden of proof,  
4 you know, and --

5 CHAIRMAN STEINBERG: But in all six cases, was  
6 the fine reduced?

7 MS. TRAEGER: I'm certain that it wasn't, just  
8 because we don't do that in that kind of manner. But I  
9 can certainly get you that information on those six  
10 cases.

11 CHAIRMAN STEINBERG: Okay. Let's open it up to  
12 the members. Start on the left. Senator Cedillo.

13 SENATOR CEDILLO: Yes. With all due respect,  
14 let me suggest to you that the directive or counsel from  
15 your staff or from your staff counsel said that you did  
16 not impose the mandatory fee penalty of \$5,000, which  
17 is wholly inappropriate. It seems to me that that  
18 discretion is not afforded you.

19 If you're looking for discretion, you may want  
20 to look to notice. If you want to distinguish motive  
21 for those who make all good faith efforts to comply, who  
22 demonstrate reasonableness and who constructively  
23 complied, you can do that within the framework of what  
24 the baseline is that the legislature set. In other  
25 words, we said the minimum that you can -- or the

1 minimum you must penalize somebody is \$5,000. So it  
2 appears the intent is to penalize others who are more  
3 egregious and less responsible, less reasonable, you can  
4 penalize them more. But it doesn't appear, at least  
5 from the surface reading, that you have that discretion.

6 Now I know it puts you in a dilemma, but there  
7 was a purpose for us passing that legislation, and it  
8 was to motivate people to speak timely so that the union  
9 could investigate timely. I mean, there's a whole  
10 scheme of intent there. I don't mean to argue that. I  
11 think what's important is to point out that, at least  
12 for your counsel, that that's not discretion that you  
13 have. If there's a minimum, there's a minimum, and it's  
14 only a question of whether or not you make a decision  
15 whether or not to conform. But once you determine they  
16 haven't conformed or complied, it seems that you're  
17 pretty limited by it.

18 So I just -- We don't need to argue or  
19 disagree, but I think it says the mandatory minimum is  
20 5,000. It doesn't seem to provide you with that type of  
21 discretion.

22 Now if you think and say to us, "Look, we  
23 cleared a backlog. We find it ineffective, and it  
24 frustrates us, and it undermines it, it pushes it  
25 underground, we need discretion," that's fair. That's

1 reasonable. We're happy to address that, and any one of  
2 us on this dais might be willing to go forward and say,  
3 "Yes, let's do that," given that we do have, today, a  
4 functioning, effective code, and it was designed around  
5 trying to deal with backlog.

6 But, clearly, I would suggest that it's not  
7 something you independently have the right to do.

8 MS. TRAEGER: I appreciate the perspective.  
9 We -- the board --

10 The Labor Code section that the attorney  
11 believed that applied to the board was Labor Code  
12 Section 3602 which says that "The board shall," and then  
13 "modify, affirm, rescind an ALJ decision." So that was  
14 the one, I think, that they believed. And the other one  
15 I believe was 6409.1 that said that "The division may  
16 issue in every case not less than 5,000," our staff  
17 believed to be somewhat ambiguous and definitely to  
18 apply to the division, because it said by its own terms  
19 a "division." And so maybe it is the kind of thing like  
20 you suggested that should have --

21 SENATOR CEDILLO: Been revisited?

22 MS. TRAEGER: Yes. That was the thinking.

23 SENATOR CEDILLO: That's one. The second --  
24 Let me just again suggest to you that -- and we hear  
25 this from the courts. This is something that's very

1 important.

2           The hearings are, in a sense, the court for  
3 workmen who are injured. To limit -- The notes tell me  
4 there's intent to or there is an effort to limit the  
5 hearing area to three areas versus 21 sites, and I would  
6 encourage you not to do that. I think it undermines --  
7 Just simply eliminating the venues undermines access  
8 both for employers and employees, and to the extent  
9 there's greater access means greater opportunity for  
10 resolution.

11           So I know for everything there's cost  
12 considerations, but clearly these are the forums for the  
13 employers to seek resolution of this, and clearly we  
14 must work to broaden access rather than restrict it,  
15 within all the other considerations.

16           MS. TRAEGER: If I might mention, the board has  
17 never held -- I think there's 21 locations in the state.  
18 I think the most ALJs we've ever had is nine. We have  
19 seven locations where we have hearings in the state now  
20 and no intent of doing anything differently. We heard a  
21 recommendation that was bandied about, and perhaps we  
22 should do that.

23           The board actually has some experience, believe  
24 it or not. They did that about ten years ago, and I  
25 think there was quite a maelstrom then at that time, so



1 we have no intention. And I think sometimes when you  
2 have an information void, people fill it with -- I don't  
3 know what they fill it with -- information, maybe  
4 speculation.

5 But I just would assure everyone we have no  
6 intention of reducing our hearing sites. In fact, in  
7 the year of customer service, I may -- and without a  
8 backlog, we'll be able to do a lot more things than  
9 we've ever been able to do, and part of that is we'll  
10 get the input through the advisory committee that's  
11 going to tell us what it is that people want and what  
12 would work best, and we can make a decision.

13 CHAIRMAN STEINBERG: Senator Cedillo?

14 SENATOR CEDILLO: It was a point that you  
15 raised with respect to fines and the reduction of fines,  
16 and what signal that sends. I understand the agency --  
17 and none of us on this dais are anti-business. We all  
18 want to figure out how to stimulate our economy.

19 Clearly, this agency has to be seen first and  
20 foremost as an agency for working men and women in the  
21 state, and I would urge you to rethink both the message  
22 sent to the workers, working men and women in the state,  
23 and specifically as it relates to the farm workers who  
24 do the most difficult work, the composition --  
25 demographic composition of farm workers and the message

1 it sends to them as workers and then to dealers in this  
2 state when we have conditions that result in people  
3 dying on the job, and the reduction of penalties.

4 To say -- I would not want to get behind  
5 somebody's findings on a case that's not before me to  
6 evaluate at all, but patently it appears it's just  
7 egregious that someone would suggest somehow \$250 is  
8 sufficient to penalize someone as a result of when  
9 someone dies at the workplace. It's patently, on its  
10 face, abhorrent, and in this context it sends a bad  
11 message with respect to California and race relations  
12 and human relations in California.

13 MS. TRAEGER: I certainly agree with that.

14 CHAIRMAN STEINBERG: Thank you.

15 Senator Aanestad.

16 SENATOR AANESTAD: Nothing.

17 CHAIRMAN STEINBERG: Nothing.

18 Senator Dutton.

19 SENATOR DUTTON: Just real quick. I appreciate  
20 the council. My colleagues and I would agree,  
21 obviously, we want to make sure it's a fair and  
22 above-board process. However, I do want to compliment  
23 you, because you're one of the very few state agencies  
24 and boards that have actually figured out a way to  
25 become more efficient and eliminate backlog, because I

1 think one of the bigger problems is having backlog is  
2 actually more costly. So you figured out a way to do  
3 it. It sounds like you have the support of the people  
4 within your department and all the employees, so I want  
5 to compliment you on that kind of leadership and thank  
6 you for your service.

7 MS. TRAEGER: Thank you, Senator. It's not  
8 without pain, and I do understand that.

9 CHAIRMAN STEINBERG: For your workers, for your  
10 employees.

11 MS. TRAEGER: Correct. Backlog in and of  
12 itself is pain, but getting rid of it is probably worse  
13 pain.

14 CHAIRMAN STEINBERG: I think it is impressive,  
15 and I believe you that you've gone from two years -- I'm  
16 sorry. Did I --

17 MS. TRAEGER: Four. It took us four years. I  
18 thought it would take two. I --

19 CHAIRMAN STEINBERG: No, no, no, no. The  
20 amount of time to have a case heard from --

21 MS. TRAEGER: Oh, yeah. Twenty-four months to  
22 nine.

23 CHAIRMAN STEINBERG: Twenty-four months to nine  
24 months. That's impressive.

25 Okay. Senator Oropeza.

1           SENATOR OROPEZA: My concerns have been -- all  
2 but one have been raised by Senators Cedillo and  
3 Steinberg.

4           I would like to note that the labor position on  
5 this board has not been filled for sometime, so I'd like  
6 you to share what you have done to communicate with and  
7 to seek the viewpoints of organized labor, or the  
8 workers, as you do your job as a board member.

9           MS. TRAEGER: Absolutely. I personally like  
10 that question, because clearly the labor perspective is  
11 a very valuable perspective, and everybody is served  
12 well by discussion.

13           We do the best with what we have. At this  
14 point, what we have done -- and if I could mention a  
15 case, the kind of thing we would do. There was a Kinder  
16 Morgan case. It was a large case with quite a bit of  
17 money, where there was a stipulation proposed before the  
18 board that that stipulation would create a U, an  
19 unclassified violation, rather than a willful or a P,  
20 which even though the full amount of the fine would be  
21 paid, the U would not go against their record as would a  
22 willful or a P. That was a stipulation that was  
23 proposed to us and advocated by both DOSH and an  
24 employer. It is done at a federal level.

25           So we did two things when we were trying to



1 decide what we were going to do with that. First, we  
2 reached out to the Labor Federation, and then we reached  
3 out to the laborers themselves. We wrote letters and  
4 asked them what they thought and engaged them, because  
5 we didn't know where -- what they would like us to do.  
6 Unfortunately, our lawyers said they had reached out to  
7 them a few times, and they declined to give us their  
8 thoughts on that.

9           However, what we had our attorneys do is  
10 research it at a federal level, and what we found there  
11 through our research was that labor was not real happy  
12 with it at the federal level. Although it did occur  
13 there, the board ultimately rejected the stipulation and  
14 felt that the -- if there was a desire to have a  
15 U classification in California, that they should  
16 probably make a regulation that said U.

17           So -- We haven't seen that back yet. I don't  
18 know what's going to happen. But certainly in  
19 cases where -- I mean, you could say every case, but  
20 there's certainly some cases that just call out for  
21 reaching out to people and saying "Help."

22           SENATOR OROPEZA: Sure, sure, and hopefully  
23 you'll have company from the labor community on the  
24 board sometime soon. I think that would be the best  
25 solution.

1           CHAIRMAN STEINBERG: Thank you very much.  
2 Let's hear from witnesses in support of the nominee.

3           JUDGE MELGOZA: Good afternoon. My name is  
4 Manuel Melgoza, M-e-l-g-o-z-a. I'm the presiding  
5 administrative law judge for the Cal OSHA Appeals Board.

6           CHAIRMAN STEINBERG: Welcome, Judge.

7           JUDGE MELGOZA: And I'd just like to tell you a  
8 little bit about my background.

9           I grew up as -- in Southern California -- in  
10 San Joaquin County as a farm laborer, a son of farm  
11 laborers, and I went to law school, came back. I worked  
12 for CRLA for a time. I worked for the Agricultural  
13 Labor Relations Board, the Public Employee Relations  
14 Board, and here at the Cal OSHA Appeals Board since  
15 1990. So I've seen a lot of boards, and I've worked as  
16 an attorney for different boards.

17           One of the frustrating things for me working as  
18 an attorney for the Agricultural Labor Relations Board  
19 was winning a case for farm workers where you had a lot  
20 of money to get picked up, getting the money to  
21 distribute to the workers and not finding them. They're  
22 gone because of lapse of time. Couldn't find workers to  
23 give them their back pay or their makeup pay. And even  
24 though we collected and we won, it was an empty victory,  
25 because by the time we got a resolution, it was

1 irrelevant to them.

2 Well, that was -- That situation was  
3 threatening to become a reality at the appeals board,  
4 and it frustrated me, working at the -- not this appeals  
5 board -- but once Candice Traeger became the board  
6 chair, that was one of our first items to tackle, which  
7 is "Justice delayed is justice denied," which I agreed  
8 with.

9 So we started to tackle this issue. Why is it  
10 that we have this huge backlog, yet we have an ALJ  
11 sitting there with no work to do? I happened to mentor  
12 a new ALJ at one point about four years ago, and every  
13 time I tried to mentor the ALJ, the hearing would come  
14 off calendar. Why? Because it was set for three days,  
15 four days, and then it would come off calendar at the  
16 last minute. So we had a huge backlog, and we had ALJs  
17 doing nothing. That was unacceptable. When you have a  
18 backlog and you have no work to do, that's just wrong,

19 So we looked for other different ways to try to  
20 deal with it. We started calendaring all our hearings  
21 to see what number would be reasonable. We're down to  
22 three hearings a day on average. Two short ones, one  
23 long one, and we feel that so far has worked for us and  
24 has helped us to come to the point where we are.

25 We looked at other agencies to see what they

1 were doing, and they had multiple hearings as well.  
2 Given our settlement rate, that seems reasonable.  
3 However, now that we're done with the backlog almost, we  
4 can do these other things. We can give the parties  
5 extra settlement conferences or -- We've been able to  
6 now tackle the cases. It's because of the clearing of  
7 the backlog that's allowed us to take cases that are now  
8 relevant and adjudicate those.

9 CHAIRMAN STEINBERG: Thank you very much. I  
10 went into the hearing -- Well, we'll hear from the other  
11 witnesses too about their view of the backlog.

12 You know, having done this sort of work before,  
13 it is important, sort of efficiency-wise, that we sort  
14 of stack the cases during the course of the day, because  
15 I remember being an ALJ too and having the same  
16 experience, no cases sometimes. It's frustrating,  
17 because they weren't stacked densely enough.

18 Okay. Let's -- Thank you, sir. Thank you,  
19 Judge. Appreciate it.

20 Next.

21 MR. DIEDE: Mr. Chairman, members of the  
22 committee, I'm Brad Diede with Cal PASC, California  
23 Professional Association of Specialty Contractors. We  
24 represent nearly 500 member companies across the  
25 state of California, and we just want to briefly express



1 our support for Candice Traeger.

2 We believe that it's important that Cal OSHA  
3 operate the appeals board efficiently, timely, and  
4 fairly, and we think that she's been doing that, and we  
5 appreciate her continued position.

6 CHAIRMAN STEINBERG: Thank you very much, sir.  
7 Other witnesses? Go ahead.

8 MS. CHRISTIAN: Hi, my name is Mary Christian.  
9 Thank you for the honor to speak to you members. I have  
10 been working -- I'm a working partner at the board.  
11 We're team members with Candice. Candice is a working  
12 member. She is a great leader. Positive. And she also  
13 works with other department heads in the collection area  
14 that I believe you need to know.

15 Collection is one of the more difficult things  
16 that the department has to do once the board  
17 adjudicates, so I just want you to know and to be in  
18 support of Candice.

19 CHAIRMAN STEINBERG: Thank you.

20 Are there any witnesses in opposition or with  
21 concerns? We'll take those categories together, and you  
22 can identify which one.

23 MR. SMITH: Thank you, Mr. Chair, members of  
24 the committee. I'm Jeremy Smith here on behalf of  
25 California Labor Federation.

1           We are officially neutral. I want to come up  
2 first and now at this point so I can get a couple things  
3 on the record.

4           First of all, I'd like to publicly thank  
5 Candice for spending two hours with us on Monday,  
6 myself, Angie, that's our DS from the State Building and  
7 Construction Trades Council, and Lee Sandol from the  
8 Longshore Warehouse Workers Union. She was very  
9 attentive. We had a very good meeting. She was  
10 checking her Blackberry quite a bit because Nettie was  
11 supposed to be calling her, which we understand. That's  
12 fine. We had a good discussion. It got heated a couple  
13 times, but generally good. So thank you for that time,  
14 two hours of her time, which we thought was well spent.

15           We have, though, some concerns, and I will be  
16 very brief, I promise, because many of them have been  
17 covered already.

18           Senator Cedillo raised the \$5,000 fine issue,  
19 and he is completely correct. And we wholly agree that  
20 if there is an issue with a \$5,000 fine, the remedy for  
21 that is not to create a legal opinion, but to come back  
22 to the legislature and figure out a way to make it work  
23 better.

24           It is important to remember from our standpoint  
25 that there are -- First of all, there are many, many

1 good employers in this state, but there are many bad  
2 employers who don't treat their workers very well. And  
3 we must have penalties that are more than slaps on the  
4 wrists for those employers who find themselves in  
5 trouble for keeping an unsafe workplace.

6 We believe when employers know that they're  
7 going to get penalized for something but that it will  
8 get whittled down to pennies on the dollar, they are  
9 less inclined to be fearful of Cal OSHA or the appeals  
10 board process, and it's that fear that keeps workplaces,  
11 we believe, safe.

12 Again, not all employers are bad. We  
13 understand that, and we believe that.

14 Secondly --

15 CHAIRMAN STEINBERG: All those in favor of that  
16 proposition?

17 MR. SMITH: Secondly, the scheduling of several  
18 cases in one day. Now, we understand there was a  
19 backlog, and we're glad the backlog is taken care of,  
20 because obviously that's not good for workers either.  
21 The docket needs to be clear. But we are concerned that  
22 scheduling several cases in one day leads the DOSH --  
23 the Cal OSHA attorney's prosecutors to settle, right,  
24 to get to the point. That's what you want me to do,  
25 Senator, get to the point.

1           CHAIRMAN STEINBERG: Exactly.

2           MR. SMITH: They want to get to the end of the  
3 case. Again, settling cases is a slap on the wrist --  
4 for pennies on the dollar is a slap on the wrist for  
5 employers. They need to be held accountable by  
6 penalties for what they have done.

7           Senator Steinberg, you passed AB 1127 to raise  
8 penalties. You understand that. You did this.

9           The continuances. It's important to know that  
10 this is something that employers and DOSH staff, Cal  
11 OSHA staff -- Sometimes there are legitimate reasons for  
12 continuances. I'm sorry. I know of one in particular  
13 where a legal counsel for an employer needed to sit for  
14 the bar, and the continuance was not given to the  
15 employer's legal counsel. Now I'm here for the  
16 employees. This is an employer problem, and I've heard  
17 from employer -- employment -- employer representatives  
18 that this is a concern.

19           CHAIRMAN STEINBERG: The bar is given every six  
20 months. What's the problem?

21           MR. SMITH: That's true.

22           I will make a couple more quick points. When  
23 you have this culture of settlement, it's going to lower  
24 the average of case time. You mentioned you were  
25 impressed with two years to nine months. When cases get



1 settled in a month or two months, it's going to lower  
2 the average pretty fast.

3           And I want to let Ms. Oropeza know that in the  
4 Kinder Morgan situation that was discussed before I came  
5 up here, we did reach out to the appeals board. It was  
6 a laborers' worker who was involved, and we decided to  
7 let the laborers handle this on their own. They got the  
8 letter, we got the letter. We spoke to Jose Mejia from  
9 the laborers. He said, "We will take care of it on our  
10 end." So we did reach out to the board on that.

11           I will just end with this. Now that the  
12 backlog is complete, almost complete, we hope that the  
13 way of doing business at the appeals board will get  
14 better, in our opinion, in terms of scheduling more and  
15 more hearings, in terms of urging settlements.

16           We understand the need to get through a  
17 backlog, but moving forward, there is no backlog. We  
18 feel justice is better served when cases are allowed to  
19 be heard in a manner that is good for all members who  
20 have business before the appeals board. So with that,  
21 I'll finish.

22           CHAIRMAN STEINBERG: Great. Very good  
23 testimony. Thank you.

24           Next. Come on up, please.

25           MS. MURPHY: Good afternoon, committee members

1 and Senator Pro Tem.

2 CHAIRMAN STEINBERG: Speak into the mic.

3 MS. MURPHY: My name is Suzanne Murphy. I'm  
4 the executive director and attorney for Worksafe, which  
5 is a nonprofit organization based in Oakland. I know  
6 you're familiar, maybe some of the other members are  
7 not.

8 We -- One of our largest projects is to support  
9 a coalition of activists from labor and environmental,  
10 legal services programs, OSHA and health professionals,  
11 workers, vendors, and other groups that provide services  
12 to and advocate for strong and effective OSH laws and  
13 effective remedies for workers who are injured on the  
14 job. We have a special focus on workers, the most  
15 vulnerable, low-wage immigrant workers, many of whom are  
16 not represented by unions.

17 I'm here today to speak in opposition to the  
18 appointment of Ms. Traeger to a second four-year term as  
19 chair of the OSHA Appeals Board. Worksafe believes the  
20 committee should send the nomination back, because under  
21 Ms. Traeger's leadership, the appeals board has adopted  
22 policies and has issued substantive rulings that have  
23 significantly undermined worker health and safety.  
24 They've ignored court rulings. They've unilaterally  
25 revised laws passed by the legislature, and in our

1 experience have nearly decimated the morale of the many  
2 dedicated employees in the Division of Occupational  
3 Safety and Health, or DOSH, whose efforts to vigorously  
4 afford to California health and safety laws which are,  
5 we believe, quite rightly among the strongest in the  
6 nation, have been thwarted on numerous occasions.

7 Many of the concerns I had planned to raise  
8 today have already been raised by the members of the  
9 committee and other witnesses, so I won't dwell on any  
10 of them. I will try to move through them as quickly as  
11 possible.

12 We definitely at Worksafe share the concerns of  
13 the other witnesses and committee members about the  
14 imbalance on the OSHA Appeals Board over the last  
15 two-plus years with only a management representative and  
16 a public representative, but with no voice for the  
17 17 million workers in California that the OSHA laws are  
18 intended to protect. We are really gratified to hear  
19 the committee is predicting that the seat will be filled  
20 soon.

21 SENATOR OROPEZA: Hoping, anyway.

22 THE WITNESS: We're hopeful as well.

23 We are also very deeply troubled by some of  
24 what we see as the docket clearing practices and tactics  
25 that have been adopted by Ms. Traeger during her tenure

1 on the first term to clean up the large backlog of  
2 appeals that have accumulated following enactment of  
3 AB 1127.

4 That bill was passed and -- by the legislature  
5 and signed by the governor specifically to raise  
6 penalties and to implement a number of other measures  
7 that were designed to improve and strengthen worker  
8 health and safety protections. What we see, however,  
9 and we believe Ms. Traeger's policies have done this, is  
10 that the hearing policies that have already been  
11 discussed pretty thoroughly have effectively forced the  
12 DOSH inspectors, attorneys, district managers, and the  
13 rest of the DOSH staff, to abandon numerous meritorious  
14 cases, or settle employers' cases at a deep discount in  
15 order to conserve their limited resources to go to  
16 hearing only on the most pressing cases.

17 CHAIRMAN STEINBERG: Is that their fault? The  
18 resource question.

19 MS. MURPHY: Well, that's -- We would certainly  
20 love to see you all give Cal OSHA a lot more resources  
21 to have more inspectors. They have one inspector for  
22 every 93,000 employees in California at this point in  
23 time, and their workload is crushing.

24 I don't hear any of them actually complaining  
25 about workload. What they complain about is their



1 ability to do a competent job and to be effective in  
2 their mission of protecting worker health and safety.

3 So, yes, I understand the resource limitations,  
4 but it is their experience that the policies that have  
5 been implemented to overbook hearings, to deny  
6 continuances, to eliminate local hearing sites, have  
7 just basically put them in an untenable position of not  
8 being able to do their job and to act in a professional  
9 manner.

10 I would also add that from what we have heard  
11 and understand, even though the backlog is now  
12 ostensibly fixed and cleared, the policy of overbooking  
13 hearings and granting -- denying continuances are still  
14 continuing as recently as this week.

15 CHAIRMAN STEINBERG: In her closing, I'm going  
16 to ask Ms. Traeger to respond to that, because it's come  
17 up now a couple times.

18 If the backlog is now cleared, what is the  
19 policy going forward in terms of the consolidation of  
20 cases and the requests for continuances? That's a very  
21 fair question.

22 Let's move to the next witness.

23 Thank you. Were you done?

24 MS. MURPHY: I have a couple more things.

25 THE REPORTER: Please slow down.

1 MS. MURPHY: Worksafe is also deeply concerned  
2 about a number of key substantive positions that have  
3 been issued by the board during Ms. Traeger's first  
4 term.

5 SENATOR OROPEZA: You're talking faster.

6 CHAIRMAN STEINBERG: It's really a fine  
7 balance. We want to make sure we don't talk too fast.  
8 On the other hand, we need to move these hearings along  
9 here too. Just like the backlog. Go ahead.

10 MS. MURPHY: In several key cases, there's a  
11 list of substantive decisions from the board. We  
12 believe that the board, under Ms. Traeger, has  
13 significantly undermined the important health and safety  
14 protections embodied in the statutes, regulations, and  
15 prior decisions.

16 In many of these cases, the board actually  
17 reached out proactively to take up cases from the  
18 ALJ decisions, not at the urging of a site of an  
19 employer or DOSH, but only, it appears, to affect  
20 changes in what was previously settled law and more  
21 protected law. One example is the case -- the Calloway  
22 case, which has already been discussed about the \$5,000  
23 fine for failure to report serious injury.

24 But Worksafe has had very difficult and  
25 firsthand experience with another case in which the

1 Traeger board set out on its own motion to weaken health  
2 and safety protections. In that instance, these  
3 protections were required by federal law for workers  
4 employed on multi-employer work sites, generally in the  
5 construction industry.

6 In early 2007, Ms. Traeger issued a decision  
7 after reconsideration in the Harris construction case  
8 that constitutes a dramatic about-face from the board's  
9 prior liberal interpretation of the controlling employer  
10 liability provisions. There were individually adopted  
11 multi-employer regulations and then later codified in AB  
12 1127 by the legislature.

13 What we believe is the board's efforts to  
14 narrow these important health and safety laws not only  
15 flies in the face of a 1975 California Supreme Court  
16 decision that directs the board to interpret health and  
17 safety laws liberally and give them broad application,  
18 but it also, that DAR in the Harris construction case,  
19 specifically defied the ruling of the Court of Appeal  
20 in the 3rd District here in Sacramento, who had rejected  
21 effectively the same rule just months earlier. So  
22 that's a real serious concern.

23 CHAIRMAN STEINBERG: If you could sum up, I  
24 would appreciate it.

25 MS. MURPHY: Okay.

1           CHAIRMAN STEINBERG: We get the import that you  
2 believe that the board is not following the spirit, if  
3 not the letter, of 1127 and some other Court of Appeal  
4 precedents that are more protective of working people.

5           MS. MURPHY: I can move, then, to my last  
6 point, which is to comment on Ms. Traeger's  
7 pronouncement that this is going to be the year of  
8 customer service in the OSHA Appeals Board.

9           While I greatly appreciate the stakeholder  
10 process that has been instituted, not yet activated, but  
11 announced for the coming months, I just have to note  
12 ironically that -- The first federal OSHA director  
13 appointed by George Bush, John Hinshaw, had startled  
14 career officials in the federal OSHA agency by telling  
15 them the need for -- that the employers are the real  
16 customers of OSHA, not the nation's workers. And one  
17 career staffer was quoted as saying --

18          CHAIRMAN STEINBERG: What does that have to do  
19 with Ms. Traeger?

20          MS. MURPHY: It has to do with the year of  
21 customer service.

22          CHAIRMAN STEINBERG: That --

23          MS. MURPHY: Let me try to get to the point on  
24 that.

25          CHAIRMAN STEINBERG: Please.



1 MS. MURPHY: What this career staffer said was  
2 everybody was pretty amazed, because they believed their  
3 purpose was to ensure worker health and safety, not to  
4 preserve the interest of employers.

5 We respectfully submit that this federal  
6 Cal OSHA staffer had it exactly right, and that some of  
7 the policies and practices and decisions of the board in  
8 recent years suggest strongly to us that Ms. Traeger and  
9 the current board have it backwards, like Mr. Hinshaw  
10 did, that in our view the committee should reject  
11 Ms. Traeger's nomination to another four-year term; or,  
12 at a minimum, we want to impress upon Ms. Traeger that  
13 we believe the most important customers are the 17  
14 million workers employed in California who have clearly  
15 the right to a safe and healthy workplace --

16 CHAIRMAN STEINBERG: That's it. Thank you.

17 MS. MURPHY: -- and the right to effective  
18 enforcement of health and safety laws.

19 CHAIRMAN STEINBERG: Thank you. I believe we  
20 have a question from Senator Aanestad.

21 SENATOR AANESTAD: I'm a little surprised here.  
22 I'm looking at today's dated memo 7, Rules Committee  
23 staff, which says we received no oppositions to this  
24 appointment. Yet I have just heard 15 minutes of  
25 allegations of Cal OSHA employee dissatisfaction and

1 worker health and safety violations or endangerment by  
2 this nomination.

3 I guess my question is: Being new to this  
4 committee, this is pretty significant opposition. Why  
5 was I not able to prepare? Maybe I would have liked to  
6 have known -- If there was going to be opposition, I  
7 would like to talk to some of the employees myself  
8 regarding the alleged dissatisfaction, or workers, where  
9 their health and safety has been of concern. But  
10 instead, I came into this meeting saying or reading that  
11 there was no opposition to this.

12 Why am I surprised? Why are you here at this  
13 late notice without letting us know?

14 MS. MURPHY: Well, I was not contacted myself  
15 by committee staff, but I understood that many of the  
16 concerns I am raising today had already been transmitted  
17 to the staff.

18 SENATOR AANESTAD: There was no letter of  
19 opposition from you?

20 MS. MURPHY: No.

21 SENATOR AANESTAD: Thank you.

22 CHAIRMAN STEINBERG: Thank you very much,  
23 Ms. Murphy.

24 You know, as the author of 1127, your points  
25 are very well taken. I don't know that I agree or

1 disagree, because there's, obviously, a difference in  
2 terms of what various experiences have been before the  
3 Traeger board. But, you know, your testimony was, I  
4 think, very, very important in terms of --

5 I know Worksafe and I know Fran Schrieber. I  
6 know the work you do, and we take your testimony very  
7 seriously.

8 THE WITNESS: And I apologize for not having  
9 submitted a letter in advance. I didn't understand that  
10 was a prerequisite. It's my first hearing.

11 CHAIRMAN STEINBERG: Now you do. You did a  
12 good job. Thank you.

13 MS. GUZMAN: Good afternoon. I'm  
14 Martha Guzman. I'm with California Real Legal  
15 Assistance Foundation, and, you know, one of the  
16 approaches, really, that can be taken now and in the  
17 future that we wished would have been taken in the past  
18 is, actually, the appeals board act as an enforcer with  
19 restricted amount of use in terms of upholding the  
20 penalties.

21 When you have employers viewing the appeals  
22 board as a body to go to to eliminate fines, guess what?  
23 You're going to get a lot of employers appealing the  
24 decisions from DOSH. It's that simple. So if you want  
25 to actually do something about backlog, you actually

1 have to uphold the penalties. And, in fact, if you want  
2 to use your discretion, like other agencies do, you can  
3 actually increase those penalties.

4 I paid more last week for a speeding ticket  
5 going 45 miles in a 35-mile zone than an employer did in  
6 a fatality case. How is that acceptable?

7 CHAIRMAN STEINBERG: Which case is that?

8 THE WITNESS: This is the 2007 death down in  
9 Kern County.

10 CHAIRMAN STEINBERG: Ms. Traeger, can you  
11 respond to that in closing.

12 MS. GUZMAN: Let me say in anticipating some of  
13 the response, because she was concentrating on the six  
14 decisions that came to the actual board and not all of  
15 the decisions that ALJs have settled and all of the  
16 other decisions that have actually been, in this  
17 culture -- I'm not going to say forced, because they're  
18 not really forcing the settlements, but encouraged in  
19 the culture, not in writing or anything else, but this  
20 is what we're seeing, is that the ALJs are dealing with  
21 more of these settlements. Clearly, it's not going to  
22 go all to the board.

23 These cases -- I think Senator Cedillo was  
24 bringing this up with the mandatory minimum penalty  
25 thing. As a board you really do have influence over the



1 ALJs. You can tell them how to, in fact, interpret the  
2 law and how you want the law interpreted. And if you're  
3 condoning the ALJs to dismiss, practically, these  
4 penalties which DOSH -- I mean, in that case it wasn't  
5 even that harsh of a penalty. It was like \$13,000 or  
6 something.

7 So we're not even talking about reducing  
8 penalties that are, perhaps, in one of the other, what  
9 DOSH says frequently in looking at the economic hardship  
10 to, quote, unquote, small employers, and they already  
11 slashed the fines significantly. We're talking about a  
12 second process here.

13 And I do want to back up a little bit saying  
14 the nomenclature of this client is, in fact, talking  
15 about the employer. This is a nomenclature that is  
16 referring to the employer. If we're talking about DOSH  
17 and those cases, the employer is going from the level of  
18 DOSH's penalties, and they are viewing the appeals board  
19 as their board to get them their penalties reduced. And  
20 right now, through this chairmanship, that is, in fact,  
21 how the chairmanship is doing it.

22 CHAIRMAN STEINBERG: What is your position?

23 MS. GUZMAN: I recognize this committee is  
24 under a tight time constraint, and I recognize that the  
25 chairwoman is actually filling her slot very well in

1 representing the management position, but we have no  
2 balance on that board.

3 CHAIRMAN STEINBERG: Might I interrupt you,  
4 just because it might be the appropriate time for me to  
5 make an announcement, which is that in anticipation of  
6 this hearing, the Pro Tem's Office has been pressing the  
7 governor very hard to actually fill that slot. Senator  
8 Oropeza raised the issue in her questioning.

9 And I now have the commitment that the governor  
10 will, in fact, fill the labor slot, quote, "very soon."  
11 So I'm trying to get some definition as to what "very  
12 soon" is. So I expect very soon.

13 So on the part of your advocacy and the  
14 advocacy of the other witnesses here who have expressed  
15 concerns, not so much about Ms. Traeger personally, but  
16 about the operation of the board and the glaring  
17 omission, the fact that for such a long time the labor  
18 slot has not been filled, because of your advocacy we  
19 have been able to receive a commitment that that slot  
20 will be filled expeditiously. So good work.

21 MS. GUZMAN: Mr. President, with all due  
22 respect to the governor, and I'm sure you trust his word  
23 better than I do, but I would request, perhaps, you not  
24 confirm her on the Senate floor until you have that  
25 confirmation in place. That's just a humble request.

1 CHAIRMAN STEINBERG: Thank you for your  
2 suggestion. Anything else?

3 MS. GUZMAN: No. Thank you very much.

4 CHAIRMAN STEINBERG: All right. Appreciate it.  
5 Is there a motion on the nomination?

6 SENATOR DUTTON: Moved.

7 CHAIRMAN STEINBERG: Moved by Senator Dutton.  
8 Let me make a couple comments here.

9 Well, I want Ms. Traeger to have an opportunity  
10 to respond to a couple things.

11 Go ahead.

12 MS. TRAEGER: I'm kind of excited by the  
13 opportunity to respond. I'm going to ask -- If you  
14 don't mind, I did bring one chart. It's on penalty  
15 reduction. And because this has been, I think, such a  
16 misunderstanding, that people believe that the appeals  
17 board drastically reduces fines, I think it's time that  
18 we show people.

19 And what I did was we actually have to hand-  
20 collect material. Our system doesn't do it very well.  
21 So what I did was -- although I think this says 2002,  
22 2007, and 2007, it's actually 2007 and 2008.

23 What it shows you -- I went back to 2002,  
24 because, of course, I wanted to see what was happening  
25 then versus what's happening now, and the blue on this

1 chart -- the dark blue on the chart shows the original  
2 citation amount. If you look at 2002 first, you see  
3 it's a little bit over six. It's 6.4 million, it looks  
4 like. That was the original citation amount.

5 The next number is what DOSH proposed that that  
6 amount be reduced to. When I say that, I'm talking  
7 about stipulations, which is obviously where the parties  
8 write up their agreement themselves. The other one is a  
9 party agreement via an order. They talked to a judge,  
10 usually at a prehearing, but they asked the judge to  
11 then embody their agreement via an order, which the  
12 board does take the party agreement to be an order.  
13 It's often easier for the parties than writing a  
14 stipulation for the board to issue an order, and it has  
15 the additional scrutiny of an ALJ.

16 So the party agreement is the majority of the  
17 way, and in this case you see where that penalty has  
18 been reduced. DOSH's average reduction is about  
19 64 percent, and that's what I'm talking about, the  
20 stipulation and the orders. A lot of people mistake  
21 that for the appeals board and think that the appeals  
22 board has reduced where the parties have actually  
23 agreed, and the parties again being DOSH and the  
24 employers.

25 So if you look over these years, the next year



1 was 2006. I got my numbers all messed up there, but  
2 2006 you see about 14 million that was in the original  
3 citation amount, and then you see what DOSH proposed was  
4 about 4.2 million, and then what the board assessed,  
5 which was about -- it looks like 4.1.

6 So the board, via a hearing where we actually  
7 issue a decision, does reduce it sometimes, and that  
8 average is about 6 percent reduction off of what DOSH  
9 suggested.

10 CHAIRMAN STEINBERG: That's a good argument,  
11 but I think it misses the point by the advocates, which  
12 is that the culture is such that -- the culture is such  
13 that from the beginning of the citation period to the  
14 time the case is settled, that there is sort of a  
15 red light there that -- you know, "Settle the case,  
16 settle the case," and therefore you're seeing a more  
17 precipitous drop from the original citation amount, even  
18 what DOSH does. So it's not just DOSH and the appeals  
19 board. It's from the beginning where an investigator  
20 says, "This is serious. There ought to be a citation  
21 this large." The allegation is that because there's  
22 sort of a warning, this fine is going to get damped  
23 down. One way or another, eventually you're saying that  
24 they drop. That's the way I'm taking it.

25 Go ahead.

1 MS. TRAEGER: You know, I can't really speak to  
2 the parties and why they make that agreement. I think  
3 board efficacy is probably one of those reasons, but I  
4 think there are many other reasons in terms of proving a  
5 case and so on.

6 At any rate, I am concerned about it. But I  
7 did mention the settlement rate has always been high at  
8 the board. When I say "the board," historically with  
9 DOSH, its settlement is about 75 to 80 percent before I  
10 came, and now it's averaging around 84. So, yes, we  
11 have increased by 4 percent the number of settlements,  
12 but I think a lot of that has to do with moving cases  
13 forward more quickly, looking at the cases, assessing  
14 and evaluating the cases for both DOSH and the employer,  
15 and deciding if they want to proceed to court.

16 At any rate, the board usually resolves about  
17 5 percent of all cases via hearing, so there's not that  
18 many that go to hearing, although we are having more  
19 hearings than we ever had. That number has increased  
20 from 49 in 2004, the first year I was here, to about  
21 160 now. So we do more hearings. We like hearings, we  
22 embrace hearings, but yet we lose judges when we don't  
23 have hearings. We like hearings.

24 CHAIRMAN STEINBERG: Who is your customer?

25 MS. TRAEGER: Everybody.

1           When I talk to customers, I mentioned internal,  
2 which is the people at the board, but the external  
3 customer is DOSH, the employer that's before us, the  
4 employee, in the event that they decide to either  
5 file -- somebody files on their behalf an amicus brief,  
6 or it becomes involved as a third party.

7           So I think the customer world externally is  
8 anybody that is before the appeals board. And they're  
9 all included, by the way, in our advisory committee.

10           CHAIRMAN STEINBERG: Okay. Thank you very  
11 much, Ms. Traeger. Thank you to the witnesses for a  
12 very thorough discussion.

13           I'm going to support the nomination, as a hard-  
14 working public servant who is doing a good job. I do  
15 hope that you take into account a lot of what you heard  
16 today and some of the concerns, if not complaints.

17           Again, I reflect on my own experience here as  
18 an ALJ who worked for an administrative agency  
19 comparable to yours, that there sometimes can be a  
20 little bit of a competition between efficiency and  
21 justice. Not always, and not always even by intent.  
22 And there's a concern raised here today that the  
23 pendulum may have swung too far in your zeal,  
24 appropriate zeal, to be efficient and reduce the  
25 backlog.

1           So as you're moving forward, especially if the  
2 backlog is reduced, if you can please consider the  
3 impact of what seem like small policy decisions, like  
4 the policy on continuances, the policy on scheduling,  
5 the amount of -- the way even ALJs approach settlement  
6 discussions at times, because that often can influence.

7           And I do want our labor committee here in the  
8 Senate to do some oversight around this issue of fines.  
9 I think -- And specifically to look at the precedential  
10 decision where you interpret the \$5,000 limit to allow  
11 you to go to 1,000, because that may be appropriate for  
12 legislation.

13           And, again, I want to announce that as a result  
14 of the advocacy we heard today, the governor has made  
15 the commitment to make sure that the labor slot is  
16 filled as well.

17           Ms. Traeger, you're an excellent public  
18 servant, and you obviously work very, very hard, and I'm  
19 going to support the nomination.

20           Is there a motion? It looks like Senator  
21 Dutton. Please call the roll.

22           MS. BROWN: Senator Cedillo.

23           SENATOR CEDILLO: Aye.

24           MS. BROWN: Cedillo aye.

25           Dutton.



1 SENATOR DUTTON: Aye.

2 MS. BROWN: Dutton aye.

3 Oropeza.

4 SENATOR OROPEZA: Aye.

5 MS. BROWN: Oropeza aye.

6 Aanestad.

7 SENATOR AANESTAD: Aye.

8 MS. BROWN: Aanestad aye.

9 Steinberg.

10 CHAIRMAN STEINBERG: Aye.

11 MS. BROWN: Steinberg aye.

12 CHAIRMAN STEINBERG: Thank you very much.

13 MS. TRAEGER: Can you indulge me one second?

14 CHAIRMAN STEINBERG: The family. I apologize.

15 MS. TRAEGER: It's okay. My family on the  
16 natural, which is -- My father is sick and wasn't able  
17 to attend anyway, but I have a family -- many families.  
18 The family of friends that are here, I would like if you  
19 could stand up for a second.

20 Sandy Garth, very good friend of mine.

21 Donna Ponicker, also a very good friend of mine.

22 And then my work family, who many of them came  
23 here today, and some I didn't know were coming. The  
24 executive officer of the board, Michael Wibberly.

25 CHAIRMAN STEINBERG: Welcome. Thank you.

1 MS. TRAEGER: Our presiding judge who  
2 testified, Manuel Melgoza.

3 CHAIRMAN STEINBERG: Thank you very much,  
4 Judge.

5 MS. TRAEGER: Teresa McKeever, one of our  
6 supervisors. Phyllis Eldridge, who is new to the board,  
7 been here going on three weeks.

8 CHAIRMAN STEINBERG: Welcome.

9 MS. TRAEGER: She's our executive sec. And  
10 then Mary Christian, who also testified.

11 And it's -- you know, we all know the family is  
12 what makes us thrive and able to do our job.

13 CHAIRMAN STEINBERG: We appreciate you all  
14 coming today and your public service as well.

15 Thank you very much, Ms. Traeger. Appreciate  
16 it.

17 All right. We have one other confirmation, a  
18 governor's appointee subject to confirmation but not  
19 required to appear. That's Pamela Giacomini, a member  
20 of the State Board of Forestry and Fire Protection.

21 Is there a motion to move by Senator Oropeza?

22 SENATOR OROPEZA: Motion to move.

23 CHAIRMAN STEINBERG: Please call the roll.

24 MS. BROWN: Senator Cedillo.

25 SENATOR CEDILLO: Aye.

1 MS. BROWN: Cedillo aye.

2 Dutton.

3 SENATOR DUTTON: Aye.

4 MS. BROWN: Dutton aye.

5 Oropeza.

6 SENATOR OROPEZA: Aye.

7 MS. BROWN: Oropeza aye.

8 Aanestad.

9 SENATOR AANESTAD: Aye.

10 MS. BROWN: Aanestad aye.

11 Steinberg.

12 CHAIRMAN STEINBERG: Aye.

13 MS. BROWN: Aye. Steinberg aye.

14 CHAIRMAN STEINBERG: The measure passes.

15 Thank you very much.

16 (Thereupon, the Senate Rules Committee hearing  
17 adjourned at 4:31 p.m.)

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A P P E N D I X



## CALIFORNIA ENERGY COMMISSION

OFFICE OF THE COMMISSIONERS

NINTH STREET

SACRAMENTO, CA 95814-5512



December 18, 2008

The Honorable Darrell Steinberg  
Chairman, Senate Rules Committee  
State Capitol, Room 420  
Sacramento, CA 95814

SUBJECT: Responses to Senate Rules Committee Questions

Dear Senator Steinberg:

I look forward to appearing before the Senate Rules Committee for my confirmation hearing on January 7, 2009. Enclosed are my written responses to questions posed to me by the Senate Rules Committee. I am available to meet with you or other members of the Rules Committee to discuss these questions or to address other issues before the hearing. I have also enclosed the latest version of my Statement of Economic Interests (Form 700), as you requested, and I am providing additional information on my professional experience and background.

During my first year of my term on the Energy Commission, I have had the honor of being able to take a leadership role on alternative transportation technology, climate change, renewable energy, power plant siting and other issues. I am currently overseeing the Energy Commission's renewable energy efforts as the presiding member of the Renewable Energy Policy Committee. I am also the associate member of the Transportation and Siting Policy Committees.

Prior to my appointment to the Energy Commission, I served as director of the California Climate Initiative at Environmental Defense. Prior to going to Environmental Defense, I spent four years at the Planning and Conservation League as the Natural Resources Director, General Counsel, and most recently, acting Executive Director. I have worked on a wide range of California natural resource and environmental protection issues, including the Imperial Irrigation District / San Diego water transfer, forest policy, and the California Environmental Quality Act.

**Senate Rules Committee**

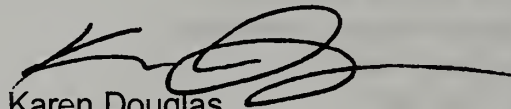
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**Appointments**

Senator Steinberg  
December 18, 2008  
Page 2

Thank you for the opportunity to respond to your questions. If you have further questions or require additional information, please do not hesitate to contact me at (916) 654-4001, or via e-mail at [kldougla@energy.state.ca.us](mailto:kldougla@energy.state.ca.us)

Sincerely,



Karen Douglas  
Commissioner

Enclosures

cc: Nettie Sabelhaus  
Appointments Director



**Responses to Questions from the Senate Rules Committee  
Energy Commissioner Karen Douglas**

**Statement of Goals**

1. *What are your goals as a member of the Energy Commission? What do you hope to accomplish during your term? How will you measure your success?*

My overarching goal as a member of the Energy Commission is to facilitate California's transition to a low carbon energy sector and economy while ensuring that Californians continue to enjoy the benefits of reliable and affordable electricity, natural gas and transportation fuel.

Because of my interest and background in climate policy, I followed the joint PUC/CEC AB 32 proceedings with great interest. While I was not a member of the Energy Commission's AB 32 Committee, I was able to provide significant input into the joint recommendations that the Energy Commission and the CPUC provided to the Air Resources Board this fall. Both the joint decision and the scoping plan subsequently adopted by the Air Resources Board underscore the importance of the core focus of the Energy Commission on energy efficiency and renewable energy. In order to contribute to statewide greenhouse gas reductions at the level contemplated in the scoping plan, we will have to increase the climate benefits of these existing programs while finding innovative new ways to achieve further energy efficiency savings and renewable energy development.

I am a strong supporter of a 33 percent RPS requirement, and in fact I see the 33 percent target as a milestone on the way to even greater reliance on renewable energy beyond 2020. While I recognize that achieving the 33 percent target by 2020 will not be easy, I think it is still possible provided that we act now to overcome barriers to renewable energy development and deployment that have become painfully evident in recent years. Thus far in my term I have focused on finding ways to reduce siting conflicts for large-scale renewable energy projects, particularly utility-scale solar projects, improving planning for the transmission that will be needed to support needed renewable energy development, and the evaluation of mechanisms such as feed-in-tariffs to accelerate development and deployment of renewable energy technologies utilizing California's existing transmission and distribution system.

A related priority of mine has been to push for the Energy Commission to more directly analyze the linkages between our environmental goals, including our State climate, renewable, and energy efficiency policy, our interest in retiring or repowering old, inefficient natural gas plants, particularly those that use once-through cooling, our efforts to reduce our reliance on imports of electricity from coal plants, with the very important work that the Commission does to forecast energy needs, assess and plan for needed infrastructure investments, site power plants, and ensure the reliability of California's electricity supply.

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I believe that new energy infrastructure is needed in California, and that it can be not only consistent with our long term environmental goals but actually integral to achieving those goals. By better assimilating these multiple and highly interrelated policy goals into our long-term planning, we will improve our ability to achieve these goals over time. One concrete step that the Energy Commission has taken to initiate this work was opening up an informational proceeding on how the Commission can better analyze the greenhouse gas implications of the siting of individual power plants. This issue raises larger questions about the current functioning and future development of the electricity system as a whole. I expect these issues to be addressed in the 2009 Integrated Energy policy Report (IEPR) as well as within the CEQA context.

Finally, as the associate member of the Transportation Committee, I am very involved in the implementation of AB 118. I have been very closely involved in the implementation of this program to date, and believe that it has the potential to provide significant environmental and economic benefits to California. The successful implementation of this program is one of my top priorities at the Commission.

With regard to all of these priorities, I hope to measure my success in terms of concrete, specific achievements such as the accomplishments listed in answer to the next question. Of course, in the longer term, I will measure my success not only in terms of my ability to compile a list of specific achievements, but more broadly in terms of whether I believe that my work on the Commission has helped California transition to a low carbon energy sector in an environmentally and economically sustainable way.

2. *What have been your most significant accomplishments as a member of the commission?*

I served as the lead Energy Commissioner in working with the Resources Agency and the Governor's office to develop EO S\_14-08, which establishes a 33 percent RPS by 2020 goal for the State and calls on the Energy Commission and the Department of Fish and Game to expedite the siting of renewable energy projects in an environmentally responsible way. Among other things, the EO requires the Energy Commission and DFG to identify preferred areas for renewable energy development, create a Desert Renewable Energy Conservation Plan to guide development in the Mojave and Colorado Desert regions and provide additional Guidance to the RETI. While completing the work called for in the EO will require a significant commitment of resources, this is exactly the kind of advance planning that is needed to lay the groundwork for a dramatic acceleration of renewable energy siting on time to meet a 33 percent RPS requirement. This approach also has great potential to reduce costs to developers and ratepayers by improving both infrastructure and conservation planning.

Soon after I arrived at the Energy Commission I began to work with our staff and my fellow Commissioner, Jeff Byron, to address the issue of GHG emissions in our power plant siting process. The Energy Commission is the Lead Agency for the CEQA review of thermal power plants that are of a 50 MW or larger capacity. Since 2003 the Energy



Commission has required applicants to project GHG emissions that will result from proposed plants and then to report on actual emissions, but to date we did not have any threshold of significance to determine if some level of emissions was harmful to the environment nor did we require any kind of mitigation for any perceived impact. Since we have begun work we have held two public workshops and plan on developing guidance on how to address this issue in our siting cases by the end of the first quarter of next year.

As I discuss in my answer to the next question I feel that one of the greatest opportunities for advancing renewable energy in the State would be to provide greater certainty to developers through the adopting of feed-in tariffs (FiTs) similar to what has been adopted in much of Europe. This year as Chair of the Renewables Committee I presided over a series of workshops exploring the history and use of FiTs and then recommendations on how California could integrate a FiT into our existing procurement and RPS programs. These workshops and the proceeding have produced two nearly complete reports on FiTs that represent the most complete analysis of this policy direction that the State has ever engaged in.

Finally, I am quite pleased with the public process we have set up for the implementation of AB 118 as mentioned above. The implementation of the legislation represents an excellent opportunity to meet multiple goals that the State shares: transitioning towards energy independence by reducing use of imported fuels, improving air quality and fighting climate change through the research and development of alternative fuels and vehicle technology and spurring job growth and economic development in the emerging occupations of the "green economy". We have put together an excellent Advisory Committee to help develop the Investment Plan for AB 118 funds. The twenty-five Advisory Committee members represent environmental, public health, and labor organizations, fuel and technology consortia, academic institutions, consumer advocates, venture capitalists, and other state agencies. This group has been invaluable in assisting us in developing our plan and I believe will continue to provide us with excellent advice as we implement this program.

## **Renewable Energy**

In its Integrated Energy Policy Report, the commission is required to conduct assessments and forecasts of all aspects of energy industry supply, production, transportation, delivery and distribution, demand, and prices. The commission adopts an Integrated Energy Policy Report every two years and an update every other year. In 2006 California's Renewable Portfolio Standard set the goal of increasing the portion of electricity derived from renewable resources and sold to retail customers to 20 percent by 2010. In its 2008 Integrated Energy Policy Report Update, the commission states that it believes the state can achieve the 33 percent renewables target by 2020. It also states that the five major barriers in reaching the 33 percent renewables target are: transmission, integration, contract delays/cancellations, cost/rate impacts, and environmental permitting.

3. *Many of these barriers are partly or wholly within the jurisdiction of the commission to address, or at least bring to the attention of other energy agencies within the executive branch. What actions has the commission taken to begin to identify and implement ways to remove these barriers?*

The Energy Commission has a varied and diverse collection of authorities, interests and leverage points in the implementation of successful renewable energy programs in California. Unfortunately, due to the fragmentation of roles and responsibilities in the State's regulatory and planning statutes the Energy Commission has limited ability to enact needed reforms. However, the Energy Commission has implemented program and process improvements in those areas that we do have authority over, and has used forums such as the Integrated Energy Policy Report (IEPR) to highlight the need for program, regulatory and legislative changes to improve renewable energy development in the State. The following is a compilation of the changes we have made, or plan to make, to our own programs and our efforts to recommend changes to areas outside of our direct authority.

*Transmission:*

The permitting of transmission lines in California currently suffers from: (1) jurisdictional responsibilities that are fragmented and overlapping; (2) environmental analyses that are inconsistent; (3) inadequate consideration of regional and statewide benefits identified during the transmission planning process; and (4) long delays in the permitting process. In addition, merchant transmission projects in California are not subject to state permitting and instead would be subject to local agency permitting, which could require multiple local agency reviews because of the linear nature of transmission facilities.

As a result, existing permitting processes can create duplication between local, state, and federal agencies, are usually very lengthy, and frequently result in the rejection of needed projects that are identified in the transmission planning process. Because of the jurisdictional overlaps, it may be difficult for a lead agency to conduct an environmental review of the entire project under the California Environmental Quality Act (CEQA).

Complicating this situation, the federal government, based on provisions in the 2005 federal Energy Policy Act has recently established a National Interest Electric Transmission Corridor (NIETC) covering most of Southern California within which they would be able to preempt state permitting authority, if State permitting of transmission projects is not carried out expeditiously or projects are not subject to State permitting. Thus, a federal preemption could significantly erode California's authority to make land use and public health decisions. California could ultimately lose its ability to determine how, where and when to expand its bulk transmission grid, thereby undermining the state's energy, environmental, and economic policy goals.

The Energy Commission has the following transmission permitting, planning and designation responsibilities:



- Permit transmission lines, associated with thermal power plants greater than 50 MW to the first point of interconnection to the existing grid and permit transmission lines that connect to a jurisdictional power plant.
- As part of the biennial IEPR proceeding, prepare a strategic transmission investment plan that recommends strategic transmission projects needed to ensure reliability, relieve congestion, and meet future growth in electricity generation, including renewable resources.
- Designate transmission corridors on non-federal lands for future use, consistent with the strategic transmission investment plan.

Because the Energy Commission does not have direct approval or oversight authority for bulk transmission infrastructure, we have focused our efforts on highlighting opportunities for improved transmission planning and permitting through forums like the IEPR and the implementation of our corridor designation program.

Since 2003, the Energy Commission has identified the state's fragmented approach to planning and permitting transmission projects as a significant barrier to project approval and construction. To that end, the Energy Commission has recommended better aligning the state's transmission and generation permitting processes with improved planning efforts to ensure that investments in the state's transmission system occur. The Energy Commission has also identified the need to expand the state's transmission system and improve access renewable resources in every IEPR since 2004

In 2004, noting both the lack of an official state role in transmission planning and the failure of the existing process to consider broader state interests, the Legislature directed the Energy Commission in Senate Bill 1565 (2004) to develop a Strategic Transmission Investment Plan (STIP) as part of the IEPR.

In its 2004 IEPR Update and 2005 IEPR, the Energy Commission recommended changes to the California ISO tariff that would facilitate the financing and development of renewable transmission lines. The California ISO petitioned the Federal Energy Regulatory Commission (FERC) for approval of this category of transmission, in early 2007 and it became effective on January 1, 2008. The policy promotes the development of renewable resources by allowing smaller projects to interconnect with the transmission system by paying a pro rata share of new transmission costs as projects come on line rather than the first generator on line paying for the entire cost of the upgrade.

In the 2005 IEPR, the Energy Commission recommended the establishment of a statewide corridor planning and designation process to plan needed corridors and designate them for future use. Designating corridors allows for earlier environmental review. Senate Bill 1059 (2006) recognized the importance of longer-term transmission planning, coordinated with local land use permitting activities, and authorized the

Energy Commission to designate transmission corridors on non-federal land to streamline future permitting of transmission projects.

In late 2005, Energy Commission staff also worked with the CPUC and the California ISO to better integrate electricity transmission planning processes, including improving the coordination between transmission and generation planning and procurement. Beginning in 2006, the Energy Commission and California ISO staffs collaboratively developed a single transmission planning process to coordinate the Energy Commission's IEPR and STIP proceedings with the California ISO's new grid planning process. For example, the Energy Commission provides the IEPR's electricity load forecast and other planning assumptions to the California ISO for their analyses of transmission path upgrades and specific projects. The California ISO also relies upon the IEPR process for load-serving entity (LSE) information not typically available to them, supply and demand assumptions, and the identification of broad statewide policy preferences.

In early 2007, the Energy Commission initiated a rulemaking to establish regulations for the implementation of Senate Bill 1059 to further define the designation process and the informational requirements for future corridor designation applications. The Energy Commission adopted the final regulations in 2008.

Concurrent with the rulemaking, the 2007 STIP encourages corridor applications requesting designations on non-federal lands to accommodate future transmission projects that would achieve one or more of the following objectives:

- provide access to renewable resource areas;
- interconnect with existing federal corridors or with proposed federal corridors identified under Energy Policy Act of 2005 section 368;
- preserve existing corridors that may be required for future facility upgrades

The state has undertaken the RETI is a statewide collaborative planning process intended to help facilitate and coordinate the planning and permitting of renewable energy-related transmission and generation projects needed to accommodate the state's renewable policy goals, support future energy policy, facilitate transmission corridor designation, and minimize the duplication of efforts. Energy Commission staff is actively participating in the RETI process to ensure that environmental issues and land use constraints are considered during the development of conceptual transmission plans to reach high priority CREZs. Commission staff is providing input to help ensure that any short-term, high priority transmission plans developed in RETI consider these issues prior to the development of project-specific CPCN applications, so that projects submitted to the CPUC have a greater likelihood of permitting success. In addition, the Energy Commission expects that longer-term conceptual transmission plans needed in the future will benefit from a pro-active analysis of routing options and potential



designation of one or more transmission corridors that will facilitate the eventual permitting of needed transmission projects.

The results of RETI will be considered in the Energy Commission's 2009 IEPR and STIP as part of a comprehensive evaluation of transmission investments needed to ensure reliability, relieve congestion, and meet future load growth and generation, including, but not limited to renewable resources, energy efficiency, and other demand reduction measures. This will include an evaluation of potential transmission corridors that may be needed to help achieve state policy objectives.

As the Associate Member of the Energy Commission's Siting Committee, I oversee the Energy Commission's transmission-related activities, which include participation in RETI, implementation of the transmission corridor designation process, and development of the Strategic Transmission Investment Plan.

*Integration:*

A major barrier to increasing the amount of renewables in California is how to integrate large amounts of variable resources, like wind and solar, into the system while maintaining grid stability, operation, and reliability. Although the governor has set a goal of meeting 20 percent of the RPS with biomass and increases in geothermal energy are expected, especially in the Imperial Valley, signed RPS contracts suggest that much of the RPS is expected to be met with wind and solar energy. Adding large amounts of wind and solar renewable energy to the electricity system can be problematic because the rest of the system needs to be able to adjust to larger amounts of unexpected drops and unexpected increases in energy production. Also, California's local reliability requirements call for load to be met primarily with local resources, and many renewable resources are located outside the state's 10 load centers.

In 2007, the Energy Commission released the *Intermittency Analysis Project Final Report*, which evaluated what is needed for the transmission system to accommodate generation from 33 percent renewables by 2020, assuming high levels of intermittent resources like wind. The study found that with significant expansion of transmission by 2020, it is feasible to operate the electricity system with 33 percent renewables. The Energy Commission's Public Interest Energy Research Program also funded a 2008 study that identified major issues associated with integrating large amounts of renewables into the system and made recommendations on how to facilitate that integration.

The Energy Commission is continuing its research and development efforts on emerging technologies that can help integrate renewables into the system and offset the impacts of intermittent renewables, such as energy storage to provide grid support, development of a "smart grid" to provide energy management options, technologies that provide real-time information to grid operators to allow them to adjust the system as needed quickly and effectively, and better resource forecasting techniques to allow grid operators to anticipate and respond to generation fluctuations that can affect grid stability. The Energy Commission's research and development is focused on identifying

emerging technologies with the greatest potential to support intermittent renewables, reducing the costs of those technologies, and accelerating their commercialization.

In addition, the Energy Commission is examining alternatives to utility-scale renewable generation, such as distributed renewables and renewable heating and cooling technologies. While these alternatives are not counted toward California's Renewable Portfolio Standard (RPS) goals, they do reduce overall electric demand which will reduce the amount of large-scale renewable generation needed to meet those goals. The Energy Commission has recommended focusing research and development efforts toward developing a targeted program to address barriers to the commercial success of emerging renewable heating and cooling technologies. The Energy Commission offers incentives for distributed generation wind turbines and fuel cells through the Emerging Renewables Program and distributed generation photovoltaics on new residential construction through the New Solar Homes Partnership.

The California ISO has initiated its Integration of Renewable Resources Program with the goal of supporting the integration of renewable resources into the California power grid to fulfill state policy objectives. The Energy Commission has committed to working with the California Independent System Operator on its Integration of Renewable Resources Program to ensure that grid impacts of increasing renewables penetration are appropriately identified and addressed.

*Contract delays/cancellations:*

The Energy Commission first identified the risk of under-procurement of renewable energy in the 2005 IEPR, noting that state experience with contracts for qualifying small power production facilities indicate that as many as one third of projects did not result in actual procurement. A 2006 Energy Commission study found that a minimum overall contract failure rate of 20-30 percent should generally be expected, and that much higher failure rates are supported by historical experience. The 2005 IEPR and 2006 IEPR update recommended that the CPUC should require investor-owned utilities to procure a prudent contract-risk margin of at least 30 percent above their annual Renewables Portfolio Standard targets.

The 2006 IEPR Update also recommended that FiTs— fixed, long-term, technology-specific prices for renewable – be further explored as a strategy to reduce the risk of contract delays or failure. The 2007 IEPR further recommended that the CPUC should immediately implement a feed-in tariff for all RPS-eligible renewable up to 20 megawatts in size, and that the Energy Commission and CPUC should collaborate to develop FiTs for larger projects incorporating features from the most successful European feed-in tariffs. Allowing developers to anticipate what price they will receive for their energy would provide the financial certainty needed to help ensure that renewable contracts result in actual deliveries of energy in a timely way.

As the presiding member of the Renewables Committee, I participated in a number of Energy Commission workshops in 2008 to discuss challenges, opportunities, and potential structures for FiTs in California. Based on information presented at the



workshops, the 2008 IEPR Update reiterated the recommendations in the 2007 IEPR that the CPUC should immediately implement a feed-in tariff program for all RPS-eligible facilities up to 20 megawatts in size, including a guaranteed purchase of energy by utilities, technology-specific prices based on generating costs, and a decline in those prices over time. The Energy Commission has offered to collaborate with the CPUC in developing such a program.

*Cost/rate impacts:*

There are concerns that an increasing penetration of renewables will be accompanied by increasing electricity costs and rates in California. The impact of renewables on costs and rates is extremely uncertain, and must be weighed against the costs of the state continuing its dependence on natural gas as a fuel for electricity generation, as well as the potential costs of catastrophic climate change. The continuing volatility of natural gas prices puts ratepayers at risk since utilities pass their fuel costs directly onto their customers. In addition, the future costs for fossil-fired generators to comply with greenhouse gas reduction goals and subsequent regulations are also uncertain.

The Energy Commission intends to examine the link between increased renewable energy generation and natural gas prices and demand, and will also work closely with the CPUC in their analysis of the cost impacts of a 33 percent renewable electricity target that is currently underway. The Energy Commission will also update its analysis of the generation costs of various renewable and non-renewable electricity sources to ensure that cost analyses are based on the most accurate information available.

*Environmental permitting:*

The Energy Commission is the Lead Agency under CEQA for thermal power plants over 50MW in size. This includes solar thermal power plants and geo-thermal power plants. This does not include solar photovoltaic, nor wind facilities. If the proposed power plant is on Federal land, such as Bureau of Land Management (BLM) or U.S. Forest Service, the Energy Commission remains the Lead Agency for CEQA but the federal agency is concurrently the Lead Agency under the National Environmental Policy Act (NEPA). The coordination between agencies and the sheer number of applications the BLM has received over the last few years has created a backlog of projects facing extensive processing times at BLM field offices.

The number and size of proposed large-scale renewable power plants in CA is causing an increasing concern among citizens and agencies about the lack of coordinated planning and siting of the facilities and their potential direct and cumulative environmental impact. Many of these new facilities are proposed in ecologically sensitive areas that could require significant habitat mitigation and restoration, which must be factored into the costs and development schedules of the projects.

The Energy Commission has entered into a Memorandum of Understanding with the BLM to provide joint NEPA and CEQA review and to streamline the environmental permitting process for large-scale solar plants in the California desert. In addition, the

Energy Commission is working closely with the BLM and the Department of Energy on a Solar Programmatic Environmental Impact Statement (PEIS). The Solar PEIS will help to identify broad environmental issues associated with developing large solar projects to help streamline the permitting process for individual projects. The BLM will apply the policies and strategies resulting from the Solar PEIS when deciding to issue rights-of-way for solar projects on BLM-managed land.

Governor Schwarzenegger's recent Executive Order (EO) S-14-08 establishes the Renewable Energy Action Team comprised of the Energy Commission and the Department of Fish and Game (DFG) to create a "one-stop" process for permitting renewable energy facilities, with the goal of cutting the application time for certain projects in half. This will be achieved through the creation of a special joint streamlining unit that will concurrently review permit applications filed at the state level and the designation of renewable energy development areas. The Executive Order also underscores California's commitment to conserving natural communities at the ecosystem scale through the use of the state's unique Natural Community Conservation Planning (NCCP) tool, coordinated by DFG and the Energy Commission, which will identify and provide for region-wide protection of plants, animals, and their habitats while allowing for compatible economic activities such as renewable energy generation. This will help reduce the time and uncertainty associated with building new renewable projects.

In addition to the Executive Order, the Energy Commission, DFG, U.S. Fish and Wildlife Service, and the BLM have signed a Memorandum of Understanding to establish a coordinated approach with our federal partners in the expedited permitting process. This coordinated approach will significantly reduce the time and expense for developing renewable energy on federally-owned California land, including the priority Mojave and Colorado Desert regions.

4. *The commission has stated at recent Energy Policy Report Update workshops that one of its major roles is to spearhead the transmission readiness process. Please explain the commission's role in the siting of transmission lines for renewable energy. What steps have you taken as the presiding member of the commission's Renewables Committee to expedite or facilitate siting of electricity transmission lines for renewable energy?*

As mentioned in the transmission section of my answer to the previous question, the State is facing some very daunting and complex challenges in our efforts to build an electricity grid for a low-carbon economy. Yet we must find solutions to these challenges because it is clear that transmission is our greatest barrier to significant expansion of renewable energy generation development in our state. Since joining the Energy Commission I have taken a very active role in a number of initiatives that I hope will serve to expedite the permitting and construction of well-planned, cost-effective transmission infrastructure in an environmentally-sensitive manner.



I have been very active in working with the rest of the administration and the Legislature in identifying options that the State may consider pursuing to overcome our transmission challenges through legislation to improve and advance our RPS program. The bifurcation of the planning and permitting of new transmission infrastructure, the multiple jurisdictional roles of the entities involved and the lack of ability to consider the regional and State-wide benefits of proposed projects represent significant barriers that I hope can be addressed in 2009.

As mentioned above Governor Schwarznegger's EO S-14-08 has provided clear direction as to the importance of renewables to the achievement of the State's environmental and economic goals. I have enjoyed working with the rest of the administration to define the Energy Commission's role in the implementation of the EO and our role in improving planning for the expansion of our State's renewable energy infrastructure. In particular, I am looking forward to the opportunity to work with our staff, other State and federal agencies and stakeholders to identify Renewable Energy Development Areas and develop the Desert Renewable Energy Conservation Plan. As mentioned above in my answer to question #2 these two new initiatives should allow the State to identify those areas where renewable energy development can be located so that it has the least amount of environmental impact while producing the greatest energy production benefit to the State. The developer and environmental protection certainty that should be gained from these processes have the potential to significantly improve the development timeline in California.

## **Climate Change**

The commission is involved with implementation of at least two major GHG laws: the Global Warming Solutions Act of 2006—AB 32 (Núñez), Chapter 488, Statutes of 2006—directs the California Air Resources Board (ARB) to adopt a greenhouse gas (GHG) cap on all major sources to reduce statewide emissions to 1990 levels by 2020. The ARB has proposed a "scoping plan" that outlines strategies such as energy efficiency and renewable energy as essential actions to meet the AB 32 goals; SB 1368 (Perata) Chapter 599 statutes of 2006 establishes a GHG emissions performance standard and requires the CEC to monitor and enforce the standard for municipal utilities.

The Energy Commission and the Public Utilities Commission (PUC) have undertaken a collaborative proceeding to develop and provide recommendations to ARB on measures and strategies for reducing GHG emissions in the electricity and natural gas sectors. In the commission's October 2008 draft of its final recommendations on GHG regulatory strategies, the commission states that it is "already aggressively pursuing the mandatory emission reduction measures."

5. *Please describe measures the commission is already taking to address GHG reduction. Has the CEC taken any specific enforceable steps to expand and increase energy efficiency and renewable energy beyond what it otherwise would*

*have done in the absence of AB 32's enactment? Has it made improvements to the Title 24 building standards and appliance efficiency standards since enactment of AB 32 in 2006?*

Since the creation of the Energy Commission efficiency standards and the promotion of efficiency and renewable energy generation has been the cornerstone of our mission. Over the last thirty-plus years, many of our core programs have had the effect of reducing state greenhouse gas emissions through the updates to our efficiency standards for buildings and appliances, our financial assistance and research programs and our new authorities, such as those created under AB 118 (2007). In particular, the Energy Commission's active pursuit of energy efficiency through building standards and appliance standards and statewide incentives for photovoltaics and other renewable generation prior to AB 32 created a strong policy foundation upon which a climate change program could be built in the electricity sector.

The passage of AB 32 and the subsequent adoption of the ARB Scoping Plan has only underscored the importance of efficiency and renewables to the future of the State's energy and climate solutions. Two of the leading measures that the Scoping Plan describes as critical components of our strategy to reduce greenhouse gas emissions levels back to 1990 levels by 2020 is the integration of all cost effective energy efficiency and achieving a 33% RPS goal by 2020. The Energy Commission clearly recognizes that we will play an ever increasing role in helping the ARB and the rest of the State in achieving these targets. But we also recognize that while we have made significant progress over the years in these areas we need to push even further and into new areas if we are to achieve our climate goals.

As a member of California's Climate Action Team, the Energy Commission has actively worked to develop aggressive climate change mitigation measures. The Energy Commission has been actively engaged in climate change initiatives for energy efficiency, renewables, and transportation.

Continued development work on the building and appliance standards and on the Energy Commission's New Solar Homes Partnership photovoltaics incentives program were "early actions" that were reported to the Legislature as directed by AB 32. The Energy Commission adopted new building energy efficiency standards in April 2008 for residential and nonresidential buildings; these standards, which will go into effect in August 2009, address not only newly constructed buildings but additions and specific alterations to existing buildings. On average, the new standards are expected to save 15% of the heating, cooling, water heating and lighting energy for residential buildings and about 7% for nonresidential buildings when compared to the 2005 version of the standards.

The Energy Commission adopted new appliance standards in December 2008. These new standards are the first step in response to direction from Assembly Member Huffman's AB 1109 (2007) that the Energy Commission adopt standards for general purpose lighting by December 31, 2008 and initiate a long-term program of standards



and other initiatives to reduce general purpose lighting energy usage by 50% for indoor residential lighting, 25% for indoor commercial lighting and 25% for outdoor lighting. The new standards took advantage of authority that was granted uniquely to California by federal law to adopt early two tiers of federal standards that phase out incandescent bulbs over the next 10 years. This adoption also established and upgraded standards for other lighting fixtures and residential swimming pools and spas, and established test procedures that are a necessary precursor to setting standards for battery chargers.

The other early action was the adoption of the New Solar Homes Partnership in December 2006. The New Solar Homes Partnership launched a major new effort by the Energy Commission to integrate energy efficiency and high-performance photovoltaic systems in a combined strategy for the first time. To qualify for incentives, participating builders must incorporate energy efficiency measures substantially better than required by the building energy efficiency standards. In addition, eligible photovoltaic systems must meet international component testing standards and be designed and installed to achieve high performance levels.

In December 2007 the Energy Commission responded to its mandate under SB 1 (2006) to establish eligibility criteria and conditions for incentives for all photovoltaic incentives programs conducted either by the Energy Commission, CPUC or POU's by establishing similar expectations for energy efficiency and high-performing photovoltaic systems in all programs carried out pursuant to SB 1. These actions are a precursor to a future where buildings with dramatically reduced carbon footprints are common due to attention to energy efficiency integrated with onsite photovoltaics and perhaps other renewable energy technologies.

The Energy Commission is also undertaking greenhouse gas reduction measures in the transportation sector, through programs and initiatives such as the fuel-efficient tire program. Vehicle fuel efficiency can vary up to about 10% as a result of tire rolling resistance, but currently there is no information available for consumers to assess the fuel efficiency of tires. Pursuant to AB 844 (Nation, 2003), the Energy Commission is developing a consumer information program for tire fuel efficiency, and will begin developing minimum tire efficiency standards later this year. Finally, the Alternative and Renewable Fuel and Vehicle Technology Program (AB 118), discussed further below, is a funding program with the express intent of transforming California's fuel and vehicle types to help attain the state's climate change policies.

But as mentioned above these programs will not be enough to allow us to reach our goals. The State will need a suite of new efficiency and renewables programs and policies if we are to reach our energy and climate goals.

In terms of efficiency we have highlighted through the IEPR, workshops and policy reports that as successful as our building and appliance standards have been the problem is less about new buildings now as about buildings that have already been built, many of them before the State had an energy efficiency code. Of the State's building stock, 70-percent of the residential buildings and over 5-billion square feet of

commercial space were built prior to the Energy Commission's first building efficiency standards. It is these buildings that represent the greatest opportunity for efficiency savings and GHG emissions reductions from the building sector. The State must develop new financing, promotional and regulatory programs to holistically address this challenging problem.

On December 17 the Energy Commission adopted the final regulations for the Home Energy Rating System (HERS). This rating system will be a uniform measurement protocol and decision support tool for home owners and contractors that are attempting to test the performance of homes and identify the most cost-effective and energy efficient retrofit options. This alone will offer a very powerful tool for homeowners and the retrofit industry. We must now use this tool most effectively by developing financing mechanisms and regulatory schemes that tier off of it so that we may be able to garner the stranded savings that reside in our building stock.

Another great area of opportunity in efficiency that we have not begun to tap is that of water efficiency. Building and retrofitting facilities and homes that will conserve water help us meet dual goals of conserving energy as well as preserving the increasingly scarce California water supply. As with energy we need a building rating system and the financing and regulatory programs to achieve the savings.

With renewables, we must find new ways to overcome the barriers to large-scale deployment of all forms of this clean, safe and cost-reliable generation. I have discussed many of the problems preventing us from reaching our RPS goals and solutions to those problems in my answers to questions above. But I would like to highlight one of the measures in particular, the adoption of a new contracting process to speed renewable energy development, the feed-in tariff. FITs would allow developers to anticipate what price they will receive for their energy before they begin to put their business plan together. This would provide the financial certainty needed to help ensure that renewable contracts result in actual deliveries of energy in a timely way. This policy tool could be an incredibly valuable addition to the State's energy strategies and as highlighted above in question #3 should be adopted and implemented in California in the near term.

6. *Has the commission collaborated with PUC and ARB on any of the activities it has already taken to ensure that these measures fit into AB 32's scoping plan?*

The Energy Commission has worked closely with both ARB and the CPUC to develop joint-agency supported and sponsored strategies. Many of those strategies are described in the Energy Commission/CPUC Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies, and some of them are mentioned in my response to Question 5 above. Here I will elaborate on a few of the measures that have required extensive interagency collaboration: the zero net energy building standards, more stringent appliance standards, and transportation sector strategies.



The 2007 Integrated Energy Policy Report recommended improvements in building standards to combine high levels of energy efficiency with onsite renewable generation so that all newly constructed buildings are “zero net energy” by 2020 (residential) and 2030 (commercial). The Energy Commission envisions a tiered approach to achieve zero net energy (ZNE) building standards. The base tier will be the traditional mandatory standards that increase in stringency with every 3-year code cycle. Additional tiers will be voluntary and represent a “reach” or “stretch” target for advanced levels of energy efficiency and onsite generation. We expect that many technologies in the reach tiers will become part of the baseline standards in succeeding cycles of the standards.

This vision has been accepted and supported by both the CPUC and ARB. The CPUC captures this vision as two of their four “Big Bold Strategies” in their “Long Term Energy Efficiency Strategic Plan.” They commit to collaborating with the Energy Commission over the coming decade and beyond and direct the IOUs to focus on program initiatives to facilitate the accomplishment of the zero net energy building standards vision. Likewise, ARB endorses the Energy Commission’s ZNE vision and strategy in the Scoping Plan. The Scoping Plan recognizes that getting to the ZNE vision requires the integration of high energy efficiency levels and onsite solar technologies, and points out that the Energy Commission’s New Solar Homes Partnership and SB 1 eligibility criteria establish precedent and a baseline for further efforts to achieve the ZNE vision.

ARB and the Energy Commission also have collaborated on Scoping Plan endorsement of increasingly stringent appliance standards as a major climate change mitigation strategy. The Scoping Plan recognizes the Energy Commission’s ongoing efforts to expand the state’s appliance standards to cover all devices using significant amounts of energy. New standards will cover consumer electronics, such as televisions, computer monitors, and plug-in, portable devices. These appliances represent an ever-increasing portion of the overall energy use in homes and commercial buildings. The Scoping Plan also recognizes and encourages the Energy Commission’s efforts to establish water efficiency standards for appliances as directed by recent legislation (AB 662, AB 1881 and AB 1560 (2007)).

As a final example, the Energy Commission is working closely with ARB to ensure that the Alternative and Renewable Fuel and Vehicle Technology Program (AB 118) complements the state’s mandatory climate change measures for the transportation sector, in particular the Low Carbon Fuel Standard and Pavley vehicle efficiency standards. For example, AB 118 funding evaluation criteria will use the same full fuel-cycle greenhouse gas emissions data that ARB will use to assess compliance with the Low Carbon Fuel Standard.

7. *Please describe the status of implementation of SB 1368 as it applies to municipal utilities. Have any utilities submitted their procurement plans to the commission for review? Are any municipal utilities violating the GHG emissions performance standard established under SB 1368?*

The Energy Commission's regulations pursuant to SB 1368 were approved by the Office of Administrative Law on October 16, 2007. These established an emissions performance standard of 1,100 lbs CO<sub>2</sub> per MWh, effective July 1, 2007, for long-term investments by municipal utilities in baseload generation. Investments subject to the standard include the construction or purchase of a power plant designed or intended for baseload use, five-year or longer contracts with such power plants, and capital investments in existing utility-owned plants that are intended to extend the life of the plant by five years or more, increase the rated capacity of the plant, or convert a non-baseload plant to baseload operation. Utilities may request exemptions from the standard based on reliability needs, the threat of significant financial harm, or because an investment is required as part of a contract or ownership agreement.

The regulations promulgated pursuant to SB 1368 do not require that utilities submit a procurement plan to the Energy Commission. Instead, the utilities submit compliance filings within ten days of making an investment subject to the performance standard. They also have the option of requesting an Energy Commission review of a prospective investment prior to committing to it. The Energy Commission may, on its own motion or at the request of a third party, conduct a complaint or investigation proceeding in the event that a utility undertakes a covered investment but fails to submit a compliance filing.

Since July 1, 2007, three compliance filings have been submitted to the Energy Commission, each for contracts with new renewable facilities; a fourth is anticipated within the next month. Several municipal utilities have contracted with renewable facilities of less than 10 MW in size; these investments do not require compliance filings. In addition, one utility-owned project has been held to comply with the standard in the course of the Energy Commission's facility siting process (a hybrid gas-solar facility owned by the City of Victorville); six other projects are currently in review. The five cases in which the standard applies are anticipated to be compliant (one project is a peaking unit). No utility has requested an exemption from the standard for an investment, nor requested a review of a prospective investment. Moreover, no utility has entered into a long-term contract for baseload energy during the past year, as most of them own sufficient resources to meet their baseload needs.

The Energy Commission also receives information from municipal utilities regarding procurement and resource planning pursuant to SB 1389 (2002; Bowen, Sher), the enabling legislation for the Integrated Energy Policy Report, and AB 380 (2005, Nuñez), which requires the Energy Commission to report upon the resource adequacy of public utilities to the Legislature on a biennial basis. Reviews of the utility resource plans submitted to the Energy Commission pursuant to SB 1389 and AB 380 did not indicate violation of the emissions performance standard by any utility.

### **Powerplant Siting**

Under the Warren-Alquist Act, the CEC oversees the siting of major new thermal powerplants. With enactment of AB 32 and SB 1368 (Perata—Chapter 598/Statutes of



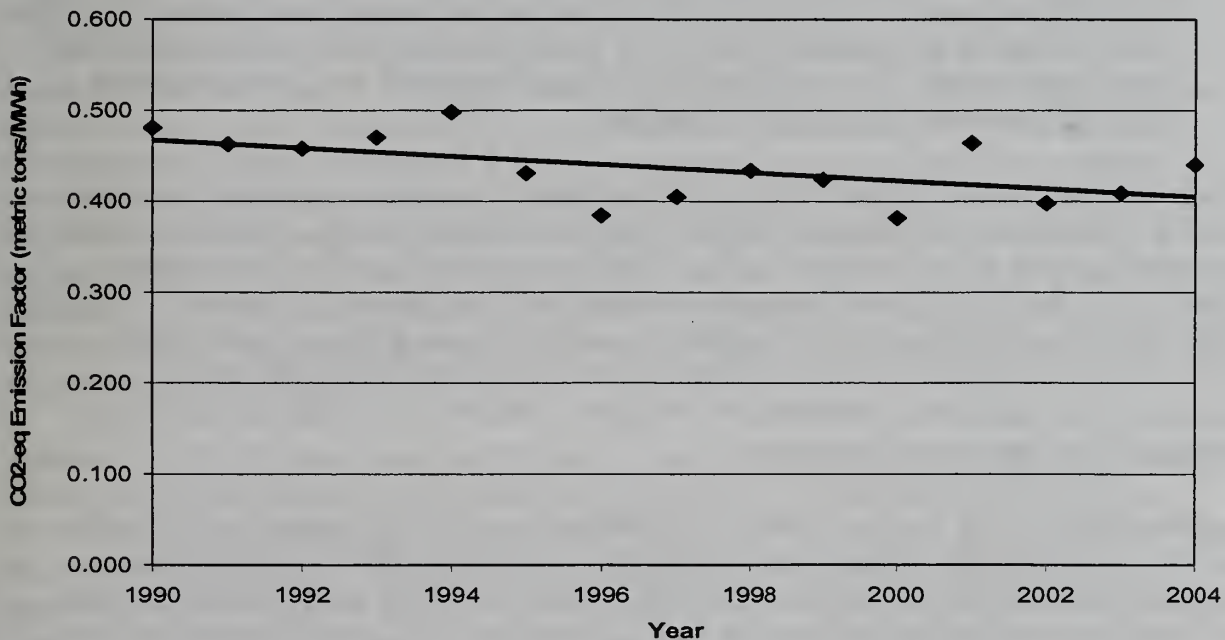
2006), the CEC has an increased role in reviewing the GHG pollution associated with electricity generation from powerplants.

8. Please describe the regulations, or other actions the CEC has adopted, to ensure GHG pollution is taken into account as part of its powerplant siting process. What effect, if any, will those regulations have on energy costs and utility bills?

For the past several years, the Energy Commission has evaluated and accounted for greenhouse gas emissions from power plants it reviews and certifies. In these analyses, the Energy Commission assesses an individual power plant's greenhouse gas emissions (both construction and operations) and has required, as a condition of certification, best management practices for construction, and that the project owner participate in a climate action registry or report on an annual basis the quantity of greenhouse gases emitted as a direct result of facility electricity production.

Additionally, because most power plants are interconnected to a utility grid, and in turn to the Western Electricity Coordinating Council, the Energy Commission more recently has begun to assess proposed projects in the context of the overall system. Figure 1 shows the trends in GHG emission rates for each MWh consumed in California. From 1990 to 2004, California electricity became almost 20 percent "cleaner" from a CO<sub>2</sub>-eq metric ton/MWh basis. This improvement was due in part to replacing dirtier, less efficient plant generation, despite electricity demand growth of almost 20 percent from 1990 to 2004.

GHG Emissions per Megawatt-hour in California (Figure1)



Source: ARB and CEC.

The trend line, a linear regression of the annual GHG emission rates, is a better representation of the statewide GHG emission rates than the actual number in any one year. GHG emissions and electricity consumption can vary from year to year due to variations in the availability of hydroelectric power,

*economic activity, and anomalous events such as the energy crisis of 2000-2001 and unusually warm weather conditions as occurred in 2004.*

On October 8, 2008, the Energy Commission approved a Greenhouse Gas Order Instituting Informational proceeding on the methods for satisfying California Environmental Quality Act (CEQA) requirements relating to greenhouse gas emission impacts of power plants. The Energy Commission directed the Siting Policy Committee to oversee the proceedings, hold workshops, report back to the full Energy Commission with a progress report on December 3, 2008, and develop a set of recommendations. Commissioner Jeffrey Bryon and I are the two members of the Siting Policy Committee responsibility for this proceeding. To date, we have held two publicly-noticed hearings to receive input from power plant developers, electric utilities, environmental organizations, environmental justice organizations, and the general public. The two workshops have been well attended, and the verbal and written comments thoughtful.

We plan to complete the proceeding in early 2009. The Siting Committee will publish its findings from the proceeding and suggest next steps to the Commission. I expect this issue to be a central part of current and future power plant siting cases. In addition, as discussed above, the work we are doing on this siting issue has broad policy implications which will be reflected in future iterations of the IEPR.

9. *A recent court decision invalidated the pollution credit rules used in the South Coast air basin to govern permitting of new powerplants and other facilities. Air quality officials and utilities state that this decision will impair siting of needed fossil fuel generation. Environmental groups contend it will help replace fossil fuel generation with new renewable energy. What are your views on the impacts of the court decision on powerplant siting in the South Coast basin? Are new fossil-fuel powerplants needed to supply the basin, or can needs be met through greater efficiency, renewable energy and the like?*

The court decision has brought the issuance of offsets to new power plants to a halt pending resolution of a number of CEQA and Clean Air Act issues. While the Energy Commission does not anticipate that the inability to construct planned new power generation in the South Coast area will cause reliability problems in Southern California in the next two summers, it does threaten to undermine our ability to meet certain environmental policy goals, including retirement or repowering of inefficient, once-through cooling facilities. Furthermore, reliability problems will surface in Southern California if this issue is not resolved.

Southern California is the region most vulnerable to supply shortages. In addition to long-term contract and utility-owned generation, Southern California utilities rely on electricity purchased from aging power plants under short-term contracts to maintain sufficient reserve margins and provide for local area reliability, specifically in the South Coast Basin. Despite significant amounts of energy efficiency and rooftop solar photovoltaic systems included in the Energy Commission's demand forecasts, some level of new or repowered natural gas generation will be needed in Southern California for four important reasons:



- to meet load growth after demand-side measures have been installed;
- to replace aging plants to improve efficiency of the generating fleet;
- to “firm up” the intermittency characteristics of renewable generation; and
- to replace power plants using ocean water in once-through cooling systems.

The development of new generating capacity to replace the aging power plants in the South Coast basin is critical to achieving environmental improvements, including reduced greenhouse gas (GHG) emissions from more efficient use of natural gas and reduced impacts on coastal and marine environments by moving away from once-through-cooling for power generation. The court rulings limiting the supply of air emissions credits in this region present new challenges for California to achieve these important environmental improvements while at the same time ensuring sufficient generating supplies and local electricity area reliability.

I believe that renewable resources will supply an increasing percentage of power used in the South Coast basin immediately and over the long term. However, this goal is not in direct conflict with the construction of a reasonable amount of new fossil generation in the south Coast Basin. Distributed solar systems such as rooftop photovoltaics can be placed directly in urban regions such as the greater Los Angeles area, but particularly during the May-October hot weather period they are unlikely to be the primary supply source for meeting electricity needs within the foreseeable future. Other renewable options are likely to be imported from outside of the South Coast basin, but they will need some fossil generation to firm them up as well as to ensure reliability, replace aging plants, and make up for reductions in imported coal power. Further, Some of the most promising solar possibilities are located in remote desert areas which could require a long transmission connection to the South Coast area, or expensive upgrades to existing lines and substations. Depending on the route and areas affected, long transmission lines can be extremely controversial and difficult to permit. The desert areas also have numerous fragile and sensitive resources such as threatened and endangered plants and animals, unique cultural sites warranting permanent protection, and stunning panoramic views of the landscape and surrounding mountains. As discussed in previous questions, I believe that development of large, new solar facilities in the desert and associated transmission is possible and desirable, but it will not happen overnight.

I believe that the future of the South Coast’s, and California’s, electricity supply needs to come from a much larger and ever increasing amount of renewable sources while simultaneously reducing the environmental impact from the fossil fueled generation that we continue to operate. To achieve this transition, the State must take a measured approach to our electricity system’s development, and I believe that the work that the Energy Commission is initiating to better describe this transition will help build public understanding and consensus about what – and how much – new fossil fuel infrastructure is needed. To further contribute to a shared understanding of this issue

the Energy Commission also plans to conduct a detailed needs assessment for the South Coast Basin in coordination with the California ISO.

## **Transportation Fuels and Technologies**

AB 118 (Núñez), Chapter 751, Statutes of 2007, authorizes the Energy Commission to spend approximately \$120 million per year over seven years to develop and deploy innovative technologies that transform California's fuel and vehicle types to help attain the state's climate change policies. The 2008 Integrated Energy Policy Report Update states that this program will deploy alternative and renewable fuels in the marketplace without adopting any preferred fuel or technology. The Energy Commission's Transportation Committee, of which you are a member, provides oversight and policy direction related to the planning, implementation, and evaluation of all transportation-related and fuel-related functions administered by the Energy Commission, including implementation of AB 118.

10. *As the associate commissioner to the commission's Transportation Committee, please describe some key steps the committee has taken to oversee the implementation of AB 118.*

The passage and implementation of AB 118 represents a significant opportunity for the State to begin the transformation of our transportation sector to a low-carbon future. The Energy Commission takes its responsibility under this statute very seriously and has dedicated significant resources to the development of the AB 118 Investment Plan and the accompanying regulations. In addition, we have engaged in a significant outreach effort to develop an idea of what the research, infrastructure, technology and workforce needs of the alternative transportation technology industry are.

We began our efforts by convening an Advisory Committee, as directed by legislation, to help develop the Investment Plan for AB 118 funds. The twenty-five Advisory Committee members represent environmental, public health, and labor organizations, fuel and technology consortia, academic institutions, consumer advocates, venture capitalists, and other state agencies. As the presiding member of the Transportation Committee, Commissioner Boyd presides over Advisory Committee meetings, and the two of us have participated actively in the Advisory Committee meetings held to date. The draft Investment Plan will be discussed with the Advisory Committee at a public meeting in January.

Parallel to developing the Investment Plan, the Energy Commission has drafted regulations to guide the implementation of AB 118, and Commissioner Boyd and I have convened several workshops to solicit public input on the regulations. The draft regulations, which were submitted to the Office of Administrative Law on December 2, include sustainability goals for the program, an elaboration of the statutory requirement that AB 118 funds not be used to support existing laws or regulations, details on the organization and role of the Advisory Committee, and the process for developing and updating the Investment Plan.



Following completion of the regulations and Energy Commission adoption of the Investment Plan, we plan on releasing solicitations for funding in the spring of 2009.

11. *Please provide some examples of policy direction you have provided to ensure effective planning and evaluation of this program.*

Given the many overlapping goals of AB 118, policy direction has been required to prioritize program objectives in order to guide the planning of the program. As you know, climate change is one of my highest priorities. The transportation sector accounts for almost forty percent of greenhouse gas emissions in California, and accelerating the transition to low-carbon alternative fuels and technologies is critical if we are to achieve our AB 32 goals. AB 118 funds should be used to reduce California's dependence on petroleum, reduce air and water pollution, and drive technological progress. Additionally, in light of current economic conditions, I believe that AB 118 funds can and should play an important role to play in stimulating California's economy and moving it in a cleaner direction. By supporting the construction of alternative-fuel infrastructure and clean vehicles, and training workers for the new low-carbon economy, AB 118 funds can provide both immediate and long-term economic benefits to the state. I have therefore directed that the Investment Plan be designed around the dual objectives of reducing greenhouse gas emissions and developing the state's economy, and that future program evaluations assess our progress toward achieving these goals.

While focusing on greenhouse gases and economic development, however, we cannot overlook the sustainability of the fuels and technologies that we support. In particular, AB 118 gives us the opportunity to support the emergence of an in-state biofuels industry, and it is critical that this industry develop in such a way as to protect California's and the planet's environment. With this in mind, AB 118 calls for the Energy Commission to develop sustainability goals to ensure that the funded projects do not adversely impact natural resources. Commissioner Boyd and I directed staff to form a Sustainability Working Group to participate in the development of the sustainability goals, and to provide input on sustainability criteria that will guide funding decisions. We will also propose devoting a portion of AB 118 funds to sustainability support activities such as developing Best Management Practices for purpose-grown energy crops and evaluating international sustainability certification programs.

12. *Have you called for certain measures so that the committee can evaluate the cost-effectiveness of this program? If so, please describe these measures.*

AB 109 (2008) amended AB 118 to require the Energy Commission to include an evaluation of the program in the IEPR. These biennial evaluations will include the expected benefits of funded projects in terms of greenhouse gas emissions reductions, air quality, reduction of petroleum use, and technology advancement. We plan to use this framework to analyze the cost-effectiveness of the program in terms of dollars spent per ton of CO<sub>2</sub> avoided. The program can thus be compared to other greenhouse gas reduction measures, both within the transportation sector and across the economy.

To conduct this cost-effectiveness analysis, we will need adequate information to estimate the greenhouse gas emission reductions achieved. Estimated greenhouse gas emission reductions associated with individual projects will be requested in funding solicitations, verified as appropriate, and used as criteria to evaluate applicants as well as in subsequent cost-effectiveness analyses. In addition, as stated in the draft regulations, the Energy Commission will develop reporting requirements and establish a database to monitor the greenhouse gas emissions and other environmental impacts of funded projects. The cost-effectiveness of the overall program will be assessed by aggregating the costs and expected impacts of all funded projects.

## **Energy Efficiency**

In its October 2008 draft of final recommendations on GHG regulatory strategies, the Energy Commission reaffirms its commitment to an aggressive approach to realize significant new reductions in energy consumption and GHG emissions, via energy efficiency measures. Under the Warren-Alquist Act, the Energy Commission is responsible for adoption and enforcement of state energy efficiency building standards and appliance standards. The Energy Commission has stated that its standards-setting authority and its development of new efficiency technologies are essential to attainment of this goal.

### *13. Should additional actions be taken to strengthen the state's efficiency standards?*

Absolutely. As a result of collaboration with our CPUC and ARB partners, there is wide recognition that energy efficiency will be California's most effective tool for achieving GHG emission reductions in the electricity and natural gas sectors, which are critical to accomplishment of climate change mitigation in the state. Further, there is recognition that aggressive advancement of the state's building and appliance standards are fundamental to California's climate change success as these standards are by far the most cost-effective means of accomplishing required energy efficiency improvements. The standards are a vehicle to deliver many other benefits to Californians, including lower energy bills, avoidance of the need to build power plants and the resulting environmental and societal impacts, increased comfort in buildings, better indoor air quality, lower water consumption and reduced construction defects.

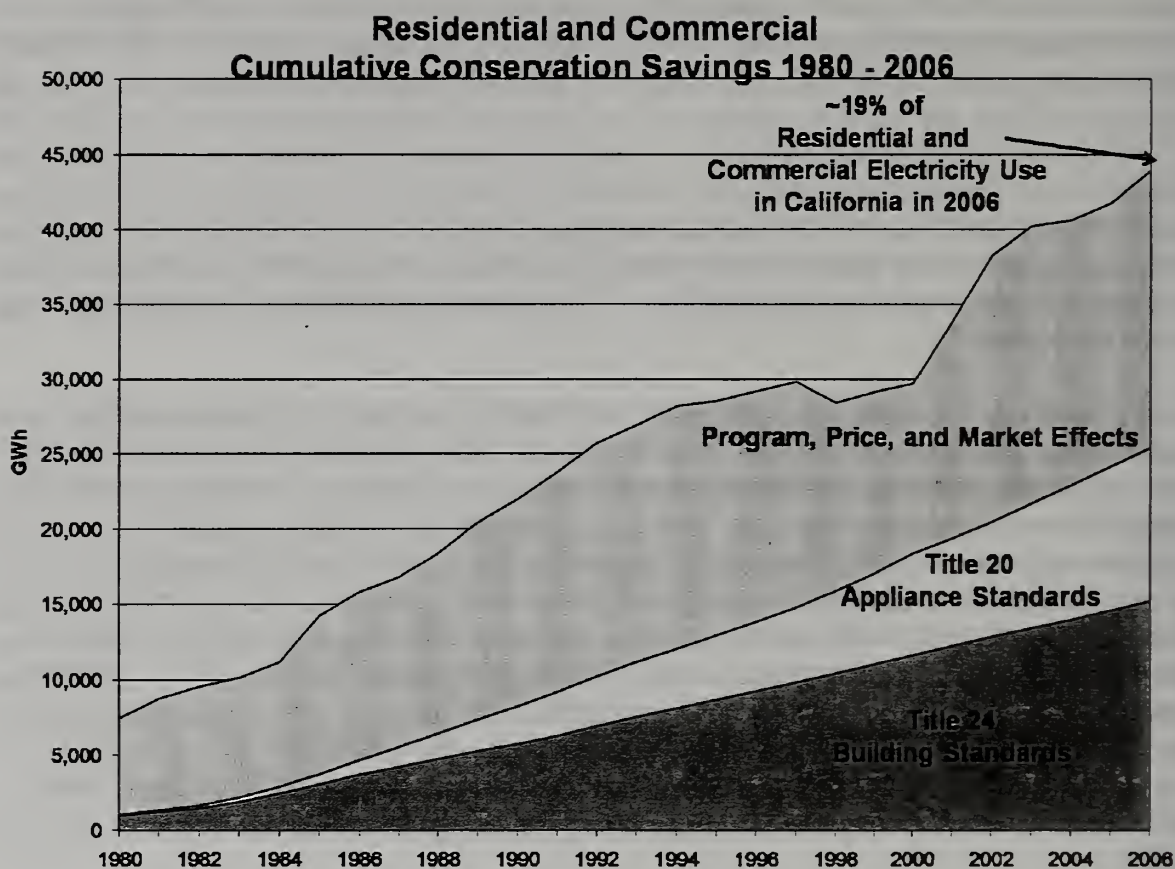
We have ambitious goals for continued expansion of building standards: driving to zero net energy in newly constructed buildings by 2020 for residential and 2030 for commercial. We are also pursuing an aggressive updating of appliance standards over the coming years focusing on lighting, consumer electronics, and water-using appliances in particular. These activities are strongly supported in the CPUC's Long-term Strategic Plan and ARB's AB 32 Scoping Plan. The Energy Commission has actively pursued additional budgetary resources to expand the scope and pace at which California's building and appliance standards are updated. We appreciate the support from the Legislature thus far in this endeavor and would welcome further support.



As noted above in my answer to question #5, two of the areas for most significant improvement regarding efficiency standards are existing buildings and water efficiency. I would direct you to my statements about each of these in question #5 above.

14. *Are there figures that show the actual energy savings being achieved by the energy efficient building standards? Should steps be taken to get a better sense of whether the standards are working fully and to ensure local governments enforce those standards?*

California's building and appliance efficiency standards have been a model for other state standards. California as a state uses 60 percent less electricity per capita than the nation as a whole. Much of our success is attributable to the energy efficiency work of the Energy Commission over the past 30 years. The following graph shows the cumulative energy savings that have been achieved since 1975 from the building standards, the appliance standards, utility and other energy efficiency programs, and price and market effects. The standards are a very cost-effective use of public funds to save energy and reduce greenhouse gases. The building standards in combination with the appliance standards are responsible for over half of the energy and peak savings achieved in California since 1975. The utility program portion of the other half results from the public goods charge funds (current annual budget of about \$750 million) that provide incentives to encourage energy efficiency improvements outside of the standards.



I am concerned that a standards program is incomplete without an active enforcement element. Historically, the Energy Commission has been underfunded to maintain an active presence in the field to ensure that standards are being complied with and enforced by local building departments (there are 530 independent building departments of the cities and counties around the state). In the FY 2007-08 budget cycle, the Energy Commission was authorized 3 permanent and 2 limited term positions to start up a dedicated compliance and enforcement unit. The enforcement staff has been visiting and working with local building departments to increase compliance with the standards. The Energy Commission also actively coordinates development of training and education materials with the Investor Owned Utilities to reach out to building departments and the many professionals and trades people who make up the building industry. The Energy Commission recently was successful in competing for a \$500,000 grant from the US Department of Energy to develop an online Learning Management System for building department personnel. The Energy Commission also works with the Contractors State License Board (CSLB) to provide information about standards compliance to licensed contractors and to obtain CSLB assistance in following up complaints against contractors who fail to comply with the standards. Legislation has been introduced in the past two sessions to provide direction to the CSLB to place a priority on addressing, in collaboration with the Energy Commission, the failure of contractors to pull building permits and comply with the energy standards,



as a means to achieve greenhouse gas emission reductions from the standards. Although Governor Schwarzenegger vetoed the multi-purpose AB 785 (2007) legislation, he urged the Legislature to reconsider legislation to add penalties for failure of licensed contractors to comply. Such legislation is sorely needed.

It is ironic that in an era when local governments are expected to play a role in reducing greenhouse gas emissions and are actively pursuing local ordinances that exceed mandatory energy efficiency and green building standards, many of the same local governments devote inadequate resources to enforcing state standards. We need to send a strong message to local governments that the state depends on their enforcement efforts to deliver the critical energy and climate change benefits resulting from building efficiency standards.

### **Public Interest Energy and Climate Research**

California state agencies spend several hundred million dollars per year on air pollution, energy, and climate related research. The University of California spends funds for these purposes as well. The Federal Department of Energy also provides federal funding for public interest energy-related research, development, and demonstration (RD&D) in the state.

The Energy Commission itself oversees the Public Interest Energy Research Program and the Natural Gas PIER Program. As noted above, it also oversees a portion of the AB 118 program. Last year, the Legislature passed two measures to establish a more coordinated and effective energy, clean air, and climate research program. The CEC opposed these measures.

15. *How do you evaluate whether California's various energy and climate research programs are sufficiently well-coordinated to provide the greatest benefit to taxpayers and the environment?*

The Energy Commission has undertaken a number of activities to ensure that particular RD&D projects help implement energy policy such as Senate Bill 1250 (2006), the multi-agency Energy Action Plan, the Energy Commission's Integrated Energy Policy Report, the "loading order" of new energy resources, and other policy sources. These activities are described below. In addition, the Energy Commission participates in the R&D subgroup of the Climate Action Team, which is designed to help streamline research coordination, collaboration, and co-funding of climate change and energy-related GHG reduction research and programs. In particular, Energy Commissioner Jim Boyd, former Executive Director of the ARB, leads this effort for all state agencies. The R&D chapter of the next climate Action Team Report is due to be released in January.

Because I am not a member of the Research and Development Committee, I do not have personal involvement in these coordination efforts. However, I do believe that the

Energy Commission should do more to improve transparency and coordination in the PIER Program. Specifically, I would like to see the Energy Commission convene its advisory committee in order to have a public dialogue about the effectiveness and future direction of the program. In addition, I believe it is very important for the Commission to develop and approve a strategic plan for the PIER Program in order to be better able to communicate our strategic objectives and assess our effectiveness in meeting these objectives. Publishing a strategic plan for PIER would also represent a significant step forward in reducing the potential for duplication with other public or private research spending.

Since its inception, the Energy Commission's PIER program has followed the loading order – first energy efficiency, then renewables, then clean advanced generation, plus transmission and distribution improvements – for directing its energy RD&D. Of the \$601 million in PIER R&D projects funded between 1999-2008, almost \$500 million (83 percent) clearly has benefitted taxpayers in implementing the energy loading order policy, as shown by the following principal categories of PIER research called for in SB 1250:

**PIER Electric & NG Funds by SB1250 Code (\$601.53 MM)**

<b>Program Title</b>	<b>Dollar Amount</b>	<b>Percentage</b>
Transportation	\$ 13.1 MM	2.2 %
Energy Efficiency and Demand Response	\$ 181.6 MM	30.2 %
Renewables	\$148 MM	24.6 %
Advanced Electricity Generation	\$97.8 MM	16.3 %
Transmission and Distribution	\$71.9 MM	11.9 %
Climate/ Environmental	\$55.8 MM	9.3 %
Program Administration	\$33.33 MM	5.5 %

To help the Energy Commission avoid redundant energy and climate change research, the Energy Commission actively solicits and participates in committees, working groups, collaborative partnerships, stakeholder organizations, and universities to discuss, obtain suggestions, and in some cases, receive funding for our research programs. For example, the Energy Commission uses research program advisory committees to identify prospective new projects, to prevent wasteful duplication and to ensure beneficial projects are considered. Advisory committees for transmission, distribution and smart grid research are comprised of high-level representatives of the Department of Energy, IOUs, renewable resource groups, CPUC, CA ISO, out of state power producers such as Bonneville Power Authority and the University of California. These processes help the Energy Commission ensure we select the best research opportunities that also meet the loading order and other legislative goals.



To ensure that state policy and goals are implemented through trailblazing energy technology research, the Energy Commission's RD&D program reports to an RD&D Committee, consisting of two of the five Energy Commissioners. They provide detailed policy guidance for the program, and new, beneficial and non-duplicative projects are approved by the full Energy Commission before implementation.

RD&D staff and management are also active in committees, working groups, collaborative partnerships, stakeholder organizations, and university undertakings involving RD&D either as participants or leaders. These forums enable them to discuss, obtain suggestions, and in some cases, receive funding for our research programs. Additionally, participation in these various working groups and collaboratives allow us the opportunity to keep abreast of current activities that others are engaging in, and to inform others our activities. Ongoing communication with entities involved in energy and climate change programs allows us ample opportunity to evaluate how well we are coordinating and leveraging our efforts and the ratepayers' money with the efforts of others to ensure the greatest benefit. Some examples of this effort are:

- The Energy Commission created the California Climate Change Center, a research institution based at several universities and research institutions in California to provide additional assurance that duplicative climate change research efforts does not occur.
- Through the University of California Office of the President's California Institute for Energy and the Environment, UC-system research is sought, identified and coordinated with related PIER energy and environmental research.
- Active membership in the Association of State Energy Research and Technology Transfer Institute (ASERTTI).
- The Energy Commission, CPUC, and the IOUs participate in the Emerging Technologies Coordinating Council (ETCC), a collaborative forum for the Energy Commission and others to exchange information on RD&D opportunities and to coordinate introduction to the marketplace new emerging technologies.
- Participating in industry technical memberships with organizations like the Electric Power Research Institute (EPRI) and the Emerging Technology Coordinating Council.
- Hosting multi-agency sponsored climate change conferences.
- Coordinating with the Department of Water Resources during the development of the State Water Plan.
- Participating on CARBs Climate Change Review Committee.
- Developing an Energy Commission long-term climate change research plan.
- Evaluating researchers and resources at the University of California (UC) for their potential contribution to cutting edge research.
- Working directly with individual companies to further develop promising new technologies with patents, etc., and negotiate for the lowest cost for the state.
- Sponsorship of many conferences and workshops on specific technology areas to collaborate and coordinate research efforts.

Through many such mechanisms we are able to accomplish and evaluate how well our research efforts are coordinated with others, and learn about new research opportunities to address the many energy and climate change challenges that the State of California faces.

16. *What, if any, improvements would you suggest to ensure that state research programs are better coordinated among agencies, the University of California, and the federal government to avoid duplication of effort?*

As noted above, the state already provides, and the Energy Commission takes part in, research coordination through:

1. The Climate Action Team's Research Subgroup
2. Participation of state agencies on federal research committees
3. Participation of federal experts on state research committees
4. State funding and participation in university research centers
5. University researchers providing expertise to state research
6. Joint state agency and utility research committees
7. Interagency research agreements

The Energy Commission's RD&D program follows the research guidance of SB 1250 and other legislation, as well as the energy priorities established by the Energy Commission's IEPR and the statewide interagency Energy Action Plan. The Energy Commission also receives feedback and direction from the PIER Advisory Board, comprised of California legislators, state and federal agencies, national laboratories, universities, and experts in the energy research community. We are scheduling the next meeting of the Board for the January-February 2009 timeframe. During the Board's last meeting, Energy Commission staff reviewed the ongoing research efforts and discussed research priorities. In the future, I believe active participation in the Board's activities and guidance by all the members would help ensure that PIER research is coordinated with other efforts in the state and the nation. I also believe the Energy Commission should enable the Board to meet more frequently as research needs change, to gain additional policy guidance and ensure coordination.

I believe the Energy Commission must rely more heavily on competitive solicitations to identify and fund technology-advancing projects. As proposals for similar research are put forward, the most promising applications can be selected and duplicative research winnowed out. In addition, I believe that the Energy Commission should increase the funding allotments for which competitors would bid. This should increase the number of competitors and help eliminate duplicative research.

As noted in Question 15, the Energy Commission has supported energy research centers at California's universities and Energy Commission staff sits on the Boards of Directors of some of these centers. This not only gives us access to the types of research the faculty is undertaking, but the faculty also provides us with information



about work conducted by other universities and researchers. I believe that the Energy Commission should increase its participation in these university research centers and support the creation and operation of more.

Finally, I think each agency should prepare updated and multi-year strategic research plans and the Climate Action team should endorse a statewide research plan that ensures non-duplication and identifies complementary research areas for state agencies, universities and federal government. I would not want to see unnecessary layers of bureaucracy added in the name of coordination that would have the effect of slowing down the process and removing the flexibility necessary to react to topical issues and rapidly developing technologies.

### **PIER Program and the Use of Contracts**

The Public Interest Energy Research (PIER) Program was created in 1996 when the state Legislature enacted AB 1890 (Brulte), Chapter 854, Statutes of 1996, California's electric utility restructuring legislation. This law requires that funds be collected annually from the three investor-owned electric utilities and deposited in the Public Interest Energy Research and Development Account, to be invested by the Energy Commission in RD&D. Passage of this law shifted administration of public interest RD&D from California's investor-owned utilities to state government—a major change intended to ensure the continuation of public interest energy RD&D.

In February 2008 the Assembly Committee on Utilities and Commerce held a special oversight hearing on the Energy Commission's use of outside contracts for various Energy Commission services. A key focus of this hearing was the PIER program and the contracts the Energy Commission uses for the administration of PIER. One of the committee's chief concerns was that the Energy Commission was paying for high-priced consultants for services that could be or are already performed by civil service equivalents, who are more cost-effective to the state.

17. *What steps has the commission taken since the oversight hearing to address the potential redundancy of outside contracts for the administration of the PIER program?*

Since the oversight hearing, only 2 of the 17 consultants still have contracts with the Energy Commission's R&D Division, a reduction of 89 percent. Two additional high level staff are from the University of California system through an Inter-Jurisdictional Exchange (IJE) and are thus considered to be Energy Commission staff; one of those IJE arrangements will end within the next six months (Dr. Martha Krebs) whose role is as the Chief Science Advisor, and the other in 2010, Dr. Larry Meyer, who is the lead scientist in the West Carbon Sequestration project. Neither IJE will be renewed. The remaining two consultants will continue to provide specific and specialized technical and limited research activities for a period of no more than two years.

18. *What administrative protocols do you believe should be put in place to ensure the long-term efficient use of state resources for the PIER program?*

In April 2009 the Energy Commission contracted with the Department of Finance (DOF) to audit the operation of the PIER program, provide recommendations for improvement, issue a report on any deficiencies, and recommend administrative actions that would help the program operate more efficiently and effectively. The Energy Commission expects the draft of the DOF audit in late December, and the final audit will be completed in late January. I expect this audit to identify administrative protocols that the Energy Commission will implement to ensure the long-term efficient use of state resources for the PIER program.

## Goals and Governance

1. *What were your most significant accomplishments during your first term as a member of SBE? What do you hope to accomplish during your second term? How will you measure your success?*

I have served on the SBE since September of 2006, having been appointed to complete the unexpired term of a former member. Coming onto the SBE, I set some specific personal goals, which were to diligently and thoroughly review issues that came before the Board, and to shape my input and base my decisions on policy and regulation development in a manner that encompassed more broadly the interests of all students. Further, I pledged to examine, in a truthful and honest manner, the real-world outcomes and impacts that would result from those deliberations and decisions. To that end, I feel that I have lived up to my personal commitments, and feel that I have been an effective member of the SBE.

As I look forward to my second term, I hope to become a more effective voice for discussing policy and regulatory issues in terms of their practical impact on schools, teachers, and students. My goals include shaping the dialog and discussion in a manner that leads to the development of curriculum and programs that are more engaging and relevant to all students. My success will be measured by the degree to which I can effectively and positively play a role in that regard.

2. *The Governor's Commission on Education Excellence released a report recently which described education governance as a "crazy quilt." How do you view your role and responsibilities within this structure?*

I regard my role and responsibilities on the Board quite simply – to do my best to make the most informed, thoughtful decisions possible on matters that come before us for our consideration. I am troubled at times by the lack of effective communication between the Board and other policy stakeholders, and believe that we need to do more to initiate those discussions. I hope that our upcoming Board retreat will give us an opportunity to set some specific goals to create those liaisons.

3. *As a board member, what training have you received regarding conflicts of interest? From whom do you seek advice on potential conflicts? Specifically, who has provided you with training on potential conflicts with respect to career technical education issues?*

Shortly after my initial appointment to the Board, I completed the ethics training course offered through the Attorney General's Office. In addition, I consulted with then-Board Counsel Paul Seave and explained the parameters of my employment with the California Agricultural Teachers' Association, and sought his advice and expertise relative to any potential issues. I have been very diligent in complying with both the intent and letter of the law in this regard, and will continue to do so in the future.

**Senate Rules Committee**

JUL 24 2008

**Appointments**



4. *Given that you are the executive director of the California Agricultural Teachers' Association and a recognized advocate for career and technical education, when, if ever, do you believe it is appropriate to recuse yourself from voting on an item pending before the board? Have you ever done so?*

I believe it is proper to recuse myself from deliberating and voting on an item any time there is a question of the personal or fiduciary impact of that decision on my status as executive director of the CATA. Specifically, I would clearly recuse myself if the Board considered agenda items that directly impacted the allocation of resources for CTE or Agricultural Education in a manner that held any potential benefit to my organization or to me personally. To date, that has not occurred. I would most happily recuse myself if the California State Legislature, the Governor, or any other entity granted the SBE such an opportunity in the future.

### **Accountability**

5. *Current K-12 education is criticized for putting too much pressure on schools to "teach to the test", referring to achievement tests. How do you, as a board member, evaluate our testing policy and take steps to modify it, if necessary? How do you balance the need to measure achievement against the danger of an over-emphasis on test results crowding out other objectives? How do you determine how much testing is too much?*

In my tenure on the Board, I have approached this issue with my earlier-stated goal of basing my decisions on the real-world impact on schools, teachers, and students. It's not always an easy call, and occasionally my viewpoint has not been shared by a majority of the Board. I clearly understand the need for assessing the progress of our schools and students, but have been hesitant to enact policies that, in my opinion, further isolate and frustrate the very populations that need the most assistance in making meaningful gains. Too many of our students view school and education as an endless stream of "memorize, test, and forget" activities that have no relevant connection to their future. I think that's an unfortunate situation, and I believe that we must continue to refine and modify our policies so that there is clear understanding of the purpose and goals of our assessment program.



6. *How do respond to the criticism that current test scores are not a true reflection of achievement in California because the lowest performing students have already dropped out and are not being tested?*

There is certainly some validity to that argument, but it's also important to note that a significant number of dropouts are not "failing" in school, just bored with curriculum that they view as irrelevant to their lives. It would be a mistake to think that all dropouts are incapable of achieving satisfactory test scores. However, there is a general recognition that there is a perverse "incentive" for districts to have the lowest-achieving and most disinterested students not be included in the general population of students taking part in statewide testing. There have been recent statutory revisions enacted to address this issue, and they will hopefully create a more accurate picture of true student achievement.

7. *The board recently raised test score targets so that specific subgroups of students, including those with the highest dropout rates, will be expected to improve their performance even more than in the past. Given that the dropout rate in urban districts is estimated between 50-70 percent, how do you determine when or if the targets you are raising are increasing or decreasing the number of dropouts?*

The setting of consistent goals establishes the expectation that all students in this state are valued, and that they all deserve access to the same high levels of inspired instruction, educational leadership, vibrant curriculum, safe and modern facilities, and other educational support resources necessary to succeed. In too many cases, students feel disconnected from the educational programs, practices, and curricula offered on their campuses, and simply walk away from what they view as an unresponsive educational system. We certainly need to examine the impact that achieving these higher goals has on students, but more importantly we need to work to ensure that adequate and equitable resources are in place to help them achieve success.

8. *The Legislative Analyst recently released a report suggesting that federal and state accountability standards be consolidated so that districts understand more clearly what is expected of them. Do you agree with this recommendation? If so, what are you doing to implement it?*

The Legislative Analysts' report contained many recommendations that deserve more attention and discussion. It has been generally recognized that neither measurement, federal or state, is perfect in design, and it may very well be possible to develop a more clearly understandable process in the future. We should continue to evaluate the LAO proposals and determine if there are ways that we can improve given the limitations of the federal act.

## No Child Left Behind

9. *Some districts have been sanctioned for their failure to reach specific "No Child Left Behind" goals. In addition, the state board recently increased API growth targets for underperforming subgroups. It is not likely that state budget funding will increase for these districts given the budget situation. As you make decisions that affect school districts, how do you factor in the problems that district face in a difficult budget year?*

The schools that were sanctioned for failing to reach their goals were differentiated by the degree to which they had made substantial ongoing progress and other mitigating factors, resulting in different intervention levels. The districts needing the highest level of intervention and assistance were designated to receive proportionately increased resources available from the federal government. These resources had been previously allocated by the federal government for this purpose, and are not affected by the ongoing state budget discussions. Hopefully these resources will be made available to districts in the near future.

10. *The Board has responsibility for standards and curriculum. It is estimated that all districts will be in program improvement by 2013-14. What is the long-term strategy for developing standards and curriculum for students that address program improvement issues?*

The circumstance cited above is a result of California establishing high goals for all of its students. Other states chose to establish minimum standards, and are now in full compliance with federal guidelines. Our goals are laudable, and as we move forward, we need to balance our desire to maintain high standards with the need to engage all students in rich, diverse curriculum that they see as relevant to their lives and future. Our efforts to improve the academic performance of our students must utilize more diverse strategies and practices if we hope to attain our lofty goals.

11. *Do you believe that the board is doing everything within its power to assist districts with meeting the requirement of NCLB? If so, what specific steps has the board taken?*

The board has approved the expenditure of additional funds for districts struggling to provide adequate facilities, materials, and experienced teachers to meet the requirements of NCLB. We have approved the delivery of targeted assistance to districts identified in the lowest two deciles on the API. We continue to search for ways to provide support and assistance to these districts. I believe the board clearly recognizes the many challenges faced by these struggling districts and communities.

## California High School Exit Exam

*12. There has been extensive discussion on options for students with disabilities who are unable to pass the exit exam. Currently, there are legislative proposals addressing the issue. However, in the meantime many students with disabilities in the class of 2008 are left in limbo. What course of action would you recommend for those students, and what course of action would you propose as a long-term solution?*

I would recommend that those students continue to work with their districts and schools to obtain the support and assistance needed to pass the exam. The board has allocated resources for this purpose as part of a settlement agreement negotiated with advocates for these students. Over the long haul, we need to ensure that students with disabilities have appropriate instruction, assistance, and resources identified in their individual education plans at their disposal as they prepare for and take the exit exam.

*13. Federal law requires an alternative assessment be provided for students with disabilities but the Board has never authorized an alternative. The Board's response has been to allow local districts to seek a waiver from the test for affected students. How should the Board accommodate students who wish to take the test rather than waive the testing requirement? Should an alternative assessment be developed for them?*

The idea of developing an alternative assessment is very appealing at first blush, but given the resources needed to develop the type of assessment tools that are educationally sound, while properly addressing the specific challenges of each student, is an overwhelming task. We do need to continue to explore ways to accommodate the students who desire to complete the exam, and provide them with the assistance they need to succeed.



## English Learners

14. *Concerns have been raised that the state's Reading Language Arts and English Language Development framework is not designed in a manner to ensure that a student will achieve sufficient proficiency in English to meet academic standards and pass CAHSEE. How do you respond to this criticism? What, if any, changes would you recommend to ensure each student has the instructional materials necessary to attain reading and English proficiency?*

To the extent that the content standards are aligned to both the frameworks and CAHSEE, the first point may not be as valid as the second. The bigger issue, beyond framework design, is whether all of the instructional support, professional development, and supplemental support programs are adequately provided in a manner that's effective. This is one area of education that the Board needs to continue to work on to ensure that the best available instructional materials, as well as the most effective instructional practices, are used for English and reading development.

15. *Should the board take any actions specific to English learners in an effort to narrow the achievement gap?*

The board has responded to the need to provide additional resources, including new intervention programs and supplemental materials, aimed at improving vocabulary and writing instruction. Development of new criteria used to evaluate the effectiveness of English learner support materials and struggling reader materials has resulted in improved instruction, and is available for teachers and schools to use as needed. Everyone involved in education, especially the board, must continue to examine the factors that contribute to this achievement gap, and seek ways to provide resources and educational opportunities that seek to fully engage all students.

16. *SBE recently reestablished the English Learners Advisory Committee (ELAC). What role will ELAC play in deciding board policy? What is the goal of the committee? Will you be involved with ELAC? If so, how?*

I strongly supported the reestablishment of the English Learners Advisory Committee, and look forward to engaging in discussions and policy development activities brought forth as recommendations by the committee. I view this as an important step in providing all members of the board with the necessary information and advice needed to make informed policy decisions. I am not currently designated as a liaison of the board to the committee, but look forward to working with members of the committee and with my peers on the board to address issues identified by the committee.



## Goals and Governance

The State Board of Education (SBE) is responsible for setting policy and adopting rules and regulations for governing standards, curriculum, instructional materials, assessment, and accountability. The board is also responsible for approving waivers of certain provisions of the Education Code, reviewing district reorganization plans, implementing federal programs, and adopting regulations to implement legislation. Some of these duties overlap with those of the Superintendent of Public Instruction.

**1. *What were your most significant accomplishments during your first term as a member of SBE? What do you hope to accomplish during your second term? How will you measure your success?***

As the principal of a large, urban, high-poverty school in Los Angeles that serves 2,200 PreK-12<sup>th</sup> grade students, I have been able to use my knowledge and skills to achieve significant accomplishments during my first term as a member of the SBE. As the Board liaison to the Special Education Commission, liaison to the Nutrition Advisory Council and liaison to the Curriculum Commission on instructional materials related to English learners, I'm proud to have accomplished the following:

- Approval of the California Modified Assessment (CMA) for students with disabilities. The assessment was available in the elementary grades in spring, 2008 and will be available to secondary grades beginning spring 2009.
- Adoption of regulations applicable to special education teachers in secondary schools so they can be deemed "highly qualified" under No Child Left Behind. Teachers who possess a special education credential but not a single subject credential will be provided with 32-hour training and/or coursework so they can provide core subject instruction to students with disabilities.
- Participation in the Special Education Commission to formalize a set of recommendations to the SBE and the legislature related to CAHSEE.
- Approval of four Special Education Planning Areas (SELPA) pilots that would include state-authorized charter schools in the coordination of special education services to assure accountability and effectiveness.
- Adoption of the new health education standards after intensive participation in the Nutrition Advisory Council.
- Approval of regulations for SB12/965 which delineate policies related to the sale of food and beverages on campus to assure nutritious meals for all students.
- Revision of Title 5 regulations related to instructional materials adoption to improve transparency, public engagement, communication and availability of digital texts.
- Monitoring the new adoption of English/Language Arts programs to assure the integration of English Language Arts standards (ELA) and the English Language Development standards (ELD) to meet the needs of all students including English learners.
- Participation in the revival of the English Learners Advisory Committee.
- Adoption of professional training criteria (AB 472) to include strategies for English learners.

**Senate Rules Committee**

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**Appointments**

- Participation in the Commission for Teacher Credentialing in the initial phase of SB 1209 implementation, specifically in the streamlining of BCLAD and foreign language certification.
- Participation in the review of California's new Foreign/World language standards to make sure that California remains globally competitive.

If confirmed for a second term, I hope to accomplish the following:

- Adopt quality ELA/ELD curricular materials with electronic resources at an affordable price. (Evidence – material availability and costs.)
- Establish a process for review and update of the state academic content standards to coincide with the existing process for the revision of curriculum frameworks and the adoption of instructional materials. Consider the integration of global literacy standards across core areas so California students will be college prepared and globally competent. (Evidence – standards updates.)
- Assume a leadership role in the adoption of Foreign/World Language standards, framework and instructional materials. (Evidence – availability of instructional materials.)
- Explore ways of reducing the testing burden on students and make the assessment more relevant to what they are actually doing in class especially in high schools. (Evidence - assessment system and timeline.)
- Develop and adopt a methodology for generating a measurement of academic performance using unique student identifiers (CALPADs) and develop a vertically scaled assessment system in which annual academic growth can provide a more accurate measure of both school's and student's academic achievement growth over time.(Evidence – an improved data system.)
- Study needs of English learners and potential economic advantages that language diversity brings to California and advocate for the study of world languages that could be highly valued in the global economy. (Evidence – students with access to world language instruction.)
- Examine new ways of accurately assessing students with disabilities including STAR, CMA, and CAHSEE to ensure that the test instruments are universally accessible. (Evidence – available modifications and other assessment tools.)
- Expand professional development for teachers of students with disabilities to include intensive training on autism. (Evidence – teachers have access to training.)
- Change the perception that SBE favors charters over traditional public schools by leading honest discussions on shared mission, Prop 39 struggles, enrollment and funding issues.(Evidence – partnership between charter and non-charter schools.)

**2. *The Governor's Commission on Education Excellence released a report recently which described education governance as a "crazy quilt." How do you view your role and responsibilities within this structure?***

I came to the United States of America because it values diversity of ideas. For democracy to thrive there must be divergent voices, shared authority and accountability. Thus, regardless of the governance structure, I'm responsible for helping all students succeed by developing and adopting policies that will accomplish the mission. To close the achievement gap, there is plenty of work to be done by all parties (the Governor, the



Secretary of Education, the Legislature, the Superintendent of Public Instruction, the professional organizations, the students and families, and the public, etc.) and my role is to work with every entity.

**3. *As a board member, what training have you received regarding conflicts of interest? From whom do you seek advice on potential conflicts? Specifically, who has provided you with training on potential conflicts with respect to charter school issues?***

As an appointed public official, I hold myself out to the highest ethical standards. To become familiar with the laws related to ethical conduct, I completed the online interactive ethics training developed jointly by the Attorney General and the Fair Political Practices Commission (April 2007) (AG/FPPC). In addition, Mr. Paul Seave, the former chief counsel for the state board, provided legal advice on conflicts issues whenever I requested this advice. During the recent period when the state board did not have a chief counsel, legal counsel for the California Department of Education (CDE) advised board members on when to disclose a conflict of interest and when we needed to recuse ourselves from participating in a decision with respect to charter school issues., I have always followed the advice of counsel when advised to recuse myself due to a conflict of interest. As you know, we now have a newly-appointed chief counsel, Donna Neville, and she is presently working on specialized ethics training for state board members.

I also serve as a Commissioner on the Los Angeles City Commission for Children, Youth and Families. The Los Angeles City Ethics Commission is highly-regarded for its proactive approach to ethics training for public officials, and through that commission I received a full-day of ethics training and a full-day of ethics training by the Los Angeles City Attorney's Office. In addition, I have, in the past 4 years, completed the biennial AG/FPPC course and received certification. I have also attended ethics workshops sponsored by the National Association of Charter Authorizers and the National Alliance of Public Charter Schools. I have also worked closely with legal counsel for the Los Angeles Unified School District (LAUSD) to ensure that I do not have a conflict of interest when I vote on a waiver request by LAUSD.

I believe that my considerable training in this area has given me a strong familiarity with conflict of interest laws. As always, I will continue to seek the advice of board counsel when there are matters pending before the board that might present a potential conflict for me.

**4. *Given that you are the principal of a charter school, when, if ever, do you believe it is appropriate to recuse yourself from voting on a charter school item pending before the board? Have you ever done so? Specifically, when the board approved regulations on the use of district facilities for charter schools under Proposition 39, how did you determine whether or not you had a conflict of interest?***

It would be appropriate for me to recuse myself from participating in any way in a board decision when state conflict of interest laws prohibit my participation in the decision. In addition, there may also be situations where my participation in a state board decision would not present a conflict of interest under the law, but where I might abstain from voting because of the appearance of a conflict of interest. The responsibility to make board

decisions that are in the public interest is one that I take very seriously, and whenever the board is presented with a decision that presents a concern for me I seek the advice of legal counsel. As examples, I have recused myself from voting on state board decisions regarding the approval of Title 1, Title III, and other grants awarded to Vaughn Next Century Learning Center.

With respect to the approval of the Proposition 39 regulations, I was recruited as the SBE liaison to the Prop 39 Task Force that drafted the regulations for the purpose of clarifying the rights and responsibilities of both charter schools and the districts whose students the charter schools serve. The Task Force, which included Ed. Coalition members, charter school representatives and CDE, understood that compromise must be reached to avoid years of confusion, disputes and litigation. I brought my extensive experience as the leader of a successful charter school to the table when I worked on these regulations, and neither my personal financial interests nor the financial interest of the Vaughn Next Century Learning Center (Vaughn ) were affected by these regulations. Thus, I did not believe it was a conflict to work on these regulations or to approve them.

In fact, the Vaughn Next Century Learning Center (Vaughn) has not been impacted by these regulations. Vaughn converted into a charter school in 1993, and has never submitted a Prop 39 application for facilities funding. Vaughn has succeeded in creating 1,000 student seats using joint-use agreement, interest-free loan from Federal Qualified Zone Academy Bond, public-private ventures, cash match from savings and donations, and most recently from State Prop 55 and Prop 1D resources e.g.

- 1996 – built 14 classrooms to eliminate multi-track schedule
- 2000 – built 20 classrooms to add middle school
- 2003 – built 35 classrooms to add a primary center
- 2008 – built 19 classrooms to add a high school

### **Accountability**

The Legislature, the Superintendent of Public Instruction, and members of the public testifying at board meetings have all expressed strong support for the view that the board's top priority should be addressing the achievement gap in California.

- 5. *Current K-12 education is criticized for putting too much pressure on schools to "teach to the test," referring to achievement tests. How do you, as a board member, evaluate our testing policy and take steps to modify it, if necessary? How do you balance the need to measure achievement against the danger of an over-emphasis on test results crowding out other objectives? How do you determine how much testing is too much?***

The SBE must evaluate its statewide assessment system and our testing policies to assure that the system measures performance and provides information for instruction. To achieve these goals, I will consider the following:

- Streamline federal and state required tests to avoid duplications.
- Shorten some tests while maintaining validity.
- Establish an optimal pacing schedule to include all mandated tests; for high school students. The schedule should take into account various college entrance exams.



- Work with districts that also administer locally-devised tests to consider 10-hour test time per student per year as the maximum testing load for students.
- Continue to strengthen standards-based instruction and the alignment of assessment to learning standards making “teaching to the test” unnecessary.
- Implement CALPADs and assure that all test results (current and historical) are captured to allow demonstration of individual student progress over time.
- Expand CALPADs to capture other accountability data including attendance, drop-out, progress towards reclassification, suspension/expulsion, and IEP goal-attainment.

**6. *How do you respond to the criticism that current test scores are not a true reflection of achievement in California because the lowest performing students have already dropped out and are not being tested?***

California has a dropout crisis. This June, as high school students across California received their diplomas, our failure to improve that system was evident in the number of student who didn't graduate. On July 16, 2008 CDE reported a staggering 127, 292 high school students dropped out during the 2006-2007 school year. This represents more than twice the number of dropouts ever previously reported. African-American and Latino students comprised 70 percent of the total.

We must expand the accountability system to maintain pressure on dropout prevention while allowing sufficient time to address the problem. An enhanced accountability system should:

- Include a combination of annual dropout, 9<sup>th</sup> grade promotion, and high school graduation rates.
- Collect and report more useful data on dropouts and the state's progress in improving graduation rates, e.g., including 5- and 6-year graduation rates in the calculation of the school's Academic Performance Index (API).
- Support the implementation of SB 219 that requires the inclusion of 8<sup>th</sup> grade dropout rates and accountability data for students attending alternative schools and community day schools in the calculation of API.
- Create “focused” districts that have schools with high dropout rates; if a district lacks the capacity to provide meaningful support to schools, schools can join other schools to form an alternative, regional support structure.
- Develop guidelines specifying the roles and responsibilities of districts and external providers in providing needed supports for schools on dropout prevention.
- Undertake middle school reform to motivate and maintain students.
- Make strategic investments in proven dropout prevention strategies targeting the most disadvantaged students and schools.
- Re-examine state high school graduation requirements to include traditional academic skills, career tech skills as well as so-called “soft skills”.

**7. *The board recently raised test score targets so that specific subgroups of students, including those with the highest dropout rates, will be expected to improve their performance even more than in the past.. Given that the dropout rate in urban districts is***

***estimated between 50-70 percent, how do you determine when or if the targets you are raising are increasing or decreasing the number of dropouts?***

Using a refined accountability system coupled with a better data system discussed in the response to question #6 will provide the SBE with more accurate dropout information. However, the SBE must begin to act on the following:

- Adopt a uniform definition of graduation rate and thus dropout calculation methodology (e.g., the definition agreed to by the National Governors Association which is included in the proposed federal regulations (200.19(a)(1)). Graduation rates should include all graduates, not just those who earn a diploma in the standard four years. California must commit to ensuring that all students leave high school with the skills and knowledge needed to compete in the global economy. While most students do complete high school in four years, others take more time. This issue is even more complex in California due to the recent settlement of a multi-year lawsuit (*Valenzuela v. O'Connell*) that requires schools to provide outreach to students who have not yet passed the state high school exit examination, a condition of graduation, for up to two years after their expected graduation date. It is critical that schools and school districts track these students and encourage them to complete their education even if it takes up to six years. Students with disabilities are entitled to services until they turn 22, and a number of these students remain in high schools more than four years.
- Focus intensively on dropout prevention and intervention by:
  - Adopting quality intervention materials for students working below grade level, including strategic intervention materials for students working one to two years below grade-level.
  - Assure that schools provide intensive intervention classes and materials for students working more than two years below grade level and actively engage parents in the process.
  - Evaluate the effectiveness of intervention programs to assure that these programs address students' individual needs and contribute to increasing students' academic proficiency.
  - Evaluate, monitor and approve Supplemental Education Services (SES) providers.
  - Scale up high-quality state preschool programs, especially in the low income areas.
- Consider multiple pathways to graduation to increase student engagement and reduce dropout rates through smaller learning communities and personalization, mentoring programs, advisory seminars, career academies, expanded learning time, work-based learning opportunities, and increased autonomy and scheduling flexibility at the school level. Creating schools that are more in line with the needs of 21<sup>st</sup> century will require the participation of legislators, families, community members and business partners.

**8. *The Legislative Analyst recently released a report suggesting that federal and state accountability standards be consolidated so that districts understand more clearly what is expected of them. Do you agree with this recommendation? If so, what are you doing to implement it?***



Yes, I agree that the current dual system of school improvement has major problems. The two sets of performance measures and expectations in California send mixed messages to teachers, parents, schools, and districts. Reform approaches that are only school-based ignore the critical role of districts and are unsustainable. To implement the recommendations of the Legislative Analyst, the SBE should:

- Replace the dual system with a unified system by:
  - Unifying eligibility criteria for program improvement status using multiple indicators, including PI status, number of AYP indicators failed, number of Title III indicators failed, etc.
  - Unify exit criteria and update exit criteria for state improvement programs including Immediate/Underperforming Schools Program (II/USP), the High Priority Schools Grant Program (HPSGP) and the Quality Education Improvement Act (QEIA).
  - Unify sanctions applied to schools and school districts (e.g., school choice, supplemental services, corrective action, restructuring) with a system that distinguishes among districts based on the magnitude of their performance; (e.g., persistently low performing students or low participation rate).
- Link federal and state funds tightly to reform. Districts must think strategically about how to allocate resources and support struggling schools; the level of support from federal and state funds should match the intensity, degree and duration of performance problems.
- Assure that schools and districts have high-quality, SBE-approved outside entities that will become increasingly involved if performance problems worsen.
- Use a simpler student outcome growth model. Creating vertical alignment and/or grade-level growth models, and alignment of academic test content from one grade level to the next so that scores are comparable year to year, may require fine-tuning the academic content standards that are included in state assessment (especially in some content areas that have standards which are “a mile long and an inch deep”).
- Effectively implement CALPADs and provide schools and school districts with funding for data collection, maintenance and security.

### **No Child Left Behind Act**

The federal No Child Left Behind Act (NCLB) requires integration of the state and federal accountability systems. Specifically, federal law requires the state to define student proficiency according to standards-aligned assessments, ensure that all schools make adequate yearly progress toward defined proficiency levels, and intervene with or sanction schools that do not make adequate yearly progress. This is in contrast to California’s academic accountability system that annually calculates an academic performance index for all California public schools, including charter schools, and publishes school rankings based on them.

Schools that do not make their growth targets for two consecutive years are designated program improvement schools. Districts that are unable to exit program improvement face corrective action. In March 2008 SBE imposed sanctions for approximately 100 districts under the

requirements of NCLB; however, the board action required the affected districts to address the sanctions whether or not funding was provided for that purpose.

9. *Some districts have been sanctioned for their failure to reach specific federal “No Child Left Behind” goals. In addition, the state board recently increased API growth targets for underperforming subgroups. It is not likely that state budget funding will increase for these districts given the budget situation. As you make decisions that affect school districts, how do you factor in the problems that districts face in a difficult budget year?*

In difficult budget years, the SBE must focus on the use of available fiscal resources effectively and make strategic decisions on human capital. Strategies may include:

- Ensure that current intervention programs (adopted curricular materials and instructional strategies) are effective, especially those targeted at the underperforming subgroups.
  - Assure that all fiscal resources provided through the state program improvement programs (e.g., II/USP, HPSGP, QEIA) and federal funds for supplemental educational services are targeted for desired student outcomes.
  - Consider flexibility in the use of supplemental funds that are directly linked to student success.
  - Update current state-funded professional development programs to include differentiated instruction through pacing and complexity, grouping as an aid to instruction, data analysis and its effect on increasing pupil achievement, and statewide and local data management systems.
10. *The Board has responsibility for standards and curriculum. It is estimated that all districts will be in program improvement by 2013-14. What is the long-term strategy for developing standards and curriculum for students that address program improvement issues?*

California has rigorous standards. And, the newly-adopted frameworks and curricular materials reflect the rigor. Program improvement districts must first have a powerful and coherent educational improvement strategy to deliver the rigorous standards and curricular materials in order to improve student academic achievement. But districts cannot implement a powerful educational improvement strategy unless they have both the leadership and teaching talent to execute the complex actions it requires. Thus, one of the most important long term strategies is the building of human capital.

California needs to launch a campaign to significantly build human capital at school and district sites. We must develop and implement strategies to advance talent management practices that will bolster teacher and administrator effectiveness and dramatically improve student achievement. Recruitment, selection, placement, induction support, mentoring, multiple pathways to certification, professional development, rewarding performance, performance evaluation, promotion into instructional leadership and retention of top talent are the means to revitalizing low-performing schools. Putting these strategies into place is not easy, and will require new thinking, assertive state and local leadership, change in school bureaucracies, and broad political support.



At this time, a large majority of the districts placed in Program Improvement (PI) are so designated because they have not met established proficiency targets for English learners and/or for students with disabilities. Thus, long-term strategies for developing standards and curriculum must take into consideration the needs of these students. My responses to questions #12-16 address these considerations.

**11. Do you believe that the board is doing everything within its power to assist districts with meeting the requirements of NCLB? If so, what specific steps has the board taken?**

In March 2008, the SBE assigned Correction Action F to each PI LEA in Correction Action which requires them to institute and fully implement “a new curriculum that is based on state academic content and achievement standards, including providing appropriate professional development based on scientifically-based research for all relevant staff that offers substantial promise of improving educational achievement for high priority pupils.” Ca Ed Code Section 52055.57(c)(1)(F). This is an appropriate beginning in assisting districts to meet the requirements of NCLB.

The SBE required each LEA to amend its LEA Plan or Plan Addendum identifying objectives and action steps to fully implement the corrective action and bring LEA Plans and LEA Plan Addendums to the SBE for review. The SBE provides PI districts with clear criteria for LEA Plans including direction to:

- Identify actions to build and support coherent, standards-based instructional programs for all students, based on the most recent SBE adoptions in English-Language Arts (ELA) and mathematics.
- Identify policies for placing ELs in ELD classes as well as policies for exit from ELD.
- Document delivery strategies that render content comprehensible to students learning English.
- Ensure collaboration among general education and special education teachers by grade level or program.
- Address the fundamental learning needs of high priority students.
- Document uniform use or development of diagnostic and placement tests to identify students requiring strategic or intensive intervention in English/reading/language arts and mathematics, and placement in appropriate intervention classes.
- Document presence of, or plans to provide SBE adopted intervention programs, offered as separate, extended-period classes, for all students requiring intensive intervention in English/reading/language arts and /or mathematics.
- Document presence of, or plans to provide, transitional and support classes for students requiring strategic intervention in English/reading/language arts and/or mathematics.

For PI districts that must contract with an outside provider, the SBE only certifies high-quality expert teams with successful track records.

**California High School Exit Exam**

Since the 2005–06 school year, all students, excluding students with disabilities, who seek a public high school diploma must pass the California High School Exit Exam (CAHSEE). The test exemption for students with disabilities ended with the class of 2007 and, unless further action is taken quickly, students with disabilities will not be exempted from passing both parts of the exam as a requirement for graduation.

**12. *There has been extensive discussion on options for students with disabilities who are unable to pass the exit exam. Currently, there are legislative proposals addressing the issue. However, in the meantime many students with disabilities in the class of 2008 are left in limbo. What course of action would you recommend for those students, and what course of action would you propose as a long-term solution?***

Short term actions for students with disabilities who are unable to pass the CAHSEE must include:

- Streamlining the local waiver process. CAHSEE results (July 2007-March 2008 data) indicate that approximately one-third of students with disabilities who use a modification would meet the CAHSEE requirement. As many as 10,883 students (32.5%) passed the English/Language Arts portion using modifications and 20,168 students (33.2%) passed the Math portion using modifications.
- More outreach to inform parents of their right for modifications and request for local waiver.
- Clear instructions to districts and schools to ensure that students with disabilities who qualify for testing with modification are given that opportunity.
- Regional technical assistance to schools and districts that need training on how to administer the CAHSEE with modifications.
- Availability to schools and districts of universal access materials including assistive technology (e.g., large print testing materials, audio items, etc.).

Longer term solutions should include:

- A statistically-based forecast system that triggers “early warning” of elementary or middle school students who will be at risk of failing the CAHSEE.
- Increased flexibility for districts related to the use of current supplemental funds.
- Additional tutoring funds for elementary and middle school students who are identified as at risk of low performance on the CAHSEE. Consideration should be given to how these additional funds could be aligned with NCLB supplemental service funds for tutoring students at schools that repeatedly fail to make AYP.
- Rigorous statewide studies of the effects of AB128 and AB347 funding on outcomes for seniors and post-senior-year students, including an analysis of what fraction of seniors denied diplomas agree to re-enroll for one or two more years as envisaged under AB347.
- An evaluation of math and ELA intervention programs targeted at students at risk of failing the CAHSEE, including whether the effectiveness of such interventions depends on the grade and geographic variation.
- Adoption of the most successful interventions, statewide.

**13. *Federal law requires an alternative assessment be provided for students with disabilities but the Board has never authorized an alternative. The Board’s response has been to***



***allow local districts to seek a waiver from the test for affected students. How should the Board accommodate students who wish to take the test rather than waive the testing requirement? Should an alternative assessment be developed for them?***

Last year, the SBE approved of the California Modified Assessment (CMA) for students with disabilities. The assessment was available in the elementary grades in spring, 2008. CMA blue prints for middle and high school, including Algebra I and Grade 10 Science were also adopted with pilot testing and implementation scheduled within two years. For students with disabilities who do not choose to be tested with modifications and/or request for local waiver, the SBE should do the following:

- Provide better outreach information to parents regarding the availability of CMA (participation in the CMA spring 2008 administration was low).
- Provide more frequent CMA administration training to schools and school districts (many school districts did not choose to offer the opportunities to eligible students in spring 2008 due to lack of readiness).
- Expedite the implementation of CMA at the secondary level.
- Consider some form of alignment of CMA to CAHSEE.

If the legislature authorizes the formation of a Special Education and CAHSEE Task Force to do a comprehensive examination of this issue, the SBE should work in partnership with this Task Force to adopt effective and realistic policies as soon as possible.

## **English Learners**

The California Department of Education reports that approximately 25 percent of California's K-12 students—about 1.6 million—are English learners. They perform at substantially lower levels on standardized tests than English-proficient students. Test results from the high school exit exam for first-time test takers in the class of 2009 (in grade 10) indicate that English learners performed an estimated 41 percent lower than the state's overall passing rate on the English-language arts exam, and 29 percent lower than the state's passing rate on the mathematics exam.

***14. Concerns have been raised that the state's Reading Language Arts and English Language Development framework is not designed in a manner to ensure that a student will achieve sufficient proficiency in English to meet academic standards and pass CAHSEE. How do you respond to this criticism? What, if any, changes would you recommend to ensure each student has the instructional materials necessary to attain reading and English proficiency?***

We serve approximately 800 English learners at Vaughn and I do agree that the current adopted English Language Arts materials are not adequate in serving the needs of English learners (ELs). We have been spending a great deal of resources in the purchase of supplemental materials; teachers of English learners are having a difficult time juggling between two programs within a tightly scheduled day.

The Reading/Language Arts (R/LA) Framework and the criteria for adoption of K-8<sup>th</sup> R/LA instructional materials, as revised September 2007, provide attention to the achievement of state standards for ELs as well as other students. The new English Language Arts Framework includes a set of extensive criteria for five program options. I believe that Option 2 will meet our needs as it requires an integration of materials that simultaneously meet the English Language Arts standards and the English Language Development standards. English learners must have access to learning opportunities that address grade level English Language Arts standards while firmly mastering the English Language Development status at individual levels.

The main goal for ELs is to achieve English proficiency in the elementary grades and be reclassified as Reclassified Fluent English Proficient (RFEP). These RFEP students do just as well as, and, in some cases, even better than non-EL students on every state standardized Test including the CAHSEE (reported by the Human Resources Research Organization).

This summer, the Curriculum Commission and the Instructional Materials Assessment Panel will meet to review submitted materials. Some of my teachers have seen a few distributed samples of the Option 2 program and are very excited that they finally will have “ready to go” instructional materials for the English learners. The newly appointed English Learners Advisory Committee will add their expertise in the program adoption and implementation process.

The new mathematics adoption also addresses universal access. In addition, California has also invested in supplemental programs and professional development for educators targeted to meet the needs of ELs (AB 472). The SBE should continue to monitor the implementation of the newly adopted materials and professional development programs to assure that the needs of ELs are being met.

**15. *Should the board take any actions specific to English learners in an effort to narrow the achievement gap?***

Yes, the SBE must take actions. Being an English learner should not be a life sentence. I have first hand experience as an English learner which includes experiences as an English learner when I arrived the U.S. at an age of 17, then as a certified bilingual teacher in Los Angeles (Spanish and Chinese), and as a school principal serving a large number of English learners for more than 25 years.

As many as 1.5 million of California’s 6.3 million K-12 students have been identified as ELs; thus the SBE must take multiple actions specific to English learners in an effort to narrow the achievement gap. These actions should include the following:

- Phase in the ELA curriculum adopted in 2008 by fall 2010.
- Document steps to provide and monitor the completion of SB 472 English Learner Professional Development (ELPD) for all teachers of English learners by fall 2010.
- Update the AB 430 professional development training program for administrator to include intensive focus on ELs; work with PI districts to assure that all school-based administrators receive the training.
- Establish clear reclassification criteria applicable to all districts



- Consider the use of CELDT scores alone to determine proficiency (not Proficient in CST scores) thus tripling reclassification rate
- Assure that linguistic tracking would not limit education choices, access to quality academic programs and opportunity to advance.
- Support the proposed change related to federal funding for EL to assure that reclassification would not be a disincentive due to funding loss.
- Disseminate best practices and examples of schools and school districts that have successfully reclassified ELs (e.g. Long Beach Unified-22%, Corona-Norco Unified – 16%, statewide- only 9.2%).
- Target 2<sup>nd</sup>-5<sup>th</sup> grade as the optimal zone for reclassification

**16. SBE recently reestablished the English Learners Advisory Committee (ELAC). What role will ELAC play in deciding board policy? What is the goal of the committee? Will you be involved with ELAC? If so, how?**

It is essential that the SBE revives the ELAC after years of inactivity. The SBE seeks the specific instructional and assessment advice from educators with experience serving the needs of English Learners (ELs). The SBE is additionally interested in a wide variety of state and federal policies, funding sources, and activities that could be better focused to meet the needs of ELS. In re-establishing the ELAC the SBE seeks the advice of a group of parents, educators and community members who have demonstrated knowledge regarding the educational needs of English learners. Advice from the ELAC may include the following topics:

- How can the SBE be most influential in helping ELs to overcome language barriers quickly and to achieve academically at levels consistent with other students?
- How can the SBE work effectively with stakeholders to provide high quality educational services to ELs?
- What does current data tell us about the academic achievement of students? Does the SBE have the most comprehensive data we need to make decisions about ELs? What type of additional data could be helpful?
- How might the SBE more clearly focus state and local funds on the academic achievement needs of ELs?
- How can the SBE achieve a better understanding of educational programs that have been successful for ELs?
- Should the state encourage and/or fund local school districts to offer each student the opportunity to learn a language other than English in elementary school in once the student is deemed to be fluent-English proficient or otherwise in compliance with applicable state law?
- In addition to the basic instructional program materials adopted by the SBE, should it review supplemental instructional materials, which may be of specific assistance to specific language groups? Have the SBE-approved supplemental materials been effective for helping students learn English? Do we have sufficient data to answer this question?
- Is primary language support needed for some students and parents to help some ELs in their pursuit of ELD and fluent-English proficient status?

All SBE members will be engaged in the work of the ELAC. Though I'm not the SBE liaison to this Committee, I will be actively engaged in the deliberation of the Committee's recommendations and the adoption of policies initiated by the recommendations.



## **Responses of Candice Traeger to the Senate Rules Committee December 9, 2008**

### **Roles and Responsibilities**

**Question #1 Roles & Responsibilities:** To what extent do you believe you have accomplished your goals (workplace environment fostering efficiency, teamwork, and professionalism)?

#### **Response to Question #1:**

*The best indicator of fostering efficiency, teamwork, and professionalism are the overall results of the Appeals Board; we have eliminated the backlog of approximately 3,752 appeals since my appointment in November 2004. In order to accomplish this the Administrative staff, the Legal Staff, and the Administrative Law Judges ("ALJs") have assisted in redesigning and streamlining Appeals Board processes, forms, and regulations.*

*For instance, the Administrative staff implemented and refined the Appeals Board processing of appeals filing so that we could dismiss incomplete appeals in 15 days instead of 90 days. Their suggestions led to revisions of our appeals form and intent to appeal letters.*

*The Legal staff recommended changes that were adopted, in the processing of Petitions for Reconsideration so that we could answer petitions more effectively, efficiently, and professionally.*

*The ALJs asked for and designed streamlined Orders and we implemented their suggestions resulting in an increased number of resolutions that eliminated the backlog. They also asked for, and received, the flexibility to cover hearings for each other and manage each case as they desire. Because of our people we have created a working environment that fosters teamwork, efficiency, and a very positive work environment.*

### **Question 2: Roles & Responsibilities**

What do you hope to accomplish in your second term? How will you measure your success?

#### **Response 2**

*In my second term, our goal is provide excellent customer service to both internal and external customers, expand and improve the Board's use of information technology,*

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*further refine our processes and procedures, and keep pace with incoming appeals so as not to create a backlog once again.*

*For the first time in Appeals Board history, we will convene an Advisory Committee that will include representation from all interested parties to elicit recommendations on improving our processes and procedures.*

*We will devise and implement a Customer Satisfaction Survey to measure the effectiveness of process and procedure refinements made as a result of Advisory Committee suggestions. We will also conduct an internal Customer Satisfaction Survey so that we can listen and learn from our people and continue to improve our employee satisfaction.*

*The Appeal's Board will continue to request funding for information technology upgrades such as digital hearing recording equipment and an automated call answering system. Our success will be measured by the acquisition of these two upgrades at a minimum.*

*In order to ensure that the Appeal's Board processes incoming appeals without creating a backlog we will continue to track the quality and performance of all employees and provide feedback on job performance on a monthly basis.*

### **Question 3; Roles & Responsibilities**

What do you view as the exclusive role of the Chairperson of the Board, and what responsibilities are those of the Board as a whole?

#### **Response to Question 3**

*I believe there are two distinctions. The Chairperson of the Board ("Chair") is charged, under (Labor Code Section 148.2) with the responsibility to supervise all personnel employed by the Board. This general delegation of supervisory authority places in the Chair the overall responsibility to ensure that the Board functions efficiently in terms of its day-to-day operations and that the Board conforms to a variety of personnel regulations including civil service rules and regulations and regulations of the Department of Personnel Administration.*

*There is also a more commonly accepted notion of what a Chairperson does, and that is someone who functions as a "presiding officer of a meeting or an organization or committee" (Webster's Collegiate Dictionary: Tenth Edition.) In this sense the Chairperson's function is to make sure that the Board's business handled in an efficient manner with the ultimate objective of fulfilling its statutory mission to serve the public by hearing and determining appeals and to determine all other matters under the Board's jurisdiction in a timely manner. I believe that it is the Chairperson's responsibility to promote efficiency by promoting procedures that eliminate the backlog and remove any unnecessarily cumbersome processes that serve as a roadblock to the processing of files and appeals.*

*The Appeals Board is a small agency. The Board members and the Executive Officer are the only managers. There are only 3 supervisors. Since any meeting of two*



*of the three members may have implications under the public meeting laws, it falls upon the Chairperson to meet with staff, get feedback, and communicate policy.*

*Finally, the role of the Chairperson of this small agency is to be a team leader, role model, and pacesetter. To that end I have monthly meetings with staff, gather and share data to apprise all staff of how they're doing, roll my sleeves up and work in the "trenches" with them regularly.*

## **The Appeals Process**

### **Question 4; The Appeals Process**

What issues prompt you to reconsider an ALJ decision?

#### **Response to Question #4**

*At the outset, it should be noted that if the Board votes to reconsider a Decision or Order of one of its Administrative Law Judges it does not mean the Decision or Order will be reversed. It simply means the Decision or Order will not automatically become final. Instead, the Board will have time to independently review the evidentiary record and the law and then either, adopt, reverse, or modify the Decision or Order of the ALJ.*

*That said, each party to an Appeals Board proceeding has 30 days to request reconsideration of a Decision or Order. The parties can petition based on the following grounds as set forth in Section 390.1 of the Board's regulations:*

1. That by the Decision or Order the Board acted without or in excess of its powers;
2. That the Decision or Order was procured by fraud;
3. That the evidence received by the Board does not justify the findings of fact;
4. That petitioner has discovered new material evidence that petitioner could not, with reasonable diligence, have discovered and produced at hearing;
5. That the findings of fact do not support the Decision or Order

*If the parties raised such grounds, I would be prompted to reconsider the Decision or Order. As noted above, that does not mean I would be voting to change the ALJ Decision or Order. It would only mean that grounds had been raised that require the Board itself to take a look at it.*

*The Board itself also has a 30 day period in which to, on its own action, seek reconsideration. (8 Cal. Code Regs., Section 390.2) There might be a number of reasons to reconsider a Decision or Order. Principal among these are cases in which the ALJ did not properly interpret and apply safety orders, statutes, or Appeals Board precedents. Also, though ALJ Decisions are the law of the case they decide only, they have no precedential effect. If ALJs are interpreting the same safety order differently, the Board may wish to clarify the meaning of the safety order by reconsidering an appropriate case*

and issuing a precedential decision itself. Whether or not the parties are dissatisfied with the decision, it is incumbent upon the Board to resolve such disputes.

*In short, my decision to vote to reconsider is made upon the same grounds for each case. Is there a need to clarify existing precedent? Does the decision deviate from existing precedent, or did the ALJ misinterpret or misapply law or regulation? Is there insufficient evidence to support the ALJ's decision? Would reconsideration of this particular decision possibly result in a clarification of the law for the Division and the Employer community and will such clarification enhance employee safety.*

### **Question 5; The Appeals Process**

OSHAB has proposed eliminating appeal hearings in DOSH offices and requiring employers and DOSH personnel to attend hearings in either Sacramento or Southern California. Please explain the reasoning behind this proposal and how it may impact the ability of both employers and witnesses to appear and testify at hearings.

### **Response to Question #5**

*The question poses three different issues. First, the Appeals Board, or OSHAB, has not proposed eliminating appeal hearings statewide in local Cal/OSHA offices and requiring employers and DOSH personnel to attend hearings in either Sacramento or Southern California. (It was suggested during budget cuts that the Board should limit hearing locations to two.) Rather, the Appeals Board has consolidated hearing locations to four (4) locations in Southern California (San Diego, Santa Ana, Van Nuys, and West Covina) and three (3) locations in Northern California (Oakland, Sacramento, and Stockton).*

*The second issue involves the Board's imperative to maintain neutrality, which impression is easily lost when all hearings are scheduled within established Cal/OSHA enforcement offices, a practice that was common throughout the early years of the program. The Board's precedential decisions recognize the importance of maintaining that actual and perceived neutrality, as noted below.*

*"The Legislature specifically established the Appeals Board as an independent adjudicator in order to avoid actual or presumed neutrality." The Legislature modeled the independent Appeals Board after the adjudicatory panel in the federal Occupational Safety and Health Act (the Occupational Safety and Health Review Commission). Senator Jacob Javits proposed this "separation of powers" arrangement in an amendment to the original OSHA bill. (See Legislative History of the Occupational Safety and Health Act of 1970, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess. (Comm. Print 1971).") Supertron Corporation, Cal/OSHA App. 91-675, DAR (May 21, 1992) "The relationship between the Board as an independent adjudicatory agency and the Division as a prosecutorial agency is, respectively [required to be] observed." Kenko, Inc., Cal/OSHA App. 00-672 through 674, DAR (Oct. 16, 2002), citing Alfred Annino/Alfredo Annino Construction of Nevada, Cal/OSHA App. 98-311, DAR (April 25, 2001); and Naco Industries, Inc., Cal/OSHA App. 95-3175, DAR (August 10, 1999).*

Therefore, to the extent feasible, the Board recognizes the need to hold hearings at neutral locations such as State Building facilities where they may exist, or Appeals Board hearing rooms.

The third issue concerns the number of locations throughout California that the Board can feasibly conduct hearings with its current staff, taking into consideration the period of time that appeals must be processed by Federal guidelines (ten months), the number of appeals filed per year, and the size of any backlog. There are currently more appeals, higher monetary fines, more complex cases, and the existing staff cannot practicably schedule hearings in the same number of locations as was originally the case without re-creating and building a large backlog, and increasing the age of cases awaiting adjudication.

To summarize, the scheduling and number of hearing locations, while continually undergoing review for efficiency and fairness, accommodates the interests of fairness and prompt and efficient adjudication, while seeking to minimize those instances where parties and witnesses may be unconvinced.

**Question 6; The Appeals Process**

Please provide the following information for the last five years: number of appeals hearings conducted by ALJs, the number of Petitions for Reconsideration filed, the number of ALJ decisions the Board has independently chosen to reconsider.

**Response to Question #6**

	2004	2005	2006	2007	2008
<b><u># of Hearings</u></b>	49	92	176	158	122*
<b><u>Petitions for Recon</u></b>	30	48	51	98	122*
<b><u>Board Ordered Recon</u></b>	2	15	5	20	4*
<b><u>Disposition of Cases</u></b>	1 S	9 D	2 D	5 D	3 P
<i>S = Settled</i>	1 P	2 P	1 P	7 P	1 R
<i>D = DAR Issued</i>		4 R	2 R	8 R	
<i>P = Pending</i>					
<i>R = Remanded</i>					
<i>* = Through November</i>					

**Question 7; The Appeals Process**

The Labor appointee position to the Board is currently vacant and has been since at least January 2007. What effect has this had on the Board's ability to resolve appeals



efficiently and provide workplace safety and health guidance to the public in a timely manner? If the purpose of designated slots is to bring specific perspectives to the Board, how is the perspective of Labor included?

### **Response to Question #7**

*The Labor Appointee left the Appeals Board at the end of March 2007; since that time the Governor has not appointed a person to that "slot". The vacancy has not had an effect on the Board's ability to efficiently resolve appeals and provide guidance to the public in a timely manner. In fact, the Appeals Board has increased the number of appeals resolved every year beginning in 2004. The trend had gone from 3656 in 04, 4373 in 05, 5621 in 06, 7075 in 07, and 6273 through November 08.*

*However, the absence does cause the Board to draw on its own labor experience and supplement that with staff analysis and research of Legislative History and technical literature. Clearly, the Board is well served by the Labor perspective, tries to draw upon its own experience and others; but that is no substitute for filling the position.*

*It bears noting that I started my career as a clerical employee represented by the Teamster Union. I was a Teamster for 9 years and learned many lessons which I have carried with me into my management style.*

### **Question 8; Calendaring**

Why has the Board moved toward the policy of multiple calendaring? What have been the unintended effects of this policy on employers and employee witnesses waiting for their appeal hearing?

### **Response to Question #8**

*The Board began calendaring more than one hearing a day per ALJ in August of 2006, in order to eliminate the backlog (3752 appeals), reduce the amount of time between the alleged violation and resolution, speed-up abatement of alleged violative conditions. The practice was instituted after reviewing court practices, practices of other adjudicatory agencies, and in response to a federal Complaint Against State Plan Administration (CASPA) requiring California to process cases more quickly or lose its ability to continue as a State Plan State. It has been extremely successful in reducing the backlog (now 300 appeals), improving the time to process cases from 24 months to 9 months, and hastening abatement.*

*However, there is a down-side to calendaring multiple hearings for the same day with one ALJ. Although 80-85% of Appeals Board cases settle prior to hearing and an additional 5% at the hearing there have been a few occasions where more than one case stays on calendar for an ALJ. When this happens there is a possibility that one of the hearings will be continued resulting in an inconvenience to the parties.*

*The Appeals Board tracked and recorded information on the number of cases calendared and the number resulting in Continuances (inconvenience) periodically. In August 2006 (the first month when 4 hearings were set a day for each ALJ there were 273*



*cases set for hearing and none (0) required Continuances. In fact, over a seven month period 1105 cases were set for hearing and only 3 required Continuances.*

*Although no number of continued hearings is desirable, those that have to be re-scheduled because multiple hearings are calendared are less than one percent. The Appeals Board believes that the benefit of multiple hearings (reducing the backlog and time for case processing) outweighs the inconvenience.*

### **Question 9; Staff**

Have you deputized Executive Officer, Michael Wimberly, to vote on issues pending before the Board and if so, under what circumstances was this done?

### **Response to Question #9**

*Executive Officer, Michael Wimberly, has been deputized five (5) times to serve as an Appeals Board member for purposes of voting on Orders or Decisions.*

<b>Date Deputized</b>	<b>Reason</b>	<b>Type</b>
5-21-2008	<i>Chair Traeger: absent</i>	<i>Full Meeting</i>
9-08-2008	<i>Chair Traeger: possible conflict of interest</i>	<i>Orders (2)</i>
8-20-2008	<i>Chair Traeger: possible conflict of interest</i>	<i>Decision</i>
10-01-2008	<i>Member Pacheco: possible conflict of interest</i>	<i>Decision</i>
10-01-2008	<i>Chair Traeger: possible conflict of interest</i>	<i>Decision</i>

### **Question 10; Staff**

Is there currently a backlog of pending appeals? If so, have you requested or taken steps to increase the number of ALJs or find additional resources to assist in reducing the backlog?

### **Response to Question #10**

*There is currently a backlog of 301 appeals or 131 cases. The Board requested additional ALJs and though it was denied in its BCP it was encouraged to work with the Division on fulfilling its staffing needs. As a result the Division loaned the Board two (2) limited term ALJs for two (2) years. We also converted one of our Legal Staff positions to an ALJ position. Finally, when one of our Presiding Law judges retired we down graded the position to an ALJ.*

### **Question 11; Non-Reporting Penalty**

Please explain how the Board determines and sets penalty amounts for employer failure to report workplace accidents to DOSH.

**Response to Question #11**

*In July of 2006, the Appeals Board issued a precedential decision directing the ALJs to examine the facts of each case individually and to determine if there was a violation (of the section 342(a) reporting requirement) and to establish what penalty, should be assessed. (Labor Code §6602.) The decision allowed the ALJs to exercise discretion in fashioning a penalty that is based on the facts of each case. In this way, employers who technically but unintentionally violate the requirement are not treated the same as those employers who have no safety programs at all, do not enforce safety programs, and have a history of safety violations. The ALJ is required to fashion a remedy that furthers the purposes of the Act and promotes and encourages workplace safety. The Board members review ALJ decisions to ensure that the precedent laid-out in Bill Calloway & Greg Lay dba Williams Ready-Mix is followed.*

2004-2008 SNAPSHOT OF APPEALS BOARD STATISTICS

Total Appeals Docketed

	2004	2005	2006	2007	2008
Jan	357	422	405	547	509
Feb	421	435	320	391	442
Mar	513	400	506	554	424
Apr	416	406	259	402	442
May	325	187	588	451	400
Jun	486	517	372	456	381
Jul	323	372	578	424	397
Aug	386	345	498	503	394
Sep	269	380	468	347	462
Oct	425	419	508	220	457
Nov	332	326	413	696	
Dec	509	442	481	466	
MO End	3921	3883	4502	4295	4308
YR End	4762	4651	5396	5457	479
Average					

Total Appeals Disposed (by Docket)

	2004	2005	2006	2007	2008
Jan	158	227	428	701	426
Feb	322	281	212	481	526
Mar	288	378	325	624	566
Apr	294	294	513	532	675
May	317	539	549	796	694
Jun	227	330	546	522	556
Jul	360	352	543	660	655
Aug	301	478	617	543	635
Sep	303	485	498	640	560
Oct	249	432	608	562	623
Nov	377	278	376	456	
Dec	460	299	406	558	
MO End	2819	3796	4839	6061	5916
YR End	3656	4373	5621	7075	657

YEAR	FILED	RESOLVED	DIFFERENCE	UNRESOLVED	BACKLOG
1989*	550	156	-394	394	0
1990	1369	911	-458	852	0
1991	1367	1241	-126	978	0
1992	1923	1123	-800	1778	488
1993	3228	2161	-1067	2845	85
1994	3400	2999	-401	3246	486
1995	4741	3679	-1062	4308	858
1996	4067	4020	-47	4355	905
1997	3623	4531	908	3447	0
1998	4338	4839	501	2946	0
1999	3490	4655	1165	1781	0
2000	4555	3530	-1025	2806	0
2001	5255	4265	-990	3796	0
2002	5367	4336	-1031	4827	567
2003	5235	3434	-1801	6628	2368
2004	4762	3656	-1106	7734	3474
2005	4651	4373	-278	8012	3752
2006	5396	5621	225	7787	3527
2007	5457	7075	1618	6169	1909
2008**	4308	5916	1608	4561	301
TOTAL	72774	66605		4561	301

46/mo avg so 10 mo =460  
 114/mo avg so 10 mo=1140  
 114/mo avg so 10 mo=1140  
 129/mo avg (90-92) so 10 mo =1290  
 276/mo avg (93-94) so 10 mo =2760  
 276/mo avg (93-94) so 10 mo =2760  
 345/mo avg (95-00) so 10 mo = 3450  
 345/mo avg (95-00) so 10 mo = 3450

-3  
 -504  
 -1669  
 -644

426/mo avg (01-06) so 10 mo =4260  
 426/mo avg (01-06) so 10 mo =4260  
 426/mo avg (01-06) so 10 mo =4260  
 426/mo avg (01-06) so 10 mo =4260  
 426/mo avg (01-06) so 10 mo =4260  
 426/mo avg (01-06) so 10 mo =4260

Appeals  
 Cases

THE HISTORY OF THE UNITED STATES

The first part of the book is devoted to the early history of the United States, from the discovery of the continent by Christopher Columbus in 1492 to the establishment of the first permanent settlements. This section covers the exploration of the New World, the struggles of the early settlers, and the growth of the colonies. It also discusses the relationship between the colonies and Great Britain, leading up to the American Revolution.

The second part of the book deals with the American Revolution and the early years of the new nation. It covers the Declaration of Independence in 1776, the Revolutionary War, and the signing of the Constitution in 1787. This section also examines the early development of the federal government and the challenges it faced in its first decades.



CALIFORNIA LEGISLATURE

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APPOINTMENTS DIRECTOR

SENATE RULES COMMITTEE

DON PERATA  
CHAIRMAN

November 20, 2008

Pamela Giacomini

Dear Ms. Giacomini:

As you know, the Senate Rules Committee will conduct a confirmation hearing on your appointment as a member of the Board of Forestry and Fire Protection on January 7, 2009. We request that you appear. The meeting will begin at 1:30 p.m. in Room 113 of the State Capitol.

We have prepared the following questions to which we would appreciate your written responses. Please provide your responses by December 12, 2008.

We would also like to receive an updated Form 700, Statement of Economic Interest, by December 12, 2008.

**Statement of Goals**

1. *What do you believe you have accomplished in your first term as a member of the Board of Forestry and Fire Protection? What do you hope to accomplish during your next term? How will you measure your success?*
2. *The Board of Forestry has five public members, three members in "forest products industry" slots, and one member in a "range-livestock industry" slot, the one to which you are appointed. As a member of the board, whose interests do you represent? If the range-livestock industry's interests are at odds with the other interests, what do you do?*
3. *Your board has few staff and depends on the Department of Forestry for its information. What staff is available to assist you with your often-complex issues? How are you able to regulate an entity on which you depend for information?*

4. *The board sets policy for the Department but is sometimes not included in policy decisions, which was the case last year after the San Diego fires. How do you determine if the board is being included and if it's not, what can you do?*

### **California Fire Plan**

The Board of Forestry and Fire Protection is responsible for developing both policy and regulations for the forestlands and fire protection system of the state. The California Fire Plan is the state's road map for reducing the risk of wildfire. The plan emphasizes what needs to be done before a fire starts. The plan looks to reduce firefighting costs and property losses, increase firefighter safety, and contribute to ecosystem health. The current plan was finalized in March 1996.

In an October 24, 2007, letter to the Governor, the board said it would begin a critical in-depth review of the California Fire Plan.

A September 2008 article in *Ecosystems* by a senior member of the U.S. Forest Service concluded that forest fires in the Sierras are more frequent and intense, and firefighting professionals may need to reassess the fire suppression methods currently used—quick suppression attacks with the goal of total suppression.

5. *How often is the California Fire Plan reviewed by the board?*
6. *What is the timeline for the board's review? Is the board, as a whole, reviewing the plan, or is this review assigned to one of the board's committees?*
7. *What has the board learned in its review of how forest fires are fought? Should some fire be left to burn?*

### **Coho Salmon Protection**

Coho salmon, from San Francisco to the Oregon border, have experienced a significant decline in the past 40 to 50 years. According to a study done for the National Marine Fisheries Service, wild populations of Coho salmon today are less than one percent of what they were in the 1940s.

In 1994 the Department of Fish and Game petitioned the Board of Forestry and Fire Protection to list Coho salmon as a sensitive species. The board declined. In 1996 the state Fish and Game Commission listed Coho salmon as endangered. Then in 1997 the federal National Marine Fisheries Service listed Coho salmon as threatened.

The timber industry is interested in the state's Coho salmon listing because, under current statutes, if a timber operation might kill Coho salmon, the timber company must first obtain an incidental take permit from the Department of Fish and Game.

In 2000 the board amended the Forest Practice Rules to include Protection for Threatened and Impaired Watersheds regulations to enhance protection of listed salmon species. These regulations were adopted in 2000 because a state scientific review panel concluded that the Forest Practice Rules did not sufficiently protect salmon. The Threatened and Impaired Watersheds rules were to be a first step in increasing salmon protections. That is the only step that has been taken to date. These regulations were temporary and were extended in 2003, 2004, 2006, and 2007. They will expire December 31, 2008. In July 2006 the Secretary of the Resources Agency called on the board and the Department of Fish and Game to develop a set of comprehensive rules to protect and restore all salmon populations. Since 2006 the discussions of the board have moved from protection of all salmon populations to discussion on rules to cover only those streams where Coho salmon are currently present.

Earlier this year, the board adopted Coho salmon incidental-take assistance regulations. These regulations would apply additional protections where Coho salmon are present and the Department of Fish and Game determines that Coho will likely be taken by logging actions. The Department of Fish and Game provided the board with another rule package that would have extended protections for Coho salmon in their total range, but the board declined to adopt that package. Despite the opinion of state and federal fisheries biologists that Forest Practice Rules did not adequately protect salmon, the board contracted for its own scientific literature review to see if additional protections are needed for salmon. That review was completed earlier this fall, and it is not yet clear whether that review will result in changes to the existing rules.

In early 2008 several environmental groups sued the board alleging the board's Coho protection rules were inadequate. These groups agreed to suspend their lawsuit and instead filed an emergency petition with the board to strengthen the existing interim rules. The National Marine Fisheries Service supported this petition; however, the board, which included your "no" vote, rejected the petition. It is now likely that the board will not have a chance to act on Coho rules until 2010.

8. *What is your view of the challenges in adopting permanent regulations to protect Coho? Why are there still no permanent regulations in place after so many years?*
9. *Please explain your "no" vote two months ago on the emergency petition for greater Coho salmon protection. What factors did you consider?*



10. *Should the board develop timber harvest rules that protect all salmon species, or should the increased protections be provided for only Coho salmon? Please explain.*

### **Timber Harvest Reviews**

The Department of Forestry and Fire Protection is the lead agency for timber harvest reviews and is responsible for ensuring the sustainable production of timber. However, two of the other trustee agencies—the Department of Fish and Game and the regional water quality control boards—have statutory mandates that, on occasion, are more protective of resources and more restrictive of logging activities. Historically, this has created a conflict between the agencies, with the Department of Forestry and Fire Protection often resistant to incorporating the changes requested by the Department of Fish and Game or regional water quality control boards.

11. *How does the board work with the Department of Forestry and Fire Protection, the Department of Fish and Game, and the regional water boards to resolve these conflicts? How do you as a board member monitor the degree of cooperation that takes place?*

### **Cumulative Impacts of Timber Harvesting**

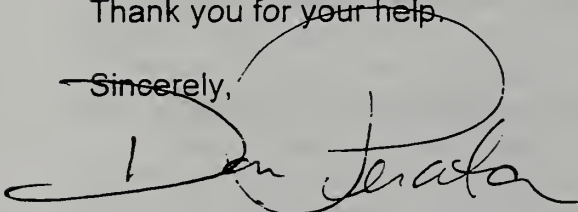
Over the last several years, governmental and scientific reports have pointed out that the timber harvest rules do not adequately address the cumulative impacts of harvesting timber which is the potential continuing effects of prior timber harvesting.

12. *Should the issue of cumulative impacts be addressed by the board? If so, how?*

Please direct your responses to Nettie Sabelhaus, Rules Committee Appointments Director, Room 420, State Capitol, Sacramento, CA 95814.

Thank you for your help.

Sincerely,



DON PERATA

DP:KW

cc: Board of Forestry and Fire Protection



HENRY AND PAM GIACOMINI  
Hat Creek Grown, LLC



November 21, 2008

The Honorable Don Perata  
Chair, Senate Rules Committee  
State Capitol Room 420  
Sacramento, CA 95814-4900

*Response*

Dear Senator Perata:

Thank you for your letter of November 20, 2008 regarding the confirmation hearing for my second term on the Board of Forestry and Fire Protection. My answers to your thoughtful questions are below. Before I get to that though, I have discussed with your Appointments Director, Nettie Sabelhaus the conflict in my calendar for the date set for my hearing. My husband and I take our vacation each winter when our ranching obligations allow us to be away, and make our reservations months in advance. We scheduled and paid for our vacation many months ago prior to getting the notice for this confirmation hearing. I take full responsibility for not contacting Ms. Sabelhaus many months back to discuss options for a hearing.

I would respectfully request that you grant me a private hearing with you or your staff in substitution for a scheduled full Rules Committee hearing. Again, I accept the responsibility for not having made your staff aware of the coming conflict months ago.

#### Responses to Questions

1). In my first term I was tasked with being the Chair of the Resource Protection Committee as well as a member of the Management Committee. In addition, the other members of the Board of Forestry and Fire Protection elected me to serve as the Vice Chair of the Board. In the absence of our Chair, Stan Dixon, I step in and run the meetings. At first, all of this was very overwhelming, then inspiring. And then you start to learn and understand how the committee system operates, how the Board operates and what is needed to get work done to benefit the citizens of California. I wish I had accomplished more, because there is much to be done. That said, I have initiated a full review of the vegetation treatment programs, which has stalled due to budget and potentially other issues. In that effort, my hope is to understand where fuels reduction work is being done, how is it being paid for and how effective is it? In a separate but related action, I am currently reviewing the Administrative DEIR for the Vegetation Treatment Program. This is an updated EIR that will set targets for fuels reduction work, not just with fire, but by

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The Honorable Don Perata

herbivory and mechanical means as well. We plan to have our Administrative DEIR review and changes completed by the December Resource Protection Committee meeting. The DEIR at that point will become a public document that we can take full input on and circulate for comments and changes. I also have been extremely intense on our work on the Fire Plan, but I will address those issues at your questions 5, 6 and 7 below. We also continually review fire safe regulations, general plan updates and changes for counties and cities, State Responsibility Area boundaries, Very High Severity Zone mapping, and more. As a member of the Management Committee, I have had the opportunity to review and help guide management of the Demonstration State Forests. I served on the sub-committee of the Board with David Nawi to finalize the Jackson Demonstration State Forest Management Plan and DEIR. We learned a lot through that process and have continued to schedule reviews and updates to each of the other DSF's. I hope to continue to accomplish the work necessary on review and implementation of programs and regulations that allow all stakeholders to work together to be more efficient, effective and cooperative. My view is that each perspective is important and that by listening and receiving input and guidance from all stakeholders, we come to better decisions and actions that benefit the citizens of the State of California. To measure that, I will look to our finished work product. And follow with questions to the stakeholders that are using the product and ask if it's working. If the answer is yes, we've done good work. If it's no, then we need to revisit our actions and make adjustments.

2). I am proud to serve as the range-livestock industry slot on the Board of Forestry and Fire Protection. I believe that allows me to bring a larger rangeland perspective to the decisions and actions that the Board takes. We often as individual Board members do not always agree. That's part of a function of a good make-up to a Board. When we have disagreement, I always try to ensure that whatever is causing the dissention is answered and attempted to be solved. I've disagreed with public members and I've disagreed with forest products industry members. My main attempt is to always find the best solution for the citizens of our state. That is what always is the deciding factor for me in making a decision or taking a vote.

3). Our staff is incredible. How they do all they do, sometimes amazes me. I think that we as Board members try to make sure that we don't burden them with unnecessary work, but work in concert as a team to get our work accomplished. We do rely upon the Department's staff for information on a regular basis. The relationship is very important. They are often the folks that have the responsibility for implementing policy actions that we as a Board take. But, that doesn't ever stop me (or other Board members) from asking the hard questions. Do we always get the answers we need. No, I'll address that later in the Fire Plan Review component. What I strive to do is to ensure that we have a positive working and professional relationship. We have several areas where Department staff may have implemented something in a different manner than what the Board intended. We work to straighten that out in a productive, positive manner. It is our role to develop policy, have the Department implement it correctly and do the oversight to ensure that occurs.

4). There is Board policy and there is Department policy. Sometimes the line blurs a bit, especially in a tense situation like the San Diego or Angora fires. The Board was not included in those discussions and should have been. What do we do about it? Have the discussion with the



Department, with Agency and with the Legislature. It's important to ensure that our role as policy making body is kept intact otherwise our oversight abilities are at risk.

5). As you know, the first state Fire Plan was completed in 1985, with the latest one being adopted in 1996. So, they tend to have a life of 10-12 years. We began our review of the 1996 Fire Plan over two years ago, with input from the Range Management Advisory Committee and a special committee tasked especially with a thorough review. Their work products came then to the Resource Protection Committee where we completed a lengthy and thorough review of the 1996 Fire Plan in the spring of this year. We had much public input and discussion on the review and a finalized review document that was adopted by the full Board in May 2008.

6). What we learned from the review is that California is always going to have fire. We need to work to make the state's landscape more resilient and resistant to catastrophic fire. The loss due to catastrophic fire is horrendous. We must look at our entire landscape and work to accomplish appropriate fuels reduction work and fire safe clearing around structures and ensure that building standards and fire safe regulations are implemented. Without the fuels reduction work to create a more resilient landscape, fires will continue to be catastrophic and be hard to put out. If we get ahead of the curve and face the responsibility for fuels reduction work head on, we can create the landscape whereby fire can be a tool, not a catastrophic event. Your reference to the statement by a senior member of the US Forest Service is heartening. The State and Federal agencies tend to have different views on fire management. This is a challenge that we are working through as we rewrite the new Fire Plan. We hope to have the new Fire Plan adopted by January 2010.

7). We have formed a Fire Plan Steering Committee, which represents a broad group of stakeholders in order to ensure we have all of the key components addressed as we develop the Fire Plan that will guide the state's strategy and vision for the next ten years. This special committee will provide input to the Resource Protection Committee and the final plan will be adopted by the Board. All of these processes are publicly noticed and we are actively seeking input on the rewrite of the Fire Plan for the future. It is critical in the new Fire Plan to have a plan that is strategic, can be implemented and that implementation is measurable. We must be able to account for the measures to learn from our successes and failures and adapt as necessary.

8). The challenge to adopting permanent regulations to benefit coho salmon is the lack of the science. This apparently has been a continual challenge that I believe the Board is getting a handle on. As you know, we formed a technical advisory committee that worked with a contractor to review all the scientific literature. We recently had a presentation and then a board workshop to learn about what the science has taught us. I believe the Forest Practice Committee is currently working through all of that information and will start formulating regulations that we are hoping can be adopted on a permanent basis.

9). As you know, the Board worked with the Department (CalFire) and the Department of Fish and Game at the request of the Resources Secretary to create a regulatory package to benefit coho that took about a year of public meetings, discussions, changes and modifications. We

November 21, 2008

The Honorable Don Perata

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adopted that package in July 2007. When the emergency package came before us, the request was that we take immediate action with very little opportunity for public input or modifications. My immediate question to both departments; John McCammon of the Department of Fish and Game and Duane Shintaku of CalFire was; "Are the current regulations that we have in place working?" The answer back was a resounding "YES". They described a healthy working relationship of review team members on the ground working with landowners to create the best solution for the benefit of coho salmon. This was a direct result of the package that we had adopted that the emergency petition would completely unravel. That is why I voted "No". I am fully supportive of anyone bringing us a regulatory package that we can vet through the public process and get the best package possible to benefit the citizens and resources of California.

10). Possibly, but it needs to be done thoughtfully and carefully with full input. The challenge is that often the needs of salmonid species compete. It's critical that we work to develop performance based rules that allow the result like we got out of the coho package I mentioned above. We want the teams on the ground to find the solutions that work. This takes cooperation and cross agency coordination. Blanket prescriptive rules often just cost money and don't appear to be as effective.

11). We continually reach out to each of the departments that serve on timber harvest review teams in order to identify issues that we can help solve to make everyone's work more collaborative and effective. For example the Chair and Executive Officer are meeting regularly with the board chairs for the State Water Board and the Central and North Coast Regional Water Boards. This is an effort to ensure that our departments and department staff work cooperatively together. Another example is the field tour the Management Committee held this past July where we pulled together field review staff from each agency in order to discuss issues with the Sustained Yield Plans and how we solve those issues moving forward. In order to monitor that collaboration I simply ask agency staff and landowners, how is it going? Are there issues that we need to help solve? Then we take those issues back to the appropriate committee and make sure that everyone is around the table to discuss and find a solution.

12). There is no doubt that timber harvesting practices from decades far past had an affect on our watershed resources. How that continues to affect our current resources however is unclear. Practices have changed dramatically on the landscape and our watersheds are cleaner, and are more productive than they have ever been. How we balance a cumulative effects analysis with those factors in mind is truly a challenge. We need to have an appropriate analysis that isn't so costly and burdensome that landowners choose to walk away from owning and operating our forested landscapes but that will give the right level of information necessary to understand the impact the actions of management of those lands is having on our resources. The key problem is the requirement from CEQA to do a project by project analysis, making the potential cost of cumulative effects analysis highly prohibitive and questionable as to its utility.

Thank you Senator, for your consideration. I am attaching an updated Form 700 as you requested. I have also included an updated resume' that has changed a bit since you viewed the last one in 2006.

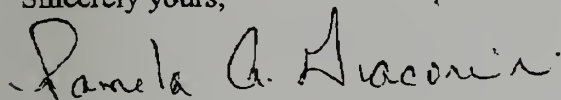


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The Honorable Don Perata

Should you choose to reconfirm my position, I assure you that I will continue to listen to all perspectives and work to make the best decision possible on all matters for the benefit of the citizens and resources of California.

Sincerely yours,



Pamela A. Giacomini

Cc: Mr. George Gentry, EO  
Mr. Stan Dixon, Chair

---

*Thank you for your support of our family ranch, enjoy our premium, natural beef !!*







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WEDNESDAY, JANUARY 14, 2009

1:32 P.M.

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Reported By: INA C. LeBLANC  
Certified Shorthand Reporter  
CSR No. 6713



SENATE RULES COMMITTEE

STATE OF CALIFORNIA

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HEARING

STATE CAPITOL

ROOM 113

SACRAMENTO, CALIFORNIA

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WEDNESDAY, JANUARY 14, 2009

1:32 P.M.

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Reported By: INA C. LeBLANC  
Certified Shorthand Reporter  
CSR No. 6713

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ALICE M. DOWDIN CALVILLO, Member, Public  
Employment Relations Board  
MARTIN N. HOSHINO, Executive Officer, Board  
of Parole Hearings  
R. KIRK LINDSEY, Member, California  
Transportation Commission

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MEMBERS PRESENT

SENATOR DARRELL STEINBERG, Chair  
SENATOR GIL CEDILLO  
SENATOR SAMUEL AANESTAD  
SENATOR ROBERT DUTTON  
SENATOR JENNY OROPEZA

STAFF PRESENT

GREG SCHMIDT, Executive Officer  
JANE LEONARD BROWN, Committee Assistant  
NETTIE SABELHAUS, Appointments Consultant  
DAN SAVAGE, Assistant to SENATOR CEDILLO  
JULIE NYSTROM, Assistant to SENATOR AANESTAD  
BILL BAILEY, Assistant to SENATOR AANESTAD  
CHRIS BURNS, Assistant to SENATOR DUTTON  
BRENDAN HUGHES, Assistant to SENATOR OROPEZA

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1 **PROCEEDINGS**

2 CHAIRMAN STEINBERG: Good afternoon, everyone.

3 The Senate Rules Committee will come to order.

4 Jane, if you could please call the roll.

5 MS. BROWN: Senator Cedillo.

6 SENATOR CEDILLO: Here.

7 MS. BROWN: Cedillo here.

8 Dutton. Oropeza.

9 SENATOR OROPEZA: Here.

10 MS. BROWN: Oropeza here.

11 Aanestad.

12 SENATOR AANESTAD: Here.

13 MS. BROWN: Aanestad here.

14 Steinberg.

15 CHAIRMAN STEINBERG: I'm here. We do have a  
16 quorum.

17 We do have a couple other members that are  
18 coming, and without objection we're going to go a little  
19 bit out of order here today to accommodate some  
20 appointees who are in the middle of their actual public  
21 service, in the middle of meetings, so without objection  
22 we will take R. Kirk Lindsey up as member of the  
23 California Transportation Commission.

24 MR. LINDSEY: Thank you.

25 CHAIRMAN STEINBERG: Mr. Lindsey, welcome to

1

1 you. If you have any member of your family or anybody  
2 you want to introduce, please do so.

3 MR. LINDSEY: I'm good.

4 CHAIRMAN STEINBERG: You're good. Make sure  
5 you speak right into that mic, and I will ask you to  
6 make a brief, capital B, brief opening statement, if you  
7 would like. And, if not, we can get right into the  
8 questions.

9 MR. LINDSEY: I would like to be reappointed to  
10 the California Transportation -- I've been appointed and  
11 confirmed by y'all to the California Transportation  
12 Commission.

13 CHAIRMAN STEINBERG: All right. Well, ten  
14 points for brevity. That's excellent.

15 I do have a few questions, and then we'll ask  
16 the members to do the same, and we'll take testimony.

17 As you know, last year the legislature passed a  
18 bill which I authored, Senate Bill 375, which requires  
19 the California Transportation Commission to maintain  
20 guidelines for travel demand models as part of allowing  
21 the Air Resources Board to determine greenhouse gas  
22 reduction targets to implement 375.

23 What is the Commission doing currently to  
24 evaluate these models and compel any necessary changes  
25 to comply with SB 375?

2

1 MR. LINDSEY: Probably very little, since we  
2 don't have any money. You know that. So we're not  
3 moving forward with new things. We're dealing more with  
4 old things.

5 The SB 375, however, the Commission has for a  
6 number of years been very in favor of the combination of  
7 land use with transportation. In fact, it became part  
8 of our STIP requirements. Certainly, your bill has  
9 strengthened that issue, and the Commission that I'm  
10 aware of, and certainly this commissioner, is all in  
11 favor to move forward with reducing greenhouse gases and  
12 requiring blueprints and such for transportation  
13 projects.

14 CHAIRMAN STEINBERG: Is there a timeline that's  
15 been developed or is being developed? I understand the  
16 financial situation, obviously, but is there any kind of  
17 expectation about when the CTC might get to this work?

18 MR. LINDSEY: I don't know that.

19 CHAIRMAN STEINBERG: Okay. I think one thing I  
20 certainly appreciate is your looking into that, maybe  
21 raising it publicly with the Commission itself, and  
22 assuring us that even with the fiscal difficulties, that  
23 there's an aggressive timeline planned to implement this  
24 very important law.

25 MR. LINDSEY: Senator, the Commission is very,

3

1 very aware of the bill, is very, very aware of the  
2 demand, the goodness of those things. I just don't know  
3 the timeline. But I'll -- if there is one, I'll get  
4 back to you, and if there is not, we'll get one.

5 CHAIRMAN STEINBERG: Thank you very much.

6 Let me ask you one other question, and that is  
7 your view on high-speed rail and how it fits in with  
8 California's other transportation priorities.

9 I mean, do you believe, as a current and  
10 prospective future commissioner, that this project is  
11 important to the State, especially to the Central  
12 Valley?

13 MR. LINDSEY: I think in the grand scheme of  
14 things, yes. I think it's expensive. I am a little bit  
15 challenged on funding. I mean, we put nine billion  
16 dollars. The people of California. That's one leg of a  
17 three-legged stool. I think you need federal funds to  
18 match that somewhere in that same neighborhood. I also  
19 think you need private investment to match that. The  
20 private investment seems to be kind of out there in this  
21 nebulous cloud that might be available. I don't see  
22 anything that really says to the tune of nine or ten  
23 billion dollars that the feds are at the table.

24 But I think in the grand scheme -- If you look  
25 at the world of transportation from 30,000 feet, it is

4



about getting people to jobs, to retail centers. It's about moving goods. It's also about high-speed rail. I mean, they'll all go together sooner or later. So it may be more of a timing issue of when it gets done. And I understand we're still ten years away, 20 years away. It is certainly a challenge out in the future.

CHAIRMAN STEINBERG: Thank you. Let's open it up to members of the Committee. Questions. Senator Oropeza.

SENATOR OROPEZA: Good afternoon. Thank you for your time yesterday. I appreciate you coming by the office. I think we had a really good conversation.

MR. LINDSEY: My pleasure.

SENATOR OROPEZA: I did want to talk to you a moment about one of the policy areas that seems to be a growing area of interest and belief, that it's maybe not the be-all/end-all, but certainly one of the main ways that we're going to get through our infrastructure problems in California, and that is the use of tolls as a vehicle for financing the infrastructure. Along with that, of course, the sort of attendant issue of public-private partnerships and how they work.

We've had a couple examples around the state of public-private partnerships that -- the one I'm most familiar with is on the 91 freeway, which I spent four

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hours on because I didn't have a FasTrak pass, going from Long Beach to Pamona on Christmas night, and the other cars whizzed, whizzed, whizzed by, but there was no easy way for me to buy one of those FasTrak things while I was out there on the freeway, so I sat for four hours.

Anyway, my question is: What is your view of these public-private partnerships? You know the history of 91 and how it initially was not so together, and then it went over to the agency, and now it is financially, I guess, and operationally doing fine, and the issue of tolls as a financing vehicle.

MR. LINDSEY: My opinion is those are methods to bridge a gap, but I don't know -- I guess my contention is they're really tinsels on a tree. The fact of life is, if the world could find a long-term, stable funding source for transportation that were to carry us over a long span of time, I don't even know if we would be talking about toll roads or, you know, fast lanes, or all of this stuff.

What happens is we don't have any money, so everybody is scurrying around trying to find out how can we do it, and that's one of the ways to do it. I would suggest we don't close the door and say we're not going to do that, because we may never find the money. So if

6

1 that's a method to get there, maybe we have to.

2 However, toll roads, for example, because I  
3 know you care about toll roads, the challenge for toll  
4 roads is it may be okay, but it's got to be fair and  
5 equitable, and there's got to be an alternative route.  
6 It doesn't make sense that I can go from point A to  
7 point B, which is six miles on a toll road for five  
8 bucks, and because you don't do a toll road, it's  
9 27 miles around the mountain. That's not the intent.  
10 So I think if the intent is fair and equitable to  
11 everybody, you know, it's okay.

12 SENATOR OROPEZA: Has the Commission ever  
13 discussed that fair and equitable issue relative to  
14 people's economic means? In other words, there's  
15 another level at which I object to the toll roads, and  
16 that's that if you've got the dough, you can go fast.  
17 If you don't have the dough, you're stuck in that four  
18 hours. I had the dough. I just didn't know how to do  
19 it, but that's another issue.

20 But, frankly, that equity issue is also one  
21 that I wonder if the Commission has had any discussion  
22 about.

23 MR. LINDSEY: We have had lots of discussions,  
24 and there's lots of actual tracking on who uses toll  
25 roads, and it does not show the wealthy people are the

7

1 only users by any stretch of the imagination. Now I  
2 will get you some information to show you, though,  
3 because that is an issue --

4 SENATOR OROPEZA: That's great.

5 MR. LINDSEY: You know, we as the Commission  
6 represent everybody in California. Not the rich  
7 people -- sorry. Not the big city. We also represent  
8 the little people.

9 SENATOR OROPEZA: That's right.

10 MR. LINDSEY: So it is really important to us  
11 that it is fair and equitable across the board.

12 SENATOR OROPEZA: Yes. Well, I'd be very  
13 interested in that. I would be interested in the  
14 proportionality of the participation.

15 I'm guessing that certainly there are people  
16 who the cost benefit of getting to work is worth it for  
17 them to do it and others that it isn't. So I would  
18 welcome that information. And I thank you very much for  
19 your answers today and yesterday.

20 MR. LINDSEY: You're more than welcome.

21 CHAIRMAN STEINBERG: All right. Thank you.  
22 Thank you. Get these mics right one of these days.

23 Do we have questions from other members?

24 Senator Dutton.

25 SENATOR DUTTON: Good afternoon. I'm extremely

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1 interested in 1B and how it's being implemented and so  
2 forth, sort of being involved in helping to negotiate  
3 the bond. What I'm looking -- What I want you to share  
4 with me and the Committee here is what kind of  
5 challenges have you encountered with the timely  
6 disposition of 1B and the projects that are under your  
7 supervision and control?

8 MR. LINDSEY: Well, you know, from the  
9 Commission's viewpoint, if you all said you had a buck,  
10 we'd like to spend it tomorrow. The world doesn't quite  
11 work that way. But I will tell you the \$19 billion  
12 dollar Proposition 1B bond, from a transportation  
13 viewpoint, which we manage about  
14 11 billion of that, we came out of the box with  
15 CMIA within ten months, I believe, from passing, maybe  
16 less than that, with passage, and that was a war zone.  
17 But that was five billion. Within a year later, we came  
18 out with the goods movement plan, which is \$4.5 billion  
19 dollars.

20 I would suggest from a Commission's management  
21 of money, we have moved as fast as you can possibly  
22 move. The one area we haven't is the \$1 billion dollar  
23 matching funds, and that's almost done but not quite.  
24 That was the last piece of our puzzle.

25 The challenge, again, becomes how do you be

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1 fair and equitable across the board to the big cities,  
2 the little cities, to all of the people, and you are  
3 trying to put together a congestion management plan.  
4 I mean, it would be real easy to go to Los Angeles and  
5 they say, "We've got 250,000 cars a day that go through  
6 this intersection. We should get all the money."

7 And then you go to the little bitty town that  
8 says, "I got 2,500 cars a day that go through this  
9 intersection. You know, at least throw me a bone."

10 We've got to somehow figure out how to get  
11 between those, so you start at the bottom. And I think  
12 we did a marvelous job of going to local communities,  
13 getting their input on a very fast track, and then going  
14 to councils and governments, which would represent a  
15 county, if you will, or a county-type area. Then you've  
16 got to go through Caltrans districts, then you've got to  
17 go through the State, and Caltrans State, and ultimately  
18 it ends up to us.

19 So it's a challenging process, and I would tell  
20 you I'm really proud of the Commission for how fast  
21 we've managed most of the money. Now, have we got it  
22 all out the door? No. But we also don't have it right  
23 now. Sometimes the good Lord throws you something you  
24 didn't expect. If we had it all out the door, I'm not  
25 sure we wouldn't be potentially closing down other

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1 projects.

2 SENATOR DUTTON: What I'm kind of curious about  
3 is that is something -- the time you just talked about  
4 that it has to go through all these processes and all  
5 these different agencies before you put the money out,  
6 that we can appropriate it, and until you actually  
7 allocate it, it doesn't take place. And what I'm  
8 certain about is that we may have missed an opportunity,  
9 because if some of these projects have actually got --  
10 many of them may be started maybe a year sooner. I  
11 think we still have some problems, but we may have --  
12 there may be a lesser burden in some areas. That's one  
13 thing I was wondering about.

14 So is there some way that you could have  
15 expedited, or is there some extra steps that were  
16 causing these projects having to go through without  
17 taking away from the controls over -- you know, the  
18 CEQA, the environment and stuff, but is there some  
19 streamlining we should consider in the process?

20 MR. LINDSEY: You know, I think there's  
21 always -- today --

22 In the meeting today we talked about -- with  
23 the feds and what they're potentially doing, and how  
24 you're going to get there in 90 days or how you're going  
25 to get there in 180 days, and certainly the

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1 environmental review and some of that comes into play.  
2 Permitting issues come into play. How do I access  
3 contractors to, maybe, shorten the timeline on a  
4 contract bid from 90 days down to 60 days. We're right  
5 now looking at every way we can so we can maximize  
6 dollars if they do come available.

7 So, certainly, hindsight is a little bit 20/20.  
8 Saying that a year ago we may have been able to do some  
9 of those same things, we didn't.

10 SENATOR DUTTON: Okay. Thank you.

11 CHAIRMAN STEINBERG: Senator.

12 SENATOR OROPEZA: Simple question I forgot to  
13 ask, and that is: I noted that there's one female on  
14 the Commission. Do you find that that poses any kind of  
15 a challenge relative to getting a total point of view on  
16 the citizenry of California, given that over 50 percent  
17 of California are female?

18 And then I would ask the same question, if you  
19 could share with me, I don't know, what the top-level  
20 staff looks like in terms of gender.

21 MR. LINDSEY: Top-level staff is male. Total  
22 staff is probably more female than male. Total staff.

23 SENATOR OROPEZA: Meaning, going down the food  
24 chain about --

25 MR. LINDSEY: Two levels is male, and then you

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1 start to diversify. Okay.  
2 The issue of gender on the Commission has never  
3 been an issue that I'm aware of. Again, I'm very proud  
4 of the fellow commissioners, over the years that I've  
5 been there, that this isn't a boy-girl thing. This is  
6 what's good for the State of California.  
7 SENATOR OROPEZA: Let me just share with you an  
8 example. Okay. The needs of a working mom who has a  
9 couple of kids, her needs in terms of access and the  
10 expeditious movement of her vehicle are very different  
11 than a -- let's say a male -- and I'm just giving  
12 examples. They could be in reverse. But a female who  
13 drives one way to work and one way home. And when  
14 considering options for what serves the most  
15 Californians the best, those kinds of perspectives can  
16 be valuable on a commission as you're making decisions.  
17 So I would hope until there are -- and this is  
18 not at your pay scale, because you don't make the  
19 appointments. Somebody else does. But what is at your  
20 pay scale is, I would hope you would think about those  
21 kinds of dynamics as you go through your work and maybe,  
22 I don't know, discuss with women in your life some of  
23 the issues that are relative -- that relate to them and  
24 their transportation needs. I would say while there are  
25 many more similarities, there are differences, and it's,

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1 I think, a valuable voice on these decision-making  
2 bodies.  
3 MR. LINDSEY: Just to give you a little bit of  
4 a comfortable feeling, I'm married. I have a wife who  
5 is more vocal than I.  
6 SENATOR OROPEZA: Where is she?  
7 MR. LINDSEY: We have four daughters. My wife  
8 has been on the school board for 20 years and interacts  
9 with moms and PTAs over our whole lifetime. And so I'm  
10 pretty dialed into what you're talking about.  
11 SENATOR OROPEZA: Ask her next time.  
12 CHAIRMAN STEINBERG: And former coach of high-  
13 school girls' aquatics.  
14 MR. LINDSEY: Actually, I just finished my 21st  
15 year and am still coaching. I coach high-school  
16 swimming and high-school water --  
17 SENATOR OROPEZA: That's great. You have to  
18 see those sports moms and dads.  
19 Thank you. Thank you very much.  
20 CHAIRMAN STEINBERG: Thank you very much.  
21 Any other questions? Support the nominee.  
22 MR. CURTIN: Mr. Chairman --  
23 Is this on?  
24 CHAIRMAN STEINBERG: Yes.  
25 MR. CURTIN: -- Members, I'm here on behalf of

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1 California Conference of Carpenters to support  
2 Mr. Lindsey. One of our --  
3 CHAIRMAN STEINBERG: Your name is Dan --  
4 MR. CURTIN: I'm sorry. Danny Curtin.  
5 One of our leaders in the Carpenters, Bobby  
6 Alvarado, is a member of the board. I think it goes --  
7 well, not without saying it, which we should praise --  
8 This board has been extremely efficient at a very  
9 difficult time when there was a lot of money to move out  
10 and a lot of demands on that money, and I think  
11 Mr. Lindsey expressed that well.  
12 What Bobby tells me is that even though there's  
13 a lot of political diversity on the board, there's a  
14 cohesion and a real attempt to make this thing work,  
15 that Mr. Lindsey brings a lot of experience and reasoned  
16 thought to that dialogue. And he asked me to come up  
17 here and make sure you are aware of that, and that we  
18 support him all the way.  
19 CHAIRMAN STEINBERG: Thank you, Mr. Curtin.  
20 MR. SMITH: Mr. Chairman, members, D.J. Smith  
21 representing a good deal of the public and private  
22 transportation community in the state.  
23 Mr. Chairman, as you know, I wrote the  
24 legislation, working as a staffer 30 years ago, for the  
25 Commission. We've seen commissioners come and go. It's

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1 something I've been always proud of. This is an  
2 extraordinary commissioner who has shown leadership  
3 beyond belief through a very, very difficult problem  
4 area. You know -- As you probably know, I think a  
5 couple of you have been here in good times and bad  
6 times. It's almost harder when you have more money to  
7 spend than it is less money.  
8 CHAIRMAN STEINBERG: We would take that  
9 problem.  
10 MR. LINDSEY: Let me cut him off.  
11 When I started on the Transportation  
12 Commission, we had two billion dollars in cash, and two  
13 years later we had zero. And I'm going to promise you  
14 it is much more fun to have candy in the candy store.  
15 There's no doubt about that.  
16 CHAIRMAN STEINBERG: Why don't you finish up.  
17 MR. SMITH: This is one of the best  
18 commissioners we've ever had, and he deserves  
19 reappointment.  
20 CHAIRMAN STEINBERG: Thank you very much, sir.  
21 Anybody else in support or opposition to the  
22 nominee? All right. If not, I'm prepared to support  
23 your nomination.  
24 SENATOR OROPEZA: I'll make the motion.  
25 CHAIRMAN STEINBERG: Go ahead, Senator Oropeza.

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1 SENATOR OROPEZA: I'll move the nomination.  
2 CHAIRMAN STEINBERG: Moved by Senator Oropeza.  
3 Accept. Prepared to support the nomination.  
4 Thank you very much for your dedication, your  
5 public service, and your willingness to continue.  
6 Please call the roll.  
7 MS. BROWN: Senator Cedillo.  
8 SENATOR CEDILLO: Aye.  
9 MS. BROWN: Cedillo aye.  
10 Dutton.  
11 SENATOR DUTTON: Aye.  
12 MS. BROWN: Dutton aye.  
13 Oropeza.  
14 SENATOR OROPEZA: Aye.  
15 MS. BROWN: Oropeza aye.  
16 Aanestad.  
17 SENATOR AANESTAD: Aye.  
18 MS. BROWN: Aanestad aye.  
19 And Steinberg.  
20 CHAIRMAN STEINBERG: Aye.  
21 MS. BROWN: Steinberg aye.  
22 CHAIRMAN STEINBERG: Thank you very much. That  
23 nomination will move to the floor of the State Senate.  
24 Thank you.  
25 All right. Next we will go back to the agenda

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1 has been a rash of late opposition to move your  
2 appointment, and feel free to make any kind of opening  
3 statement that you want, but it would be fine if you got  
4 right to the heart of it and responded to some of the  
5 concerns and criticisms that you have heard.  
6 MS. CALVILLO: Thank you, Senator.  
7 Good afternoon, Mr. Chairman and members of the  
8 Committee. I would like to thank you for the  
9 opportunity to come before you today. I'm honored and  
10 humbled to serve as a member of the Public Employment  
11 Relations Board. I'm privileged to continue my 20-plus  
12 years of public service to the great people of the state  
13 of California.  
14 The charge of a PERB board member is to protect  
15 the rights of both the employee and the employer under  
16 the seven collective bargaining statutes under our  
17 jurisdiction. This is a charge that I take very  
18 seriously. The cases that come before us impact  
19 people's lives and their livelihoods, and I'm respectful  
20 and I'm mindful of these responsibilities as the board  
21 makes its decisions.  
22 Mr. Chairman and members, to be an effective  
23 member of PERB, fairness and impartially are key. An  
24 integral part of our job is to ensure consistent  
25 application of the board's precedent and the laws we

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1 as it is laid out and ask Alice M. Calvillo, member of  
2 the Public Employment Relations Board, to come forward,  
3 please.  
4 Ms. Calvillo, welcome to you.  
5 MS. CALVILLO: Thank you, Senator.  
6 CHAIRMAN STEINBERG: Would you like to  
7 introduce any members of your family or supporters that  
8 are here today?  
9 MS. CALVILLO: Yes, I would. Thank you for the  
10 opportunity. I have my family in the first row here, my  
11 husband, Frank.  
12 CHAIRMAN STEINBERG: Welcome.  
13 MS. CALVILLO: My brother, Stan, my mother  
14 Elaine, my sister, Laura, and my father, Dick Dowdin.  
15 CHAIRMAN STEINBERG: Welcome all of you to the  
16 California State Senate. Glad to have you here.  
17 MS. CALVILLO: I also have my PERB family here  
18 as well in the audience. And I thank them for being  
19 here as well, Senator. Thank you for the opportunity.  
20 CHAIRMAN STEINBERG: Very good. We're glad  
21 you're here. What we would like you to do is make an  
22 opening statement, a little longer than Mr. Lindsey  
23 here. We'd like to hear why you seek reappointment and  
24 maybe -- you know, we like to sort of cut to the chase  
25 here. We do know that -- The Committee knows that there

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1 administer. To this end, we are fortunate to have more  
2 than 30 years of board precedent, as well as decisions  
3 from the National Labor Relations Board, to use in  
4 formulating our rulings.  
5 In keeping with my belief that justice delayed  
6 is justice denied, resolving disputes that come before  
7 PERB in a timely manner is crucial. I also strive for  
8 PERB's charge for neutrality and work to foster our  
9 mission to promote harmonious labor relations. The work  
10 done at PERB is very important, and it is my sincere  
11 hope that my service there may continue. And, again, I  
12 thank you for the opportunity to speak before you today  
13 and welcome your questions.  
14 I know that there has been opposition lobbied  
15 against me, Senator and members. One of the allegations  
16 has been that I have not been impartial, and I have not  
17 been fair in my rulings.  
18 Since I've been on PERB, I have participated in  
19 making 28 decisions. That's a lot of decisions. Five  
20 of those have been administrative in nature, requests  
21 for denial of appeal and so forth. Eleven of my  
22 decisions have focused on -- excuse me. Eleven of my  
23 decisions were actually appeals of decisions that were  
24 written by administrative law judges, and 12 of those  
25 appeals came from board agents who dismissed a case

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1 before us.

2 When you separate those two sets of appeals,  
3 reality is I've ruled in favor of labor just as many  
4 times as I've ruled in favor of the employer, four times  
5 each, and I've ruled in favor of both three times. So  
6 it's confusing to me in understanding how there is this  
7 argument that I'm not -- I haven't been fair and  
8 impartial.

9 So I'd like to leave it at that. There may be  
10 some more questions, and I'll entertain those.

11 CHAIRMAN STEINBERG: Right. I know I have a  
12 series of questions of some of the cases that have been  
13 raised, but I'm going to hold off for now. If you are  
14 done with your statement, I would like to -- I think I  
15 would like to begin, if there's no objection, with  
16 support and opposition testimony, because I think that  
17 will help frame some of the questions that the members  
18 may want to ask.

19 So if we could please have the witnesses in  
20 support of the nominee please come forward.

21 Okay. Witnesses in opposition to the nominee.

22 Again, I don't know how many witnesses in  
23 opposition are representing the same viewpoint, but if  
24 you can organize the testimony in a way that somebody  
25 gives the bulk of it and everybody else says, "Me too,"

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1 if that's the way it works, we'd appreciate it.

2 MR. LOW: Okay.

3 CHAIRMAN STEINBERG: Okay.

4 MR. LOW: Thank you. Chairman and members,  
5 David Low, California School Employees Association.

6 CSEA does oppose the confirmation of Alice  
7 Dowdin Calvillo to the Public Employment Relations  
8 Board, and it's a rare occurrence for us to oppose  
9 confirmations. In my 27 years with the CSEA, I can  
10 count on one hand the number of times I have appeared  
11 before the Senate Rules Committee in this capacity.  
12 However, in this case, we're very compelled to oppose  
13 based on the general anti-labor direction that the PERB  
14 board is taking as a whole and the specific role that  
15 Ms. Calvillo has played.

16 In her short term on the board, she has issued  
17 23 board decisions, and by our math 16 of these  
18 decisions was decided against labor. She seems to  
19 account where she split the decision and overturns --  
20 but doesn't overturn the whole case against labor as a  
21 favorable decision. We view those decisions as an  
22 opposing decision.

23 We don't oppose just based on the numbers. Her  
24 70 percent voting record against labor is not the issue.  
25 The fact is that the real issue is that we have gone

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1 through and very carefully reviewed these cases. And,  
2 in fact, our opposition did come in late, but I think  
3 you have to understand in her first month on the board,  
4 she issued a very small number of decisions, not very  
5 controversial. In the last several months, from  
6 September to December, she issued a large number of  
7 decisions. And the basis of our opposition is primarily  
8 upon those cases that were issued in December, in  
9 particular, two cases that were issued December 19th.

10 So rather than oppose her based on issues not  
11 related to the facts, we carefully reviewed the details  
12 of each of these cases, and the last cases she issued  
13 were the most egregious cases that we found, two on  
14 December 19th, one, the Amalgamated Transit Union vs.  
15 Omnitrans, where she reversed the administrative law  
16 judge on two of the three decisions, on three points,  
17 all of which the ALJ ruled in favor of the union.

18 We are particularly concerned that in this  
19 case, she used the past practice of the employer in the  
20 first charge to overturn the ALJ and rule against the  
21 union, and then she turned around and used the past  
22 practice of the union and ignored that, rejected that  
23 past practice, and instead used testimony by two  
24 management workers to overturn the ALJ again against the  
25 union. So she interprets past practice in that case in

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1 totally opposite manners in the same case. She gives no  
2 weight to the union past practice, and then she also  
3 ignores precedent in that case as it relates to the  
4 charge where the union is using leave to participate in  
5 activities of external union matters.

6 The McPherson case, which is referenced in that  
7 decision, states that it's established that activities  
8 on behalf of other unions or units of employees  
9 constitutes protected union activity, yet what the board  
10 does is they say, "No, we're going to reject that and  
11 we're going to say that because they -- the banishment  
12 of employees mentioned, that they said it's not a union  
13 activity, we're going to reject them on precedent, and  
14 we're going to decide against the union." So she states  
15 that she adheres to precedent, and in fact in this case  
16 completely rejects the precedent and overturns the union  
17 on two charges.

18 You know, the cases of retaliation for union  
19 activity are amongst the most important decisions that  
20 the unions bring. This is our livelihood here in terms  
21 of protecting members. Local union officers are almost  
22 always volunteer officers who donate their time and work  
23 at the employer's job and represent their fellow  
24 members, so it's difficult to recruit these people to  
25 donate their time for these jobs. And when they are

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1 found that management has carte blanche to harass,  
2 intimidate, or terminate union officers, it just makes  
3 that job that much harder. Yet Ms. Calvillo, in this  
4 case, treats this case as if it's nothing more than a  
5 simple case of forgetting to present your leave request  
6 48 hours in advance.

7 In this case, the employee presented it on  
8 Friday for a Monday leave. So in fact the employer knew  
9 it was for union leave, it was a legitimate union leave.  
10 Even though it was three days in advance, it wasn't  
11 48 hours of workdays, and she just rejects any facet of  
12 union representation and instead says, "No, in a lead  
13 case, if you don't give 48 hours' notice, you're  
14 terminated."

15 In Baker Valley Teachers Association vs. Baker  
16 Valley Unified, the ALJ found in favor of the union in  
17 both of two charges where the employer brought union  
18 officers in and asked them to resign. In the one case,  
19 Mr. Zear was the union president. He was one of only  
20 three members of the union, because it was a newly  
21 active union. The president resigned, he got thrust  
22 into the presidency, and he started holding more union  
23 meetings, bringing CTA representatives to the bargaining  
24 table, just engaging in much more active union activity.  
25 And the employer called him in after that and asked him

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1 Mr. Zear's union activism had been ongoing and  
2 recent, and the evaluations of him were six months  
3 earlier. She also finds the term "classroom management"  
4 is not at all vague or ambiguous, which we find fault  
5 with.

6 The new standard established by Ms. Calvillo in  
7 this case, and her fellow board members, sends dire  
8 warnings to union leaders, which is: If you don't have  
9 a spotless record, or if you have a single blemish, your  
10 union activism can be discounted in a retaliation case,  
11 and we will instead reach back into the record as far as  
12 we can to justify these terminations.

13 In the San Mateo Firefighters case, the board  
14 found in favor of the employer, and Ms. Calvillo writes  
15 a concurrence in this case where she agrees with the  
16 board's majority decision, but she takes it a step  
17 further. The board decided that -- at least in this  
18 case, there's a well-established precedent that shows  
19 that a person that reports a safety violation is  
20 engaging in a protected activity.

21 Ms. Calvillo argues that she disagrees with  
22 her fellow board members, and that a different standard  
23 than the PERB precedent under the Regents of UC,  
24 L.A. Unified, and Oakdale should not apply, instead an  
25 NLRB precedent should apply. And we would urge you to

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1 to resign, and the ALJ found that the elements of  
2 protected activity were met, adverse actions, timing of  
3 the charge, and he ruled the district departed from  
4 standard procedures by not giving Zear a written notice  
5 of opportunity for a hearing and a statement of charges  
6 as required by the Ed Code.

7 Now, Ms. Calvillo reverses the ALJ's decisions  
8 and asserts that the district is justified in their  
9 violation of the Education Code because they have a  
10 past practice of violating the law in other cases. So  
11 because they didn't give previous employees their legal  
12 right to notification of a hearing and their statement  
13 of charges, she states that they don't have to give the  
14 union president this legally required Education Code  
15 notice of a hearing and a statement of charges, and  
16 dismisses the charge and reverses the ALJ.

17 She also asserts the nexus is not established  
18 between the connected activities, and that the forced  
19 resignation of the union president is okay because he  
20 had been given a previous evaluation criticizing him for  
21 classroom management.

22 We find this decision onus on many levels. It  
23 continues a pattern where Ms. Calvillo disregards facts  
24 in favor of the union, issues a decision that has a  
25 chilling effect on union representation.

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1 read -- We have attached her actual -- her concurrence  
2 opinion, because I had to read it five times. I thought  
3 her logic was tortured and flawed. She concedes that  
4 the employee had safety concerns; she concedes that he  
5 communicated them; but she questions his motivation,  
6 essentially, and finds, because he might have had some  
7 self-interest, that reported safety concerns aren't  
8 protected activity in this single case.

9 Finally, lastly, we find fault in the  
10 California Federation of Interpreters case, Region 4,  
11 where Calvillo and the board again reversed the ALJ who  
12 ruled that the committee violated the act by denying  
13 union-requested information and request to arbitrate a  
14 dispute on behalf of a court interpreter. The court  
15 interpreter was a contract employee. And the board  
16 concedes in their decision that one of the purposes of  
17 the act is to convert independent contractors to trial  
18 court employees, and another key purpose of the act is  
19 to give collective bargaining rights to these employees.  
20 Yet Ms. Calvillo overturns the ALJ's decision and rules  
21 the union can't receive information to represent this  
22 employee, and he cannot arbitrate because the court  
23 interpreter is a contract employee.

24 This case has very far-reaching ramifications  
25 for all of us in labor, because we often run across the

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1 practice of employers who misclassify workers to deny  
2 them union representation and benefits in other areas.  
3 They classify them as "temporary," "contractors,"  
4 "intermittent," "short-term," "provisional," all sorts  
5 of terms. So this throws the door wide open for these  
6 abuses, because now it opens the door to grant the  
7 employers the right and not to give us the information  
8 to represent these people and not allow us to challenge  
9 these misclassifications and make these people whole and  
10 bring them in as employees.

11 For us, PERB is the equivalent of the Supreme  
12 Court. Ms. Calvillo often stated when we've talked to  
13 her, "The facts are the facts," but the fact is for us  
14 she interprets the facts in a way that shows a very  
15 strong anti-union bias, and while we applaud her for  
16 issuing many, many decisions in her short tenure, while  
17 justice delayed is justice denied, the fact is justice  
18 denied is also justice denied, and we feel she has  
19 denied justice to public employees and ask your "No"  
20 vote on her confirmation.

21 CHAIRMAN STEINBERG: Thank you, Mr. Low. Could  
22 you explain -- Before you leave, I noticed that Senator  
23 Aanestad had a question or two for you.

24 SENATOR AANESTAD: Mr. Low, in the first few  
25 cases that you quoted, one was McPherson, the other was

1 law judge decided in favor of the union in both charges.  
2 Both of them dealt with retaliation against union  
3 officers. And the board reversed the ALJ, and instead  
4 of siding in favor of the union --

5 SENATOR AANESTAD: So it was the board that  
6 reversed the ALJ.

7 MR. LOW: There's never a decision that goes  
8 before the PERB where only one person decides. All of  
9 the decisions from PERB are board decisions. There's no  
10 such thing as an individual judge's decision.

11 SENATOR AANESTAD: And what is the purpose of  
12 the board to meet after the ALJ has made their ruling if  
13 not to be able to question the ALJ's ruling?

14 MR. LOW: We do not dispute the right of the  
15 board and the responsibility the board to question all  
16 ALJs' rulings. What we question is -- is her rationale  
17 used in these decisions.

18 SENATOR AANESTAD: Her rationale or the board's  
19 rationale?

20 MR. LOW: Well, both.

21 SENATOR AANESTAD: Both. So if you had your  
22 way, you would urge a "No" confirmation vote on any of  
23 those members who voted against you in those two cases.  
24 It just happens Ms. Calvillo is here today --

25 MR. LOW: Not just those two cases. Our

1 Baker Valley, what was the final disposition in those  
2 cases?

3 MR. LOW: The final disposition on the first  
4 case, which was ATU Omnitrans, there were three charges.  
5 The administrative law judge ruled in favor on all three  
6 charges. The final disposition was PERB overturned the  
7 ALJ and terminated the union president on charge one,  
8 affirmed charge two, and overturned or reversed the ALJ  
9 on charge three, and it was a unilateral change charge.

10 SENATOR AANESTAD: And she did this  
11 unilaterally?

12 MR. LOW: She did -- no. It was the whole  
13 board decision. She was one of the board members.

14 SENATOR AANESTAD: So this was a board decision  
15 to overturn the ALJ.

16 MR. LOW: Yes.

17 SENATOR AANESTAD: Not just her decision.

18 MR. LOW: Right. She participated in that  
19 decision.

20 SENATOR AANESTAD: And where is that case  
21 standing today, legally?

22 MR. LOW: I don't know if it's been appealed or  
23 not.

24 SENATOR AANESTAD: Okay. Baker Valley.

25 MR. LOW: Again, two charges. Administrative

1 opposition to confirmation aren't just those cases.  
2 Those are what I've testified on.

3 SENATOR AANESTAD: Why was --

4 MR. LOW: What we would do is review the whole  
5 record of anybody who came before this body, and we  
6 would make our decision on opposition based on all the  
7 decisions on which they participated.

8 SENATOR AANESTAD: In the Baker Valley case,  
9 final disposition, legally?

10 MR. LOW: I also don't know if that's been  
11 appealed or not.

12 SENATOR AANESTAD: Okay. I guess my question  
13 would be: If the final findings by the board which  
14 happen to be concurred with by the nominee are so  
15 egregious, why have they not been appealed?

16 MR. LOW: I don't know if they've been  
17 appealed. Neither of --

18 SENATOR AANESTAD: Don't you think that would  
19 be a very vital part of your allegations --

20 MR. LOW: Sure, but I know --

21 SENATOR AANESTAD: -- because the failure to  
22 appeal would seem to me that maybe the board did make  
23 the correct --

24 CHAIRMAN STEINBERG: Not necessarily.

25 MR. LOW: There's a lot of factors that go into



1 a decision to appeal, and that is not -- that's one, but  
2 that's not all.

3 SENATOR AANESTAD: The point here that I'm  
4 making is: This nominee is not making these decisions  
5 unilaterally, that it is the board that is making these  
6 decisions. She just happens to be voting with the  
7 majority of the board on this way with which you are  
8 disappointed.

9 CHAIRMAN STEINBERG: That's correct.

10 MR. LOW: You use that rationale, you can't  
11 oppose anybody.

12 CHAIRMAN STEINBERG: That's correct, but I  
13 think Mr. Low's point is that any member has a right to  
14 either join the majority or dissent --

15 SENATOR AANESTAD: And I guess I have the right  
16 to make the point that if the entire board is voting to  
17 overturn an ALJ decision, maybe the board was correct.  
18 And maybe her decision, although you're unhappy with it  
19 as a representative of labor, maybe her decision was  
20 correct and fair.

21 MR. LOW: We will dispute that.

22 CHAIRMAN STEINBERG: That's what we're here to  
23 talk about today, among other issues.

24 All right. Thank you very much, Mr. Low.

25 Other witnesses in opposition, please.

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1 we're here. Thank you.

2 CHAIRMAN STEINBERG: Thank you, Ms. Vega.  
3 Ms. Sanchez.

4 MS. SANCHEZ: Good afternoon. Libby Sanchez on  
5 behalf of the Teamsters, the Machinists, Amalgamated  
6 Transit Union, Local 21, and SCOPE.

7 First of all, I just want to say I'm so pleased  
8 to see a court reporter here doing the good work that we  
9 know they do.

10 I just want to speak, really, about the public  
11 policy rationale behind the unions I represent opposing  
12 the confirmation of Ms. Calvillo. It really goes to the  
13 question of what is the purpose of the board. Is the  
14 purpose of the board to make determinations based on  
15 facts and law, or is the purpose of the board basically  
16 to legislate from the bench?

17 We would contend that several of the decisions  
18 that the -- that Ms. Calvillo made were not based on the  
19 facts before her, were not based on the law before her,  
20 but rather were based on an erroneous interpretation of  
21 the facts and the law before her.

22 Reasonable minds can disagree about a perfect  
23 world being one in which, you know, union-side  
24 determinations or management-side determinations are  
25 made, but I would hope that we would all agree that the

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1 Again, I think Mr. Low did a very thorough job  
2 of going through the specific cases. I don't think we  
3 need to repeat them. I know I'm going to want to ask  
4 specifically about the cases myself to the nominee.

5 Go ahead, Ms. Vega.

6 MS. VEGA: Mr. Chairman and members, Caitlin  
7 Vega for the California Labor Federation also here to  
8 oppose this nomination.

9 We appreciate the meeting that we had with  
10 Ms. Dowdin Calvillo, and after that meeting we also did  
11 a review of the cases and had all of the same concerns  
12 expressed by Dave Low.

13 I would just focus, for us, on the central  
14 issue of what constitutes retaliation, because  
15 California has strong collective bargaining laws, and  
16 this legislature has determined the workers in the  
17 public sector have the right to get together and bargain  
18 collectively and make a better life for themselves and  
19 their families, and yet when workers who stand up for  
20 themselves, who attend union meetings and choose to be  
21 on negotiating committees, face retaliation, are fired,  
22 or pushed out, or disciplined, the message is, Don't get  
23 involved with the union. Don't speak up for yourself.  
24 Don't exercise these rights. And that effectively  
25 undermines everything that we've fought for. That's why

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1 purpose of the board is to appropriately interpret the  
2 law and the case -- the cases before them. Thank you.

3 CHAIRMAN STEINBERG: Thank you very much.  
4 Next. Ms. Castro.

5 MS. CASTRO: Michelle Castro representing the  
6 Service Employees International Union. We do not wish  
7 to repeat but would concur with all the statements made  
8 by the prior witnesses.

9 With respect to appeals, it's a matter of  
10 timing. The most egregious cases have probably not yet  
11 been appealed and probably will be appealed. There have  
12 been cases overturned by the Court of Appeal which is  
13 the adjacent function for the PERB. Most recently, the  
14 Fourth Court of Appeal overturned a case by PERB,  
15 CTA v. Journey Charter School where the court lambasted  
16 PERB for failing to follow the law and follow their own  
17 precedent.

18 So there is a history here with this board, and  
19 in particular with this member, so I just wanted to cite  
20 that there may be a timing issue on some of these cases.  
21 Some of these cases --

22 SENATOR AANESTAD: Was she a member of that  
23 board that was --

24 MS. CASTRO: On the original decision on  
25 CTA v. Journey Charter School, no.

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1 SENATOR AANESTAD: So, really, that information  
2 is irrelevant.  
3 MS. CASTRO: With respect to this case and only  
4 in this case. There are other cases that involve other  
5 unions that will be going before the Court of Appeal,  
6 and we're waiting on those decisions.  
7 CHAIRMAN STEINBERG: Thank you very much.  
8 Next.  
9 MR. BOLDEN: Good afternoon, Mr. Chair and  
10 members. Michael Bolden here for the American  
11 Federation of State, County and Municipal Employees. We  
12 concur with all the previous comments made. I'll keep  
13 it short and strongly also oppose this recommendation  
14 for appointment to the special board.  
15 CHAIRMAN STEINBERG: Thank you, Mr. Bolden.  
16 Appreciate it.  
17 SENATOR AANESTAD: Question.  
18 CHAIRMAN STEINBERG: Yes.  
19 SENATOR AANESTAD: How many of your members  
20 have been affected by decisions regarding this nominee's  
21 reversal of an ALJ?  
22 MR. BOLDEN: That's a very good question. I  
23 don't have a specific number, but I do know we've had  
24 decisions before the PERB regarding the University of  
25 California employees which were negatively impacted by

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1 decisions on the board that went against the union, in  
2 particular, cases regarding the University of  
3 California.  
4 CHAIRMAN STEINBERG: I can answer the question.  
5 Of the two cases cited where there was a reversal, I  
6 don't believe they were AFSCME cases. Thank you.  
7 SENATOR CEDILLO: Let me ask this question. If  
8 that law applied to you or those rulings are applied to  
9 you, you don't get to say, "I'm from AFSCME. That was  
10 another employee from another union"?  
11 CHAIRMAN STEINBERG: Precedence is precedence.  
12 MR. CEDILLO: Correct?  
13 MR. BOLDEN: Correct.  
14 CHAIRMAN STEINBERG: Okay. Mr. Toppin.  
15 MR. TOPPIN: Mr. Chairman and members, Ted  
16 Toppin for the Professional Engineers in California  
17 Government and the California Association of  
18 Professional Scientists in opposition to confirmation.  
19 I think Mr. Low and others did good specifics  
20 on the specifics of the cases. In general, we believe  
21 the anti-labor bias now dominates the board, and it is  
22 time to get back to what is law and precedent in  
23 determining those decision there. Thank you.  
24 CHAIRMAN STEINBERG: Thank you.  
25 Mr. Hawkins.

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1 MR. HAWKINS: Mr. Chair and members, David  
2 Hawkins, California Faculty Association. We share the  
3 concern of the lowering of standards that were  
4 established by previous precedent, and we must oppose  
5 Ms. Calvillo's appointment.  
6 CHAIRMAN STEINBERG: Thank you.  
7 MS. SANCHEZ: Dolores Sanchez with the  
8 California Federation of Teachers. Not much more to  
9 add. We are in strong opposition, and we don't take  
10 these appointments lightly at all. We don't come before  
11 you often, but we felt the facts in this case warrant  
12 it. Thank you.  
13 CHAIRMAN STEINBERG: Thank you very much. Any  
14 other witnesses in opposition?  
15 All right. Before we get into the questions,  
16 we'll take a five-minute break, please. We'll be right  
17 back.  
18 (Recess taken.)  
19 CHAIRMAN STEINBERG: All right. We'll call the  
20 hearing back to order. I'd like to begin questioning  
21 Ms. Calvillo.  
22 Ms. Calvillo, I want to talk about the specific  
23 cases cited by Mr. Low, but I think it's a little easy  
24 to get lost in the weeds and to argue different  
25 interpretations. I'd like to start a little bit

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1 differently, because I'm a former practitioner before  
2 PERB myself, as we talked about, and know something  
3 about this issue of retaliation. And so when it comes  
4 to retaliation, what usually happens, of course, is  
5 that -- what often happens is that there is, in fact, a  
6 protected activity, and there is evidence that the  
7 employer retaliated against the employee for that  
8 activity. But there's also, maybe, some evidence in the  
9 record that the employee was not perfect, and then  
10 there's a justification made by the employer, "That's  
11 the reason why we terminated or disciplined the  
12 employee."  
13 So what I want to ask you in general is your  
14 philosophy or your approach to addressing so-called  
15 mixed-motive cases. How do you determine whether the  
16 motive is, in fact, the protected union activity or  
17 something in the employee's record that justified the  
18 action made by the employer? Can you expound on that a  
19 little bit, please.  
20 MS. CALVILLO: Thank you, Mr. Chairman. I  
21 appreciate that.  
22 Yes. I take a look at the record. It is my  
23 duty, as it is my colleagues' on the board, to review  
24 the record in its entirety. That is the records -- if  
25 we're talking about an administrative law judge

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1 decision, the evidence in the record, the testimony at  
2 the hearing, and we determine whether or not a nexus has  
3 been established between protected activity and the  
4 adverse action in the case of retaliation. So it's  
5 truly a decision based on what the evidence provides and  
6 what the testimony has provided and whether or not it's  
7 been refuted by any side.

8 CHAIRMAN STEINBERG: That doesn't quite get at  
9 it, so let me press a little bit. I mean, you just  
10 described sort of the burdens of proof, if you will, in  
11 terms of how -- analyzing a case. I'm interested in  
12 something different.

13 When you look at a specific set of facts, and,  
14 in fact, there may be two reasons that a reasonable  
15 person could say led to the termination, one being  
16 protected union activity, the other is some spot or  
17 something serious in the employee's record, how do you  
18 balance and weigh the two in determining which is the  
19 more likely factor? How do you do that?

20 MS. CALVILLO: Again, it goes back to what the  
21 evidence is before us. I think there's a -- this,  
22 perhaps, will best illustrate an example of a case that  
23 we had, and that has been a case that, obviously, has  
24 been raised today, and this is on the Baker Valley case.

25 We had a situation where you had two teachers,

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1 months, one year, two years, five years prior to the  
2 disciplinary action? Is timing a factor, and where do  
3 you generally draw the line in terms of an employer  
4 being able to go back in time and saying, "This is the  
5 reason why we took the action"?

6 MS. CALVILLO: I appreciate that. I don't have  
7 a fixed set in my mind that it's two months or six  
8 months. Again, I look at every case on a case-by-case  
9 basis, and I try to --

10 CHAIRMAN STEINBERG: Excuse me. Is there an  
11 outside line? So not two months, six months; but is it  
12 a year, is it a year and a half?

13 MS. CALVILLO: I guess what I'm saying to you  
14 is that I don't go into a case saying it's six months or  
15 one year. I do the best I can, based on what the  
16 evidence is that's before me.

17 I apologize if I'm not answering your question,

18 SENATOR OROPEZA: Can I give it a try?

19 How far back would you look? Say the guy is a  
20 30-year employee. How far back would you look and  
21 consider relevant?

22 MS. CALVILLO: It would depend on the evidence  
23 that's provided to me. I don't know how far. I only  
24 know how far it is now, as far as it's stated in the  
25 record.

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1 and the allegation was they were retaliated against for  
2 protected activity. And in one instance, the board  
3 found, as we agreed with the administrative law judge in  
4 that case, that the employee did indeed -- was  
5 retaliated against for protected activity.

6 With regard to the second employee, the second  
7 employee's personnel record contained information  
8 suggesting -- actually, there was evidence that there  
9 were issues of concern with regards to the employee.

10 Now what happened during the testimony during  
11 that particular case is that the employee did not refute  
12 that -- the testimony that was provided. They actually  
13 agreed, so --

14 CHAIRMAN STEINBERG: That they had performance  
15 problems.

16 MS. CALVILLO: Yes, that they had a performance  
17 problem. So I'm taking a look at the evidence before me  
18 as well as the testimony before me.

19 So if the employer said there were issues and  
20 the employee agreed that there were issues, in that  
21 particular case we found there was no -- retaliation was  
22 not for protected activity.

23 CHAIRMAN STEINBERG: Does it matter, for  
24 example, whether or not the negative chapter of the  
25 employee's performance occurred three months, six

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1 Again, in this case, the ALJ found -- The issue  
2 here was the ALJ had found it was unclear and ambiguous,  
3 and we ruled against that. That was the whole crux of  
4 this particular issue. It wasn't whether or not the  
5 information or the performance issues were old. It was  
6 the reasoning for determining that they were a protected  
7 activity. And the board did not agree that it was  
8 unclear or ambiguous. We felt that based on the  
9 testimony provided and the fact that it wasn't refuted,  
10 that it was clear.

11 CHAIRMAN STEINBERG: It was clear that the  
12 employee had performance problems.

13 MS. CALVILLO: The reasoning, yeah, and that  
14 was the ALJ's reasoning. The ALJ was not looking at the  
15 time issue. The ALJ was looking at whether or not this  
16 was clear and ambiguous -- unclear and ambiguous.

17 CHAIRMAN STEINBERG: You know, I don't want --

18 MS. CALVILLO: I'm sorry. Vague and ambiguous.

19 CHAIRMAN STEINBERG: Believe me, nothing but  
20 respect for you and your public service and, you know --  
21 and this is intended to be nothing -- nothing but civil,  
22 and it's a discussion, but it's an important discussion  
23 about philosophy and how you approach cases going  
24 forward. That's why I'm asking this. I've tried to ask  
25 it a couple ways.

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1 I think it's relevant to ask in these  
2 retaliation cases how far back you think is reasonable  
3 to look at past performance. And since you're not  
4 comfortable going there, let me ask it a different way.

5 Is timing important itself? Is the timing of  
6 the action, the adverse action in relation to both the  
7 protected activity and whatever performance issues may  
8 exist, is the timing and the sequence of those events  
9 relevant in making a decision?

10 MS. CALVILLO: It could be, depending on the  
11 circumstance and the evidence provided.

12 Unfortunately, I'm unable to reopen this case  
13 and to discuss it any more than what is in the decision.

14 CHAIRMAN STEINBERG: I'm deliberately not  
15 asking you about a specific case. This is where I feel  
16 I'm now a member of the Senate Judiciary Committee in  
17 Washington, D.C., and the Supreme Court nominee doesn't  
18 want to talk about any potential pending cases.

19 So I think what's fair, as I've observed that  
20 process over the years, is certainly not to ask you how  
21 you would decide a case exactly, because you're right.  
22 There always is a set of facts.

23 But I think it is fair for the Committee to  
24 know and understand your approach and the reasoning that  
25 you use, and what you've told us is that you look at the

1 evidence in front of you, and that's -- that's  
2 important. And that's, frankly, expected, because I'm  
3 sure you are a person of integrity, and you're going to  
4 be impartial. But that isn't enough for us to  
5 understand what your guiding philosophy is here.

6 What the union has said in general is that when  
7 it comes to retaliation, at least in a couple cases,  
8 that you'll pick something out of the past that may not  
9 be nearly as weighty as the union activity that the  
10 union believes motivated the action. So I just want to  
11 know in general how you weigh those two things. Is  
12 timing relevant? Do you weigh the gravity of the  
13 performance problem versus how involved the individual  
14 is with the union? I mean, there are ways to weigh  
15 this, and I want to understand how you weigh it.

16 MS. CALVILLO: And I do. I take these things  
17 into consideration.

18 CHAIRMAN STEINBERG: Take what into  
19 consideration?

20 MS. CALVILLO: I would take time into  
21 consideration. Again, in the case of question --  
22 Actually, I've had, I believe, five retaliation cases  
23 before me as author, and I did find retaliation occurred  
24 in two and a half of those cases, just for purposes of  
25 the record.

1 CHAIRMAN STEINBERG: That's important to know.  
2 When you found retaliation, on what basis did  
3 you find it? What were the factors?

4 MS. CALVILLO: Each case, again, is different,  
5 but there was a direct nexus between the protected  
6 activity and the adverse action. I would have to go  
7 through the details of each of those cases where we  
8 established retaliation occurred, but there was enough  
9 evidence to prove that. And based on precedent --

10 Another thing I consider is precedent and case  
11 law, and I apply that to each and every case, looking at  
12 the evidence. If timing is the issue, I'm going to look  
13 to see what case law, what precedent before may have  
14 addressed that issue and apply it there.

15 There are many, many cases before me, as I  
16 mentioned. I've had the benefit of 30-years-plus of  
17 board precedent, so certainly I don't just look at the  
18 evidence. I am applying case law. I am applying  
19 precedence, how my colleagues addressed this issue in  
20 the past, so I apply all of those things to my cases.

21 If the crux of this issue is timing, I'm going  
22 to go back and take a look at what case law or what  
23 precedence dictates with regards to that. I have had a  
24 case that dealt -- where everything was built on timing,  
25 so....

1 CHAIRMAN STEINBERG: Okay. Let me get right to  
2 the Amalgamated Transit Union case and hone in a little  
3 bit more specifically. The thing about that case that  
4 bothers me that I think Mr. Low or the other witnesses  
5 raised in that case -- They've raised a concern that  
6 you're applying the notion of past practice in a  
7 differential way, that on the one hand, the employer  
8 apparently had a past practice of requiring 48 hours'  
9 notification for union leave, and that that was  
10 violated, and yet the union had established in the case,  
11 apparently, a past practice of being allowed to use  
12 leave for external activity, i.e., supporting another  
13 union, and you said that wasn't valid past practice.

14 So two-part question. One is: Can you  
15 describe your philosophy and view on the use of past  
16 practice? And, secondly, this is the part that nobody  
17 has raised that troubled me: When you're looking at  
18 grounds for termination -- When you say, "I'm  
19 terminating somebody," it's sort of the old death  
20 penalty for employment. Why is not giving a full 48  
21 hours' notice before you begin bargaining a contract  
22 grounds for termination? Isn't there a  
23 form-over-substance sort of issue here that also speaks  
24 to the motive of the employer in this case? Two-part  
25 question.



1 MS. CALVILLO: Yes, I appreciate that. And I  
2 just want to preface my comments by saying that this  
3 case actually is now pending before the District Court  
4 of Appeal, so I am a little bit limited in how I can  
5 respond. I just want to put that on the record.  
6 This was a very difficult case that came before  
7 us, and there were actually two allegations of  
8 retaliation against union negotiators for time they took  
9 to conduct union business. And what we did in this  
10 particular case is that the -- The administrative law  
11 judge in this case found that, in fact, Omnitrans  
12 retaliated against two union negotiators, and they also  
13 found two issues here, the unilateral charge had changed  
14 the union business leave policy.  
15 The board, after examining the record as a  
16 whole and anew, found that the MOU itself was silent  
17 with regards to the amount of time needed to give the  
18 employee.  
19 CHAIRMAN STEINBERG: Right.  
20 MS. CALVILLO: Because the MOU was silent, we  
21 regarded on several cases that dictated that we then  
22 look to past practice regarding the notice requirement  
23 for union leave.  
24 CHAIRMAN STEINBERG: It was 48 hours.  
25 MS. CALVILLO: No.

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1 CHAIRMAN STEINBERG: The past practice.  
2 MS. CALVILLO: The past practice was the  
3 employees were required to give 24 hours of notice for  
4 union leave. The union's own witness testified that  
5 this was the past practice.  
6 We then -- And we actually relied on a case to  
7 determine what actually constituted past practice, but  
8 because the board found that the MOU was silent, and  
9 what -- the case law was showing the next best thing is  
10 to look at past practice, we determined, based on the  
11 evidence in the record, that 24 hours' notice was the  
12 past practice. One employee provided 24 hours' notice,  
13 one did not.  
14 CHAIRMAN STEINBERG: I get that. Let me get to  
15 the heart of it. Why should somebody be terminated for  
16 violating that provision? Is that a capital offense?  
17 SENATOR OROPEZA: Punishment fit the crime.  
18 CHAIRMAN STEINBERG: That's the part that's  
19 striking me about this. In other words, if it is minor,  
20 doesn't that speak to a greater likelihood of a motive  
21 for retaliation?  
22 I'm trying to get to your thought process here.  
23 Why is that technical violation grounds for terminating  
24 a union a union leader or any employee?  
25 MS. CALVILLO: What we were trying to determine

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1 and -- was whether or not they were retaliated for  
2 protected activity, and because -- because the employee  
3 did not meet the notice requirement, then the activity  
4 in which he was participating in was not protected.  
5 So....  
6 SENATOR OROPEZA: Say that again, please.  
7 CHAIRMAN STEINBERG: Go ahead. I understood  
8 it.  
9 SENATOR OROPEZA: For me.  
10 CHAIRMAN STEINBERG: Yes. Go ahead.  
11 MS. CALVILLO: The issue here was that the  
12 employee did not provide 24 hours of notice, and  
13 therefore he wasn't violating -- because he provided  
14 notice for more than 24 hours, he wasn't in compliance  
15 with past practice. And we weren't seeing that there  
16 was a protected --  
17 CHAIRMAN STEINBERG: Right. He didn't follow  
18 the rules. There wasn't protected activity to even,  
19 then, trigger an analysis of retaliation.  
20 SENATOR OROPEZA: So he couldn't have been  
21 retaliated against.  
22 CHAIRMAN STEINBERG: Right, that's the theory.  
23 Again, I'm asking the question whether that is, you  
24 know, form over substance.  
25 Okay. I don't want to dominate --

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1 SENATOR OROPEZA: Is it?  
2 CHAIRMAN STEINBERG: Is that form over  
3 substance?  
4 MS. CALVILLO: I don't --  
5 SENATOR OROPEZA: I want to know. If he  
6 doesn't ask it, I will.  
7 MS. CALVILLO: I'm not sure what you're asking.  
8 CHAIRMAN STEINBERG: I'm asking is violating  
9 the 24 -- How many hours' notice did the union activist  
10 provide in this case?  
11 MS. CALVILLO: I believe he provided 48 hours.  
12 I'd have to go back.  
13 SENATOR OROPEZA: No. The one who didn't.  
14 MS. CALVILLO: There was one that provided --  
15 He provided 24-hour notice.  
16 SENATOR OROPEZA: The other one.  
17 MS. CALVILLO: It was, like, 48. It was more  
18 than 24 hours.  
19 CHAIRMAN STEINBERG: Wait. You just said past  
20 practice was 24.  
21 MS. CALVILLO: Yes. I'm sorry. He provided  
22 less than 24 hours.  
23 CHAIRMAN STEINBERG: How many? That's what I'm  
24 asking.  
25 MS. CALVILLO: I'd have to look at exactly how

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1 much.  
2 CHAIRMAN STEINBERG: If you could.  
3 SENATOR OROPEZA: We've been told it was the  
4 same day. It was in the middle of his shift instead of  
5 the beginning.  
6 CHAIRMAN STEINBERG: Hold on. I would like her  
7 to go through the record, please.  
8 MS. CALVILLO: I can look at the case itself  
9 and tell you. It will take me a little bit of time. I  
10 apologize. I just know it was less than 24 hours.  
11 CHAIRMAN STEINBERG: Okay. It was less than  
12 24 hours. Do you remember whether it was 12 or 18, or  
13 was it just, "I'm leaving work, and I'm going to the" --  
14 MS. CALVILLO: I don't recall. I apologize. I  
15 don't recall.  
16 CHAIRMAN STEINBERG: The point is, and I'll get  
17 to the question Ms. Oropeza was going to ask, is: Let's  
18 assume for discussion purposes that it was 12 hours. I  
19 don't know, and you don't recall. Why does that matter?  
20 Really, why does that matter?  
21 MS. CALVILLO: Because my job is to take a  
22 look -- We're looking at a retaliation case, and I have  
23 to follow precedent and case law, and the fact is I have  
24 to show -- or I don't have to show, but the record has  
25 to show that the protected activity has occurred, and it

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1 MS. CALVILLO: Yeah. In this particular case,  
2 the evidence showed that Omnitrans -- again, the MOU was  
3 silent with regards to what specifically defined  
4 authorized union business.  
5 Then we look at the facts in the case as  
6 presented to us. At the time the MOU was signed by both  
7 parties, the union only represented employees for  
8 Omnitrans. They didn't represent employees in other  
9 places of work. So we -- There was no opportunity for  
10 the employer to think there would be a cause for the  
11 union employees to be going out taking union time to  
12 participate in activities for other employers, and --  
13 CHAIRMAN STEINBERG: What is the past practice  
14 in that regard?  
15 MS. CALVILLO: The past practice there -- The  
16 past practice was it was silent, again.  
17 CHAIRMAN STEINBERG: The contract was silent.  
18 I'm asking what the past practice was. I'm sorry.  
19 Did you analyze whether there was a practice of  
20 this particular employer or an industry practice  
21 allowing the union officers to get leave time to  
22 organize --  
23 MS. CALVILLO: They didn't ask what the reason  
24 was for. The employer didn't ask what the reason was  
25 for.

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1 is because of that protected activity an adverse action  
2 has occurred. That's within the PERB's jurisdiction.  
3 And so there are some fine lines there, and I can only  
4 rule under what's under our jurisdiction.  
5 CHAIRMAN STEINBERG: Okay. Two more questions,  
6 and then I'm going to be quiet for a while.  
7 The issue of how you look at past practice,  
8 because that was the fundamental complaint in the  
9 Amalgamated Transit Union case, that you looked very --  
10 Obviously, you just said it. You looked very closely  
11 and held to the past practice of requiring 24 hours'  
12 notice, but that on the other side, the union apparently  
13 established a past practice that it was okay to use your  
14 union leave time to advocate on behalf of another union,  
15 and they say you ignored that past practice. Is that  
16 true, and, if so, how do you justify using past practice  
17 in one instance and not in another?  
18 MS. CALVILLO: Okay. Again, these were two  
19 different charges. You had the charge of retaliation,  
20 which was against the two employees, and then you had an  
21 issue of whether or not the employer actually conducted  
22 a unilateral change. In the unilateral change case --  
23 this is the issue with regard to whether -- when --  
24 CHAIRMAN STEINBERG: Under what circumstance do  
25 they grant union leave?

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1 Generally speaking, if I recall in this  
2 specific case, the employees would ask for the union  
3 time, and that was granted.  
4 CHAIRMAN STEINBERG: Okay. I'm going to turn  
5 it over for now. Thank you.  
6 SENATOR AANESTAD: I just have a question.  
7 Again, I made this comment last week, and this candidate  
8 has been on the docket for a month. The paper that I  
9 have from the staff says, "We have received no  
10 opposition to this appointment," and as of Friday, as I  
11 understand it, is when the opposition came in.  
12 Ms. Oropeza's comments -- I surmise that you  
13 have been briefed by somebody as to the specifics of  
14 this case. My staff is not aware of any of the  
15 specifics of this case.  
16 I continue to wonder at the late-minute  
17 opposition that we're getting with such serious  
18 allegations and an inability of me and my staff to be  
19 able to weigh in on those who are making -- asking  
20 questions of those who made the allegations until the  
21 actual hearing time. And I'm just wondering if somehow  
22 we can't start asking opposition to appointees to give  
23 us more lead time and make sure the information is  
24 shared with both the chair and --  
25 CHAIRMAN STEINBERG: Senator Aanestad, I want

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1 to respond, because I think it's fair.  
2 This particular circumstance is unique in a  
3 couple ways. Number one, we're caught in the transition  
4 here between legislative sessions and a new pro tem.  
5 This nominee -- Ms. Calvillo's nomination expires  
6 Saturday, so, again, we've only -- this is our second  
7 Rules Committee hearing.

8 Secondly, as Mr. Low said, in fact, the  
9 opposition was late, and I've expressed some of the same  
10 concerns. But in mitigation, as they point out, a  
11 number of the cases that are of concern here were cases  
12 that were, in fact, recently decided, so they didn't  
13 have the basis for the opposition prior to very  
14 recently.

15 So I think those two factors put us in a little  
16 bit of a squeeze here, and I encourage anybody who  
17 opposes any nominee, if you have concerns, come as early  
18 as possible; and at the same time, that you'll have  
19 adequate time to explore, and we would have adequate  
20 time, for example, to put a nominee over if we had more  
21 questions that we wanted to ask. But we don't have that  
22 luxury in this instance. Okay.

23 SENATOR OROPEZA: On this particular one, but  
24 that does not mean, I think, Mr. Chair, that under the  
25 normal operating procedure, there would generally be

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1 et cetera, but you're substituting your opinion for  
2 another, and I don't believe that's the appropriate role  
3 in terms of your review here. It would seem to me there  
4 would be something -- a different criteria, as the  
5 pro tem mentioned, philosophy for reversal.

6 MS. CALVILLO: Thank you, Senator. Thank you,  
7 Senator.

8 I believe the issue of concern here is the fact  
9 that myself and my colleagues in a couple of cases  
10 demonstrated today have been responsible for concurring  
11 with the administrative law judge's findings and his or  
12 her proposed decision.

13 Again, to preface this --

14 SENATOR CEDILLO: Let me ask, in fact, a more  
15 exact question. Was this a mistake in this case?

16 MS. CALVILLO: Which case, Senator?

17 SENATOR CEDILLO: In the reversal here. It  
18 seems to me a mistake, or fraud, or some other  
19 intervening act would be a criteria. So either it's a  
20 mistake of fact, or there's fraud, or there's some other  
21 factor that compels you to reverse a lower court, not  
22 simply a disagreement with the analysis.

23 MS. CALVILLO: Absolutely. And the reason for  
24 my uncertainty to your question is there were actually  
25 two cases. Baker Valley and Omnitrans were both

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1 more time, and the expectation would be that there would  
2 be a time for responding.

3 CHAIRMAN STEINBERG: Yes.

4 SENATOR OROPEZA: With the holiday and 'da,  
5 'da, 'da, 'da, and this expiring, this is a unique  
6 situation, right?

7 CHAIRMAN STEINBERG: Yes. This is unique.

8 Okay. Other questions of the nominee.

9 Senator Cedillo.

10 SENATOR CEDILLO: It's interesting that -- my  
11 colleague's concerned about timeliness. My impression  
12 would be simply from the nominee that you're either  
13 timely or not timely so we have an opportunity to object  
14 before the hearing commences. The unions here have  
15 raised those objections. They're timely. There doesn't  
16 seem to be a lot of gray in this area. But let me get  
17 more specific here.

18 I could see the reason in your analysis of this  
19 case. I might disagree with you, but, I mean, it's  
20 reasoned. It's very reasoned. But that's not the  
21 question here or my question, though, is: What is the  
22 criteria to reverse a ruling that comes from below? In  
23 other words, is simple disagreement sufficient? Because  
24 what we're talking about here is not your opinion about  
25 a case, your analysis of the facts,

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1 reversals.

2 SENATOR CEDILLO: Omnitrans.

3 MS. CALVILLO: Thank you very much for the  
4 clarification, Senator.

5 In this particular case, the administrative law  
6 judge has responsibility for reviewing records and  
7 making a decision based on, again, case law and  
8 precedent, and then make their findings.

9 SENATOR CEDILLO: Case law and precedent facts,  
10 appropriateness of the punishment in the context of the  
11 full record.

12 MS. CALVILLO: And there is the checks and  
13 balances. And there's the opportunity, when a party  
14 does not agree with those findings, to appeal that  
15 decision to the board. And it is the board's  
16 responsibility at that time to -- given the complexity  
17 and the multiple issues that are in a case -- to review  
18 the case as anew and as a whole, and to consider the  
19 testimony that was provided during the ALJ's hearing.

20 And the fact of the matter is some of these  
21 cases are very close calls, but it is our responsibility  
22 to give that second look, just as it is the  
23 responsibility of the District Court of Appeal to take a  
24 second look at our cases when there is a dispute as to  
25 whether or not we've ruled correctly, according to that

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1 particular party.

2 The fact is, there are a couple different  
3 reasons why a board or this board might reverse an  
4 administrative law judge's decision. One of those would  
5 be based on legal reasons. For example, that we  
6 disagree with the application or interpretation of the  
7 law.

8 In the case of Omnitrans, this is a perfect  
9 example, and this was cited by Mr. Low as well, the  
10 administrative law judge applied the McPherson case in  
11 this particular instance. The McPherson case deals  
12 specifically with retaliation. This was a unilateral  
13 change charge. The board disagreed with the application  
14 of that particular case to this set of circumstances.

15 In addition, there may be a reason based on  
16 evidence. For example, we know we're not all perfect,  
17 and there may be a discrepancy in the testimony in the  
18 record which we pick up on.

19 In the Omnitrans case, we found that this  
20 was -- we found because the MOU was silent in this  
21 particular instance, that we relied on past practice for  
22 the termination in this case.

23 So there are a couple different reasons to  
24 reverse an administrative law judge. I have to say that  
25 the majority of my decisions, Senator, have been to

1 uphold the findings of the administrative law judge. We  
2 have a tremendous pool of talent at PERB, and they do a  
3 great job, but every once in a while we just don't see  
4 eye to eye on issues. And that's why there's a  
5 check-and-balance procedure established at PERB. That's  
6 why we're there.

7 And to be honest with you, PERB doesn't always  
8 keep these close statistics, but very loose statistics  
9 say this board has not operated differently than  
10 previous boards with regards to the reversal of  
11 administrative law judge cases.

12 SENATOR CEDILLO: In this expression here, the  
13 18 -- 14 out of 18 decisions, which is about 80 percent,  
14 eight out of ten decisions you vote against labor. Are  
15 those reversals?

16 MS. CALVILLO: Thank you, Senator, for raising  
17 that. I appreciate it.

18 There seems to be a discrepancy with regards  
19 to numbers floating around, and I will tell this  
20 Committee that I have never spent so much time looking  
21 at statistics with regards to how it applied to my  
22 particular docket than I have in preparation for this  
23 confirmation hearing, because that's not my job. My job  
24 is not to keep score. My job is to look at the  
25 evidence, apply case law and precedence, and rule.

1 But I have done a thorough examination. The  
2 fact is, I have participated in 28 decisions while  
3 sitting at PERB. Five of those were administrative.  
4 I -- We granted the request to withdraw an appeal.

5 Of the remainder 23, 11 of those appeals that  
6 came before me were actual appeals of an administrative  
7 law judge decision, and, Senator, when you look at those  
8 cases, that's where it can be found.

9 I have ruled in favor of labor the same amount  
10 of times that I've ruled in favor of the employer, four  
11 times each; and I ruled in favor of both or against  
12 both, if you will, three times. And, again, it's not "I  
13 ruled." Senator Aanestad brought up a good point. My  
14 colleagues. We're a panel.

15 CHAIRMAN STEINBERG: Okay.

16 MS. CALVILLO: So thank you very much for the  
17 opportunity.

18 SENATOR CEDILLO: I know, but we're reviewing  
19 your record.

20 MS. CALVILLO: I appreciate that. But my  
21 record shows --

22 SENATOR CEDILLO: Unless you're going to argue  
23 that you voted distinctly from your panel, the only  
24 question we need to know is: Are these reflective of  
25 your policy?

1 MS. CALVILLO: No. The information that you  
2 were given, they are not reflective of my policy.

3 SENATOR CEDILLO: Are your votes consistent  
4 with the decision of the panel? Are you saying you  
5 voted the minority or you voted the majority?

6 MS. CALVILLO: I sided with the majority, but  
7 the numbers that were provided to you are incorrect.

8 SENATOR CEDILLO: That's separate, but --

9 MS. CALVILLO: Yes, Senator. I concurred with  
10 my colleagues in these decisions.

11 SENATOR CEDILLO: But the panel is not here for  
12 review. You're here for review.

13 MS. CALVILLO: No, they are not, but the  
14 decisions I concurred with, there were only 11 that  
15 dealt with an administrative law judge decision, and of  
16 those -- that's the point I'm trying to make. Me and my  
17 colleagues did support labor four times, as we did  
18 employers. That's where the numbers are a little bit  
19 skewed.

20 CHAIRMAN STEINBERG: Anything else,  
21 Senator Cedillo?

22 SENATOR CEDILLO: I think you asked a very good  
23 question in terms of looking at the totality of the  
24 record, right. First of all, I -- If a case comes  
25 before you as it moves through an appeal process, they

1 have to argue that there's some issue here, unless there  
2 is a factual error, there's a mistake, some fraud, if in  
3 reviewing the case there's some application of law or  
4 practice, you look to that point. But if you say you're  
5 looking at this de novo, you're looking at this  
6 completely new, you're somewhat substituting. It seems  
7 like a redundancy. You're not dealing with an  
8 appealable issue. You're just getting a second look at  
9 it, you disagree, and you reverse it and send it back.  
10 That doesn't seem to be the function of any appeal  
11 process as things move up.

12 Assuming that's the case, Senator, you had  
13 asked the question: Even if you are looking at it de  
14 novo, then there's the whole question of the totality of  
15 the circumstances in which you have to look at the  
16 precedent, and the circumstances that a union leader  
17 gets terminated over hours difference, and how does that  
18 fit within the totality of the work record.

19 So let's assume they didn't make the 24-hour  
20 notice, period. Right. Notice came. You know, let's  
21 say he just didn't make the notice at all. Clearly,  
22 though, there seems to be a question -- If you're  
23 reviewing the record and you're looking at it new,  
24 there's a totality you have to look at, and to what  
25 extent -- what other factors were involved and not

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1 so you can establish that technically, it's not  
2 protected activity, because he didn't meet the hours.  
3 So then in terms of the decision, you have to then look  
4 at the totality of the circumstances, to the merit of  
5 the response.

6 MS. CALVILLO: Senator, the example that you  
7 just provided, just a generic example of five employees  
8 that came to work late one day, and one happened to be  
9 the union president, if the union president were fired  
10 strictly because he came in late that day and the other  
11 five employees were not fired for coming in late that  
12 day, then that union president has a very good case to  
13 show that there was --

14 If the union president was -- If the union  
15 president was late because he was conducting union  
16 business, he was conducting a meeting and he was late,  
17 and the other employees were late for whatever reason,  
18 they weren't in the union meeting --

19 SENATOR CEDILLO: Then you would say he's  
20 protected? Evidence of union activities.

21 MS. CALVILLO: Because we've been able to  
22 establish -- Again, you look at the evidence. If you're  
23 able to establish the nexus between the protected  
24 activity, in this case, a union president conducting  
25 union business --

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1 simply is this protected activity. So you make an  
2 argument this is not protected activity.

3 But what other factors were there that  
4 terminates a employee, and particularly an employee that  
5 is obviously noticed as the union leader/union activist?  
6 Those things seem to bleed right into each other. I  
7 don't know how you do that.

8 MS. CALVILLO: I appreciate your comments,  
9 Senator.

10 Again, PERB has a specific jurisdiction, and we  
11 have to determine, in the retaliation cases, that there  
12 is a nexus between the protected activity and the  
13 adverse action. And if we can't find protected  
14 activity, then it's outside of our jurisdiction to rule  
15 whether or not they took appropriate disciplinary action  
16 against their employer.

17 SENATOR CEDILLO: But isn't appropriateness of  
18 the discipline a factor in determining -- I'll say to  
19 you, the appropriateness of the discipline is a factor  
20 in determining retaliation.

21 So, for example, five employees come late, and  
22 four employees are given a warning, and the union  
23 activist is fired. You cannot say that, then, this is  
24 not a retaliation. So you have to look at those -- the  
25 totality of that. So while it may not be technically --

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1 SENATOR CEDILLO: What are the factors that you  
2 look at in that circumstance to enter into that  
3 discussion? Is it disparate treatment? Let me say  
4 this: What you're telling me is that it is the  
5 disparate treatment that triggers a consideration of  
6 retaliation; is that correct?

7 MS. CALVILLO: That is one of the trigger  
8 points.

9 CHAIRMAN STEINBERG: We want to wrap it up.  
10 Finish the question. Go ahead, Senator. Move it along.  
11 All right.

12 SENATOR CEDILLO: So there's disparate  
13 treatment, and that triggers a consideration of that,  
14 and then it's the disparate treatment that triggers it,  
15 because it's the unfairness of the discipline.

16 So five people come in, they're late, they get  
17 a warning. Four get a warning, fifth person is fired.  
18 That triggers disparate treatment. We abhor disparate  
19 treatment. We look for fairness in the workplace. And  
20 then you said we've got to find out why that's not fair,  
21 and then he argues, "It's not fair. I'm a union rep,  
22 and I'm doing union activity."

23 So you know he's a union rep, and he's fired.  
24 But if you apply the question of protected activity to  
25 the appropriateness of the notice that he gave, right --

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1 and this is the question you were going back to, the  
2 substance of protection of union activity, and then if  
3 this person was doing this but didn't give notice for  
4 that, walked away from the work site, went upstairs,  
5 went downstairs, didn't give the 24-hour notice or the  
6 check-in with the supervisor, it's no less protected  
7 activity, and it's no less anti-union activity if this  
8 person is fired and not protected, because they didn't  
9 comply with a technical requirement.

10 MS. CALVILLO: I appreciate what you're saying.  
11 I apologize.

12 CHAIRMAN STEINBERG: Do you need some more  
13 water?

14 MS. CALVILLO: I have some water. My daughter  
15 gave me her cold. Children do that.

16 Senator, what I can say is that there was case  
17 law in the Novato case that actually establishes -- For  
18 the purpose of establishing a prima facie case to show  
19 that nexus, there's a test we apply to determine that  
20 nexus. So we apply this equally to each and every  
21 retaliation that comes in. They have to meet these  
22 nexus factors.

23 So if somebody can show that there has been  
24 protected activity and an adverse action has occurred,  
25 then absolutely the board is going to rule in that

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1 manner, as I have in two and a half of the other cases.  
2 Two and a half of five, I found retaliation did occur.  
3 So I appreciate your point. I'm sorry.

4 CHAIRMAN STEINBERG: Do you need a break? Take  
5 a break.

6 MS. CALVILLO: I think I'll be all right.

7 CHAIRMAN STEINBERG: She's about to choke. I  
8 don't want that to happen.

9 SENATOR OROPEZA: We don't want you to choke.

10 MS. CALVILLO: I'm okay.

11 CHAIRMAN STEINBERG: You okay?

12 MS. CALVILLO: Yeah.

13 CHAIRMAN STEINBERG: Senator Cedillo.

14 SENATOR CEDILLO: Okay.

15 CHAIRMAN STEINBERG: Okay. Senator Oropeza.

16 SENATOR OROPEZA: This whole conversation has  
17 been worrisome to me, because what has been pointed out  
18 is that there are shades of gray and judgment that must  
19 be made. Otherwise, I guess, we wouldn't have a PERB.  
20 We would just have a little computer that would put in  
21 all the data about what the rules are and what the laws  
22 are, and we'd spit out a response.

23 So you're being asked to continue -- by the  
24 governor to continue on this board to use your brain, to  
25 use who you are as a human being, what you bring as a

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1 unique human being. And a lot of the response that I  
2 have heard is around, "Well, we had this technical --  
3 this was the precedent, or we had -- This was a  
4 technical thing in the law that said this."

5 I guess what I'm wondering about is where  
6 humanity comes into it relative to the judgments on what  
7 is fair and reasonable to a reasonable person,  
8 understanding not just what the letter of the law is,  
9 because it reflects a set of principles and values,  
10 right? I'm so sorry.

11 MS. CALVILLO: Sorry.

12 SENATOR OROPEZA: Not just what's on the  
13 written page, but the principles and values. So what  
14 I'd like to ask you is: How you view yourself as a --

15 MS. CALVILLO: I'm sorry.

16 CHAIRMAN STEINBERG: You know what, take a  
17 break, please.

18 MS. CALVILLO: Thank you.

19 CHAIRMAN STEINBERG: Why don't you -- Take a  
20 break.

21 MS. CALVILLO: Thank you.

22 (Recess taken.)

23 CHAIRMAN STEINBERG: All right. We will come  
24 back to order.

25 Senator Oropeza.

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1 SENATOR OROPEZA: I was actually sort of  
2 closing up the question. Do you remember what I was  
3 asking you about so I don't have to say the whole thing  
4 all over again?

5 MS. CALVILLO: You were asking me about the  
6 humanity as I began to choke.

7 SENATOR OROPEZA: So the question is about --  
8 Because board members that come before us, or  
9 commissioners or whatever, we have to hold them  
10 accountable for using their own judgments, their own  
11 value system. Otherwise, like I said, we'd be doing all  
12 this by computer.

13 So with that in mind, can you tell me how you  
14 feel, if you believe that you are, number one, expert  
15 enough to do this, because your background is so broad,  
16 but it wasn't really in the labor relations area; and,  
17 two, if you feel -- given all that you have heard today,  
18 if you feel that there is something that you need to  
19 re-think about how you're approaching your job.

20 MS. CALVILLO: First of all, the question you  
21 asked is how do I feel I can do my job, because I do  
22 have a broad background. I'm not a labor law expert. I  
23 don't pretend to be.

24 Again, each of our cases are paneled to three  
25 board members, and each three -- excuse me -- each board

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1 member is lucky enough to have a legal advisor who has a  
2 very strong background in labor law. And my legal  
3 advisor, who is here today, has a very strong background  
4 in labor law. He's actually practiced for firms that  
5 have been primarily representing labor and also a firm  
6 that primarily represents management. He spent time at  
7 the National Labor Relations Board as well, so he's got  
8 some public-sector experience -- excuse me -- and the  
9 Ag Labor Relations Board as well, so both of those  
10 boards, so he has some public-sector experience and  
11 labor and management.

12 SENATOR OROPEZA: And he's been there from  
13 before you were?

14 MS. CALVILLO: No. He came on board when I  
15 started. But he has done a tremendous job in helping me  
16 get through the legal analyses and ensuring that my  
17 cases are based on precedent, on case law, and the  
18 evidence is there. So that's how I can do my job.

19 Also, with the great work of my colleagues --  
20 Again, we're three members on each of these panels, and  
21 a decision can only go out with a majority vote, so we  
22 collectively work very tirelessly to go through these  
23 cases. And in some instances, we'll deliberate for  
24 quite some time, because there aren't always -- we're  
25 not always on the same page, to be honest with you,

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1 today about the concerns that people have about -- the  
2 specifics in the case and also some general things about  
3 how you apply whatever facts you have, is there anything  
4 that you have learned or that you would change in the  
5 way you approach things, or that you want to take a  
6 second look at, or anything like that?

7 MS. CALVILLO: Well, one of the things I  
8 believe I expressed to Senator Steinberg yesterday in  
9 our meeting is that I was very surprised of the concerns  
10 that were levied against me. I didn't know they were  
11 out there. And I appreciated hearing their concerns,  
12 because it does make me aware, and it may -- when I go  
13 for future cases, because certainly I can't retry cases  
14 that we've already settled, it's in the past, but moving  
15 forward, certainly, I will take those issues into  
16 consideration. That's part of, now, my thought process.  
17 So I do appreciate the concerns. I appreciate hearing  
18 them. I won't know unless they are brought to my  
19 attention. So certainly --

20 SENATOR OROPEZA: So if you succeed here today  
21 getting confirmed or recommended for confirmation, we'll  
22 see how that all shakes out in reality. And I just need  
23 to tell you that while I'm not able to support your  
24 appointment today, because of all of what I've heard, I  
25 also, you know, will be anxious to see -- if you

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1 Senator, so we do the very best that we can. So I do  
2 feel that I'm able to do my job.

3 SENATOR OROPEZA: So what piece do you put into  
4 it? You've got your legal advisor. Where do you fit in  
5 terms of your perspectives, your values?

6 MS. CALVILLO: I weigh the evidence. Again, I  
7 read every single page that comes before me. I read the  
8 record for that page. I'm poring through the testimony  
9 that's been provided; I'm poring through what evidence  
10 has been presented; I'm poring through the responses  
11 that have been provided with regards to the appeal, what  
12 exactly is the charge being appealed, because sometimes  
13 it's not the entire decision they're appealing, maybe  
14 only a portion.

15 I'm reading all of that, I'm listening to what  
16 my advisor is saying, and I'm making a determination  
17 based on that information. But I've got enough  
18 real-world experience to help me through that process,  
19 so I bring that experience with me to the table.

20 SENATOR OROPEZA: And were you to achieve your  
21 ultimate objective, which is --

22 MS. CALVILLO: -- to be fair and impartial, and  
23 to be neutral. I was appointed to PERB to be neutral  
24 and to protect the rights of employees and employers.

25 SENATOR OROPEZA: And given what you've heard

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1 prevail, which I think you will -- how things evolve on  
2 this, because it is an extremely important board that  
3 you serve on. This is where the rubber hits the road  
4 for workers and workers' rights and being treated fair  
5 and equitably in this day, and it's a fundamentally  
6 important board.

7 MS. CALVILLO: I agree with you.

8 SENATOR OROPEZA: Which is why we've spent so  
9 much time on this.

10 MS. CALVILLO: I agree with you. This is a  
11 very important job. I agree with you.

12 SENATOR OROPEZA: Thank you, Mr. Chair.

13 CHAIRMAN STEINBERG: Senator Dutton.

14 SENATOR DUTTON: Just to be real brief, and I  
15 think it's more in the form of a statement than anything  
16 else, because, obviously, today we've heard a lot of  
17 concerns, some may be fact, some may be perception, and  
18 that's what's really a problem, because fact you can  
19 dispute, perception you can't.

20 I think what you need to do, just like any  
21 of -- all of us, you need to evaluate the perception and  
22 make sure the concerns are met, because, obviously, this  
23 board is -- provides a critical function. But if it  
24 ceases to be of value, if the public perception is --  
25 the perception of the employees are that they don't get

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1 a fair hearing here, obviously, there's no reason for  
2 this to exist. So that would be my only concern.

3 This may turn out to be on my cut list if it  
4 doesn't get a better reaction from the employees,  
5 because, obviously, it's not doing the job.

6 CHAIRMAN STEINBERG: You might be confirmed but  
7 then lose your job. That's eventually the message.

8 MS. CALVILLO: I'd like to take it one day at a  
9 time.

10 CHAIRMAN STEINBERG: I do want to wait for just  
11 a second for Senator Cedillo to get back, if we know  
12 where he is. We're going to wait just ten seconds, and  
13 I'd like to make a statement.

14 Why don't you make the closing statement.

15 MS. CALVILLO: I was going to say, would you  
16 like me to provide some entertainment?

17 CHAIRMAN STEINBERG: No, just a brief closing  
18 statement.

19 Senator Oropeza, I think, asked a really  
20 important question, because, you know, this is our  
21 chance -- This is the separation of powers, and this is  
22 our chance to impress upon you our concerns and for  
23 you to take that in. And some people might react to the  
24 difficult questions and the opposition from advocates in  
25 a real negative way going forward. Sort of like, How

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1 dare they?

2 I'm not saying that's you, but I want to know,  
3 for one, you know, how do you take criticism? How do  
4 you take constructive criticism? You've handled it fine  
5 at the table.

6 MS. CALVILLO: Thank you.

7 CHAIRMAN STEINBERG: How do you take it going  
8 forward? And this is your closing.

9 MS. CALVILLO: Senator, I was going to say as a  
10 former elected official myself, having run for office,  
11 I've had a lot of criticism in my day. I welcome  
12 criticism, because it helps us all become a better  
13 person.

14 So while I may not necessarily be happy with  
15 it, I do appreciate that there are differences of  
16 opinion, and there will always be differences of  
17 opinion. But I appreciate the constructiveness of  
18 what can be said to help us all improve.

19 CHAIRMAN STEINBERG: Okay. Thank you.

20 If I might make a statement here in terms of  
21 where I come down on this.

22 First of all, I think you've impressed me as a  
23 hard-working person and as a person of integrity, that  
24 you're approaching your job in a serious way and that  
25 you're doing your job honestly.

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1 I must say after participating in this hearing,  
2 I do have some concerns, and I think my concerns are  
3 around the lack of clarity in terms of how you go about  
4 approaching decision-making, aside from the clear  
5 statement that you're impartial, which I believe, and  
6 that you review the evidence.

7 On this issue of retaliation, you know, in some  
8 ways those of us who have law degrees and have been  
9 practicing lawyers, we like to think this is a big  
10 complicated thing, and in some ways it really isn't. In  
11 some ways it really isn't, because the question is, in a  
12 retaliation case, whether or not the employer fired the  
13 employee because of the union activity, or whether the  
14 employee was a bad employee.

15 So it seems to me that going forward, at least,  
16 if you're confirmed, there needs to be a distinction  
17 between somebody who gives 12 hours' notice instead of  
18 24 hours' notice -- that just doesn't seem like a basis  
19 for discipline or termination to me.

20 Now, if this same employee or a future employee  
21 has a long track record of being insubordinate, or never  
22 following the rules, or poor performance, then it's  
23 arguable. But -- You know, we cannot let the  
24 hyper-technicality of whether this was a protected  
25 activity because it didn't conform to the exact letter

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1 of the notice required in the contract rule the day.

2 The question is: Was a person participating in union  
3 activity fired because of that union activity?

4 So if there's a confirmation here, I think I'm  
5 going to implore you to think about that sort of  
6 distinction and that sort of clarity, because what I  
7 heard today, with all respect and honesty, didn't  
8 comfort me in that way. It just didn't.

9 And then on the other hand, I do think you  
10 point out that there have been instances in your time on  
11 the board in which you have, in fact, ruled in favor of  
12 the union or the employees in a particular retaliation  
13 case, and so I am willing, by, really, barest of margins  
14 here, respectfully, to give you the benefit of the  
15 doubt, and that the facts presented, while very, very  
16 important and not sufficient, given the fact that you at  
17 least can demonstrate you have ruled on behalf of  
18 employees on a couple occasions, and that you do  
19 approach your job seriously and work very hard, aren't  
20 quite enough to cross that line for me to say "No" to  
21 this nomination.

22 But I do have those concerns, and I hope you  
23 take the constructive criticism and the opposition to  
24 heart in the most positive way, not to feel like -- not  
25 to feel political pressure. You're a quasi judicial

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1 officer -- but to understand that a couple of these  
2 decisions don't make sense to me, and I'm a former  
3 ALJ myself, and that retaliation is either one or the  
4 other. The guy is either a poor worker and is fired for  
5 that reason or is fired because of union activity. And  
6 that if the pretext, if you will, for firing a person is  
7 skim, that tells you something.

8 Again, termination is termination. And in  
9 these cases, we're not talking about people who were  
10 given letters of reprimand, I don't think. They're  
11 fired from their jobs. So I'm willing to give you the  
12 benefit of the doubt, but I do hope you hear my  
13 sincerity and the sincerity of the advocates here, and  
14 that you think about that.

15 With that, I'm prepared to take a motion.

16 SENATOR AANESTAD: So moved.

17 MS. BROWN: Senator Cedillo.

18 SENATOR CEDILLO: (Inaudible.)

19 MS. BROWN: Dutton.

20 CHAIRMAN STEINBERG: That's a "No" for  
21 Senator Cedillo.

22 Is that --

23 SENATOR CEDILLO: Yes. That's a "No."

24 MS. BROWN: Senator Cedillo no.

25 Dutton.

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1 recognize that the hour is late and --

2 CHAIRMAN STEINBERG: Hold on, if we may. I  
3 think we just need to wait a second for people to clear  
4 the room. Here we go. Mr. Hoshino.

5 MR. HOSHINO: Chairman Steinberg, Vice-Chairman  
6 Aanestad, and members, it is an honor to appear before  
7 you today seeking your votes for approval and to address  
8 any questions you may have about my performance as  
9 executive officer of the Board of Parole Hearings.

10 I am a 22-year career public servant. I began  
11 my service as a student intern at the California State  
12 Controller's Office in 1986. I worked my way up through  
13 the civil service rank and served in a number of  
14 management and executive leadership positions. Each  
15 position provided me with opportunities and experiences  
16 that prepared me for the job at hand.

17 Today it is my privilege to lead the 500-plus  
18 dedicated employees at the Board of Parole Hearings. We  
19 solved many problems in our position for more  
20 improvement in the years ahead.

21 I am the beneficiary of solid support from  
22 Governor Schwarzenegger's administration, the CDCR  
23 secretary, and the hard-working team at the board  
24 itself. I am also the beneficiary of support from the  
25 many partners and stakeholders involved in the board's

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1 SENATOR DUTTON: Aye.

2 MS. BROWN: Dutton aye.

3 Oropeza.

4 SENATOR OROPEZA: No.

5 MS. BROWN: Oropeza no.

6 Aanestad.

7 SENATOR AANESTAD: Aye.

8 MS. BROWN: Senator Aanestad aye.

9 Steinberg.

10 CHAIRMAN STEINBERG: Aye.

11 MS. BROWN: Steinberg aye.

12 CHAIRMAN STEINBERG: Passes three to two, will  
13 go to the Senate floor on Thursday. That's tomorrow.

14 MS. CALVILLO: Thank you very much.

15 CHAIRMAN STEINBERG: Thank you very much.

16 Thank you, your family, and thank you for hanging in  
17 there. Appreciate it.

18 MS. CALVILLO: Thank you.

19 CHAIRMAN STEINBERG: Very good.

20 (Pause.)

21 CHAIRMAN STEINBERG: Now we have Martin  
22 Hoshino, executive officer of the Board of Parole  
23 Hearings.

24 Mr. Hoshino, welcome.

25 MR. HOSHINO: Good afternoon, Mr. Chairman. I

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1 operation.

2 At the time of my appointment in January 2008,  
3 it was clear to me that it was wasteful and  
4 fundamentally unfair to prisoners and to all hearing  
5 participants to allow the cycle of hearing postponements  
6 and hearing backlogs to continue. This protracted  
7 problem must be solved, and it must be done without  
8 compromising the already high level of performance  
9 occurring in the board's revocation operations.

10 By developing management controls and retooling  
11 processes, my team and I made significant progress on  
12 these major issues. The cycle of postponed lifer  
13 hearings was reduced from a high of 53 percent to  
14 less than 10 percent at the close of October -- excuse  
15 me -- November.

16 The decade of backlogged hearings that peaked  
17 last year at approximately 1500 hearings was reduced  
18 to 577 hearings. More importantly, those 577 backlogged  
19 hearings are currently on calendar and scheduled to be  
20 heard by June of 2009. Barring any abrupt changes to  
21 add capacity to produce hearings or other unforeseen  
22 events, we expect to eliminate this backlog under the  
23 terms of the court's conditions.

24 In addition, the board maintained and improved  
25 its compliance rate with parole revocation hearings last

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1 year. For the roughly 95,000 hearings conducted, the board was on time 96 percent of the time.

3 In recognition, the *Valdivia* court's special master is determining whether the State is in, quote, substantial compliance. I believe this signals the beginning of the end of this 14-year-old litigation.

7 Despite the progress, significant challenge remains. The State faces a \$40 billion dollar budget deficit. The board operates under court supervision in three separate class actions. The board is 30 days into the implementation of Proposition 9.

12 This coming year will be difficult, but I remain steadfast in my commitment to lead the Board of Parole Hearings. Subject to your support today, I intend to lead an organization that is focused on the State's goal of a long-term, sustainable rehabilitation-based corrections system that protects public safety and treats prisoners and parolees fairly. If I had just one vision for the board tomorrow to share with you today, it would be that we plan and control our future and not be litigated into it.

22 Thank you for your consideration today.

23 CHAIRMAN STEINBERG: Thank you. Well, we don't file lawsuits. Okay. I have some questions, but any questions from members at this point. I got a few.

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1 SENATOR AANESTAD: Family or friends.

2 CHAIRMAN STEINBERG: I'm sorry. Thank you very much, Senator Aanestad.

4 Do you have families and friends you'd like to introduce?

6 MR. HOSHINO: Just one. My best friend and my wife of 16 years is the same person, Heidi Hoshino.

8 CHAIRMAN STEINBERG: Welcome to you.

9 MRS. HOSHINO: Thank you.

10 CHAIRMAN STEINBERG: Thank you for being here. Thank you for your husband's public service.

12 I want to go into one area here -- I think we can keep this relatively brief -- and that is the passage of Proposition 9, otherwise known as Marsy's Law.

16 Can you -- I'll ask this question in five parts to expedite. I can go back over them.

18 Brief overview of Prop 9 as it affects your board. You've been implementing the law for about a month now. We want your assessment of how that implementation is going. There's been significant concern raised about the length of denials now for those who are serving life sentences, and what steps your board is taking to discern the appropriateness of a 15-year denial rather than a ten, seven, five, or

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1 three-year denial. Why don't we go with those three.

2 MR. HOSHINO: That was four, Senator, but I'll consolidate two of those.

4 Proposition 9 was large and sweeping. It not only affected the board's procedures, which I'll get to, it also went down to the streets and the courtrooms of California. But suffice it to say it did change significantly some of the operating procedures by which we conduct our hearings at the Board of Parole Hearings, within both major parts of our operation, not only with respect to revocation hearings but also lifer hearings.

13 And the latter part of your question talked about lifer hearings in terms of -- I promise I will get to that.

16 CHAIRMAN STEINBERG: Okay.

17 MR. HOSHINO: Proposition 9 had major provisions, and I'll talk to the ones that affected the Board of Parole Hearings. I categorize them in those two or three major areas, which are organizational changes, which is not getting a lot of focus from a lot of folks. There is the area having to do with revocation hearings and the timeliness and the provision of attorneys related to that.

25 There is, then, also lots of noticing

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1 requirements, lots of hearing changes and denial schedules, which most people are most concerned about, having to do with the denial schedule related to life prisoners.

5 CHAIRMAN STEINBERG: What does that mean?

6 MR. HOSHINO: If I could, just taking and setting aside the organizational and the revocation portions for a moment, because those portions, the implementation of which has been staid by court action in the federal court, so we are not implementing those provisions today.

12 There is a hearing scheduled for March 9th for which the court will hear the matter and make decisions about what elements can and cannot go forward. I presume because there is a famous injunction, which the name -- which is *Valdivia*, that is controlling how we conduct that process today.

18 The part that we are able to implement are the parts on the lifer side, and we have done a rather extensive communication roll-out related to that. We have a public board that has public meetings, and we can pass a lot of information through that particular process starting in October, also in November, and then a week-long public meeting and training session for commissioners and deputy commissioners.

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1 With respect to the length of denial, Marsy's  
2 Law made a very significant change in that respect, and  
3 that change in that respect is the prior schedule by  
4 which an inmate receives a denial used to be one, two,  
5 three, four, or five years.

6 CHAIRMAN STEINBERG: What were they denied? A  
7 hearing?

8 MR. HOSHINO: Yes. In the hearing, if I can  
9 take you one step back, a life-term prisoner will come  
10 up for a question of parole suitability, and whether  
11 they will be returned to the community or whether they  
12 need to remain incarcerated and work on factors of  
13 suitability in order to gain their freedom.

14 The commissioner will make a determination,  
15 suitable or unsuitable. That determination and the  
16 rules and the criteria for that determination did not  
17 change under Marsy's Law. What did change is if a  
18 commissioner makes a determination of unsuitability,  
19 what did change is the denial schedule, which previously  
20 was a one-year denial, a two-year, three-year, four-  
21 year, five years, and it changed it to fifteen years,  
22 ten years, seven years, five years, and three years. So  
23 there's still five choices, but the denial periods  
24 lengthened.

25 And the reason I gave it to you in the sequence

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1 of fifteen, ten, seven, five, and three is Marsy's Law  
2 also flipped the schedule. And in this respect, it  
3 requires the commissioners, on determination of  
4 unsuitability, to start at fifteen years, and then to  
5 apply an evidentiary standard of clear and convincing  
6 evidence. And having found clear and convincing  
7 evidence that a fifteen-year denial is not warranted, a  
8 commissioner now steps it down to a ten-year denial,  
9 again applying a clear and convincing evidence standard,  
10 and then having found clear and convincing evidence that  
11 a ten-year denial is not warranted, they are now in a  
12 discretionary zone of seven, five, and three. But it  
13 doesn't -- You don't have the same precedential scaling  
14 down of seven, five, three. You're making a choice  
15 between those three particular terms.

16 CHAIRMAN STEINBERG: How are you training  
17 commissioners on that change?

18 MR. HOSHINO: The training is -- After it  
19 passed, we brought them to Sacramento for their  
20 week-long training, and we essentially laid it out the  
21 way I described it to you. We provided them the  
22 evidentiary standard, because that was new. Prior to  
23 that we were using a preponderance of evidence standard,  
24 clear and convincing being a standard that is higher,  
25 that standard more than preponderance, less than

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1 reasonable doubt, and having a body of law and  
2 instructions related to that that was provided to  
3 the commissioner so that they could apply a new denial  
4 schedule.

5 The method by which they would make a  
6 determination inside the seven, five, three range  
7 relatively remained unchanged. The regulations in  
8 Title 15 that we have on the books already provide for  
9 them the discretion to ascribe relative weight to  
10 factors of suitability and unsuitability. The  
11 prisoner's progress, the availability of programming so  
12 they can meaningfully and reasonably make that progress  
13 and be able to demonstrate it at the next hearing.

14 So while there's always some variation in  
15 there, Proposition 9 did not change the method by which  
16 they would do that, so that was made clear with respect  
17 to the training. But suffice it to say we are trying to  
18 pay attention to the amount of variation that's going  
19 on.

20 I can tell you now, 30 days into it, having  
21 explained what we believe to be the changes, having  
22 provided the training and dispatched the commissioners  
23 in the field, we are in real time watching what the  
24 decisions are that are coming out of that, that we could  
25 look for particular patterns.

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1 It's difficult to talk about trend, because we  
2 haven't, what I would consider, completed an entire  
3 cycle of hearings. And what I mean "cycle" -- what I  
4 describe for that is that there are hearings going on  
5 across the state at different institutions, at different  
6 levels of classification and security. So it would be  
7 almost premature, after 30 days, I think, to make a  
8 judgment that this is the way it's coming out with  
9 respect to Marsy's Law in terms of all of the outcomes.  
10 We may not have covered all of the level one, two,  
11 three, four level institutions which have different  
12 categories and different types of life prisoners. So  
13 when those cycles close off, I think --

14 CHAIRMAN STEINBERG: You'll be able to evaluate  
15 it. It's something you're looking at.

16 MR. HOSHINO: And make adjustments.

17 CHAIRMAN STEINBERG: Okay. Very good.

18 Questions from members? I'm sorry.

19 SENATOR AANESTAD: How many of your  
20 commissioners are going to be up for confirmation  
21 hearings this year?

22 MR. HOSHINO: Eleven of the twelve, Senator.

23 SENATOR AANESTAD: Eleven of the twelve. Does  
24 that mean eleven of the twelve have been there less than  
25 one year?

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1 MR. HOSHINO: Some of them, because they have  
2 status, have been there longer, but I think the majority  
3 of the commissioners have been here for less than a  
4 year. It might be six, it might be seven.

5 Am I incorrect?

6 MS. SABELHAUS: Some have been reappointed.

7 MR. HOSHINO: Yes, but I believe we at least  
8 put six on the books last year, so there will be six up,  
9 and the appointments director may correct me on that.

10 I know the number is eleven between now and  
11 June of this year. So I'm very focused on June,  
12 because, again, we calendared these hearings. I think  
13 we're in a position to be in a very good place in June  
14 with respect to the *Rutherford* litigation.

15 CHAIRMAN STEINBERG: Thank you.

16 Witnesses in support.

17 MR. WARREN: Good afternoon. My name is  
18 David Warren. I'm appearing on behalf of Taxpayers for  
19 Improving Public Safety.

20 In light of your comments to remain brief, I'll  
21 limit it to we are supporting the nominee, although I  
22 have some trepidation because of the burden being placed  
23 on his wife, because the guy works 24 hours a day. But  
24 we have noticed some major improvements in the  
25 administrative aspects of the Board of Parole Hearings,

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1 and it is solely on the basis of his admission.

2 One of the questions I would request the  
3 members to address on Prop 9 and its impact on the  
4 parole hearings is the change where an unlimited number  
5 of individuals can now participate on behalf of the  
6 victim to testify against the inmate's parole hearing,  
7 and the prohibition for his counsel or the parole  
8 nominee to ask any questions about that. The burden of  
9 being placed -- These large number of individuals coming  
10 into very small spaces in correctional facilities  
11 diverts correctional staff from otherwise important  
12 tasks. Thank you.

13 CHAIRMAN STEINBERG: Thank you, Mr. Warren.  
14 Other witnesses in support.

15 MR. MILLER: Good afternoon. My name is  
16 Donald Miller. I'm speaking on behalf of myself. I'm a  
17 legal consultant, and I work for eight attorneys, many  
18 of whom do parole hearings. And my work is in  
19 litigation in cases in court following denial of  
20 parole by the board, by the governor. Approximately  
21 40 life prisoners who have been denied parole on cases  
22 we've worked have been set free by the courts.

23 I'm not a lawyer. I obtained my law degree  
24 while doing a life sentence under the jurisdiction of  
25 the parole board through my time in prison, parole, and

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1 afterwards.

2 We, the attorneys that I work for and myself,  
3 wholeheartedly support Martin Hoshino for this position,  
4 because we've noticed, first of all, a great improvement  
5 in accessibility to his staff, to get legal and  
6 administrative problems resolved, and he seems to have  
7 the talent and background to do it.

8 He certainly can't be blamed for the problems  
9 that he inherited, and there's probably one or two of  
10 those problems that he's powerless to resolve because of  
11 a problem that exists with the board that he can't  
12 control. But for all other things, I believe he is the  
13 answer to resolve the majority of the problems that this  
14 committee has struggled with over the last few years.

15 Lastly, and this is something that won't come  
16 up until you're your facing confirmation of  
17 commissioners, which Mr. Hoshino doesn't have control  
18 over, one of the major problems that the Committee, I  
19 would like to think about in the future, is that the  
20 board now consists of nine commissioners, all with  
21 law-enforcement backgrounds or peace officers, which is  
22 in violation of the Penal Code Section 5075 which  
23 requires the governor to appoint and this Committee to  
24 confirm a commissioner that represents a cross-section  
25 of the community in gender, in employment, and in all

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1 other respects.

2 So having said that, I hope the Committee will  
3 focus on that in the future, but we fully support  
4 Mr. Hoshino. He is the man who has already started to  
5 resolve some of these problems.

6 CHAIRMAN STEINBERG: Thank you very much for  
7 your testimony.

8 Are there witnesses in opposition of the  
9 nominee?

10 Let me ask one other question, and then we'll  
11 have somebody move the nomination. Our staff here has  
12 had a difficult time getting the answer to an important  
13 question, and that is whether or not there's actual  
14 programming for so-called lifers', rehabilitation  
15 programs for lifers who have more than three years left  
16 before they're likely to be released. Could you clarify  
17 that for all of us, please.

18 MR. HOSHINO: It's a question we are also  
19 seeking an answer for at the board. We have been  
20 impressing upon the commissioners wherever and whenever  
21 they can get the information from the actual institution  
22 that they're at when they have time to seek it out,  
23 because we think local availability of information is  
24 best.

25 We have made requests from the part of the CDCR

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1 that controls that program beyond some of those you  
2 requested. We've had some high-level presentations. I  
3 do believe their program is in a state of flux.  
4 Nevertheless, we were able to get an inventory from them  
5 in December of last year, I believe, of what was  
6 available.

7 And I was lucky enough to actually meet a  
8 provider of programming, Prison Focused Insight, and  
9 there's a woman named Jaime Carroll, who I invited to  
10 come to the next board meeting, which will be next week,  
11 and make a presentation. I happened to meet it and get  
12 lucky and see it, and what struck me about it was that  
13 they were specifically talking about life-term inmates  
14 that were in this particular program. So it was  
15 noteworthy for me and impressed upon me.

16 CHAIRMAN STEINBERG: How long before you might  
17 get back to us with a little more comprehensive answer?

18 MR. HOSHINO: I'm sure before the week is out.

19 CHAIRMAN STEINBERG: Before the week is out.  
20 Okay. Thank you.

21 All right. Mr. Hoshino, by all accounts and by  
22 your testimony here today, you're obviously a committed  
23 public servant and an excellent nominee, and I'm ready  
24 to support you today. But I want to make the statement  
25 in general that my predecessor in this job really placed

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1 a priority on scrutinizing appointees made by the  
2 governor when it comes to Corrections, and we're going  
3 to continue with that scrutiny.

4 I know there are a whole host of appointees  
5 that are due to come before this Rules Committee over  
6 the course of the next year. We spend way too much  
7 money in this area, and to expect anything less than,  
8 frankly, the kind of performance you're exhibiting will  
9 make no sense to the State legislature. We want people  
10 who focus on reform, we want people focused on  
11 efficiency, and we want folks who can give quick answers  
12 and appropriate answers and full answers to the  
13 legislature when it comes to our oversight of this  
14 still-troubled department.

15 It should be of great embarrassment to all of  
16 us that we're under the jurisdiction of a federal  
17 receiver here. And that's not anybody's fault in  
18 particular. It's -- you know, I say all of us. And so  
19 this is going to be a core piece of our work with the  
20 Rules Committee to make sure we have in place people --  
21 not only with the Board of Parole Hearings, but  
22 throughout the entire department that are focused on  
23 reform and fixing these multitude of problems.

24 So I'll take a motion.

25 SENATOR OROPEZA: I'll move.

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1 CHAIRMAN STEINBERG: Senator Oropeza moves.  
2 Please call the roll.

3 MS. BROWN: Senator Cedillo.

4 SENATOR CEDILLO: Aye.

5 MS. BROWN: Cedillo aye.

6 Dutton.

7 SENATOR DUTTON: Aye.

8 MS. BROWN: Senator Dutton aye.

9 Oropeza.

10 SENATOR OROPEZA: Aye.

11 MS. BROWN: Oropeza aye.

12 Aanestad.

13 SENATOR AANESTAD: Aye.

14 MS. BROWN: Aanestad aye.

15 Steinberg.

16 CHAIRMAN STEINBERG: Aye.

17 MS. BROWN: Steinberg aye.

18 CHAIRMAN STEINBERG: Thank you very much. All  
19 right. We will now go into executive session.

20 No. I'm sorry. We've got a number of  
21 gubernatorial appointees subject to confirmation but not  
22 required to appear.

23 We have Richard Figueroa, member of the Managed  
24 Risk Medical Insurance Board; John McGinness, member of  
25 the Commission on Peace Officer Standards and Training;

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1 Gil Van Attenhoven, member of the Commission on Peace  
2 Officer Standards and Training; James B. Hussey, member  
3 of the State Bar Board of Governors; Edward Olson,  
4 member of the Cal Veterans Board; Thomas Richards,  
5 member of the Cal Veterans Board; and Cynthia L.  
6 Dellums, member of the Commission on the Status of  
7 Women.

8 Are there a few that you're not prepared to  
9 support, Senator Dutton?

10 SENATOR DUTTON: Yes, items 2D and 2J.

11 CHAIRMAN STEINBERG: Okay. If we can take a  
12 motion on items 2E, F, G, H, and I, we'll take those  
13 first. Moved by Senator Dutton.

14 Please call the roll on those nominees.

15 MS. BROWN: Senator Cedillo.

16 SENATOR CEDILLO: Aye.

17 MS. BROWN: Cedillo aye.

18 Dutton.

19 SENATOR DUTTON: Aye.

20 MS. BROWN: Dutton aye.

21 Oropeza.

22 SENATOR OROPEZA: Aye.

23 MS. BROWN: Oropeza aye.

24 Aanestad.

25 SENATOR AANESTAD: Aye.

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1 MS. BROWN: Aanestad aye.  
 2 Steinberg.  
 3 CHAIRMAN STEINBERG: Aye.  
 4 MS. BROWN: Steinberg aye.  
 5 CHAIRMAN STEINBERG: All right. Those will go  
 6 to the floor.  
 7 With regard to Richard Figueroa, is there a  
 8 motion on Mr. Figueroa?  
 9 SENATOR OROPEZA: I move.  
 0 CHAIRMAN STEINBERG: Senator Oropeza.  
 1 Please call the roll.  
 2 MS. BROWN: Senator Cedillo.  
 3 SENATOR CEDILLO: Aye.  
 4 MS. BROWN: Cedillo aye.  
 5 Dutton. Oropeza.  
 6 SENATOR OROPEZA: Aye.  
 7 MS. BROWN: Senator Oropeza aye.  
 8 Aanestad.  
 9 SENATOR AANESTAD: Aye.  
 0 MS. BROWN: Aanestad aye.  
 1 Steinberg.  
 2 CHAIRMAN STEINBERG: Aye.  
 3 MS. BROWN: Steinberg aye.  
 4 CHAIRMAN STEINBERG: All right. Cynthia  
 5 Dellums, member of the Commission on the Status of Women

1 moved by Senator Oropeza. Please call the roll.  
 2 MS. BROWN: Senator Cedillo.  
 3 SENATOR CEDILLO: Aye.  
 4 MS. BROWN: Cedillo aye.  
 5 Dutton. Oropeza.  
 6 SENATOR OROPEZA: Aye.  
 7 MS. BROWN: Oropeza aye.  
 8 Aanestad. Steinberg.  
 9 CHAIRMAN STEINBERG: Aye.  
 0 MS. BROWN: Steinberg aye.  
 1 CHAIRMAN STEINBERG: Okay. Both of those --  
 2 Figueroa and Dellums move to the floor.  
 3 (Thereupon, the Senate Rules Committee hearing  
 4 adjourned at 3:53 p.m.)  
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1 --o0o--  
 2 I, INA C. LeBLANC, a Certified Shorthand  
 3 Reporter of the State of California, do hereby certify  
 4 that I am a disinterested person herein; that the  
 5 foregoing transcript of the Senate Rules Committee  
 6 hearing was reported verbatim in shorthand by me,  
 7 INA C. LeBLANC, a Certified Shorthand Reporter of the  
 8 State of California, and thereafter transcribed into  
 9 typewriting.  
 10 I further certify that I am not of counsel or  
 11 attorney for any of the parties to said hearing, nor in  
 12 any way interested in the outcome of said hearing.  
 13 IN WITNESS WHEREOF, I have hereunto set my hand  
 14 this 21<sup>st</sup> day of January, 2009.  
 15  
 16  
 17  
 18  
 19

*Ina C. LeBlanc*  
 INA C. LeBLANC  
 CSR No. 6713

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1 APPENDIX  
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JOHN CHALKER, Chair  
BOB ALVARADO, Vice Chair  
LUCETTA DUNN  
JAMES EARP  
DARIO FROMMER  
JAMES C. GHIEMMETTI  
CARL GUARDINO  
R. K. LINDSEY  
PHILLIP H. TAGAMI  
JOSEPH TAVAGLIONE  
LARRY ZARIAN

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER  
GOVERNOR



**Senate Rules Committee**

DEC 29 2008

**Appointments**

SENATOR ALAN LOWENTHAL, Ex Officio  
ASSEMBLYMAN MIKE ENG, Ex Officio

JOHN F. BARNA JR., Executive Director

## CALIFORNIA TRANSPORTATION COMMISSION

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December 23, 2008

Ms. Nettie Sabelhaus  
Senate Rules Committee Appointments Director  
State Capitol, Room 420  
Sacramento, CA 95814

Dear. Ms. Sabelhaus:

I am pleased to provide a response to the following questions for my upcoming confirmation hearing for re-appointment to the California Transportation Commission. Also enclosed please find my Form 700 as requested.

### Proposition 1B

1. *What have been some of the greatest challenges in implementing Proposition 1B? Do you have any suggestions for statutory changes related to Proposition 1B or future infrastructure bond legislation?*

The California Transportation Commission's (Commission) greatest challenge has been to fulfill its promise to implement Proposition 1B programs under its purview thoughtfully and expeditiously. At the close of 2008, the Commission had adopted guidelines, established application processes, approved project evaluation criteria, held public hearings and developed baseline agreements for eight of nine bond programs it is responsible for, and approved more than \$10.6 billion in projects. In December 2008, the Commission adopted guidelines for the last remaining program, the State-Local Partnership Program, with program adoption (project approval) expected in April 2009.

In 2009 and beyond, the challenge will be delivering these projects. The longer the budget deficit is allowed to linger, the more difficult the atmosphere becomes for issuing transportation bonds, let alone other types of infrastructure bonds. Given the state's precarious cash position, lack of bond proceeds may result in the Commission re-evaluating how much Proposition 1B funding can be allocated for the balance of the 2008-09 year, and beyond.

**Senate Rules Committee**

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**Appointments**

Proposition 1B infrastructure projects, along with other transportation projects, require funding from a variety of sources, including state funds such as the State Transportation Improvement Program, and federal and local funds. When state funding sources are suspended, projects must be delayed, or if available, other funding sources need to be used to keep the projects going. This has a domino effect with the Department of Transportation (Caltrans) and regional agencies taking funding from one project to complete another delaying the project that the funding was originally committed to.

In its 2006 and 2007 annual reports the Commission recommended that the Legislature convene a blue-ribbon transportation funding task force to examine options for enhancing transportation revenues and to consider additional ways to raise revenue. An added impetus to establish a dedicated, special funding source is that the Federal Highway Trust Fund will likely not have enough resources to meet all of its obligations by the end of the decade. Statutory changes to Proposition 1B are not necessary. What is necessary is stable, reliable, growing funding sources for transportation that enable project sponsors to bring their projects forward for Proposition 1B funding.

2. *Through September 2008, only \$97 million of the \$417 million appropriated to the CTC for the Trade Corridor Improvement Fund (TCIF) had been allocated to projects. Why is this program moving along so slowly? What needs to be done to move funds "to the streets" more quickly?*

In its program adoption actions for most Proposition 1B programs, including the TCIF, the Commission mandated that bond funding be limited to the cost of construction - - resulting in the back-loading of construction funding. This mandate ensures bond funds are only expended for physical capital improvements with quantifiable benefits.

In keeping with the 5-year time frame of the Corridor Mobility Improvement Account (CMIA) and State Route 99 (SR 99) Corridor programs, the Commission also required that projects must begin construction by December 31, 2013, putting a premium on project delivery.

In adopting the initial TCIF program, the Commission directed the nominating agencies to provide executed Project Baseline Agreements that set forth the proposed project scope, measurable expected performance benefits, delivery schedule, and a project budget and funding plan. For investments in rail projects, the Commission required that the project baseline agreement include a memorandum of understanding between the private railroad and the regional transportation planning agency and/or Caltrans, if applicable.

As of January 1, 2009, the Commission had approved 70 of the 79 project baseline agreements. Several of the remaining agreements consist of rail projects that are engaged in active negotiations. The bottom line is that projects in the TCIF are not as far along in their development as those in the CMIA program.



3. *What procedures has CTC implemented to ensure and evaluate project delivery after bond funds are allocated? Please describe.*

The Commission put forth an accountability implementation plan that incorporates provisions from Proposition 1B, the Governor's Executive Order S-02-07, and Senate Bill (SB) 88. The accountability implementation plan emphasizes transparency and accountability throughout the lifetime of a project.

In its programming actions, the Commission required the development of project baseline agreements that are signed by the recipient agency's Executive Director and the Director of Caltrans Director, and for some programs the Commission's Executive Director. The baseline agreements set forth the agreed upon project scope, schedule, cost and expected benefits. These agreements also include the estimated cost and the start and completion dates for the environmental, right-of-way, design, and construction phases of the project. The baseline agreement is considered the front-end document that forms the foundation for the Commission's in-progress and follow-up accountability.

The Commission requires recipient agencies to report, on a quarterly basis, on the activities and progress made toward the implementation of a project, including those activities taking place prior to the allocation of bond funds. The quarterly progress report includes approved budgets, actual expenditures and forecasted costs, as well as approved schedules, progress to date, and forecasted completion dates for each phase of a project.

The Commission's accountability implementation plan requires the recipient agency to develop a corrective plan to address anticipated deviations or variances from the approved project baseline agreement. Efficiency measures for possible cost increases or schedule delays are addressed on an ongoing basis by the project team and documented through the corrective plans.

The Commission incorporated audit requirements in its program guidelines as mandated by SB 88. The audits will be performed at the completion of construction when the facility becomes operable (typically when the construction contractor has completed the work and the recipient agency has opened the facility to traffic) and at the conclusion (close-out) of all project activities to document the full cost of the project.

The Commission provides semi-annual reports to the Department of Finance and the Legislature on the status of each program to communicate whether projects are being executed in a timely fashion and are within the scope and budget identified in the executed baseline agreements. The Commission also provides in its annual report to the Legislature a summary of its activities relative to the administration of bond programs highlighting significant issues with these programs, and may recommend legislative proposals that could facilitate their implementation.

The Commission's accountability measures are designed to help manage projects to successful delivery. This level of project scrutiny, combined with bi-annual reporting requirements, is unprecedented at the state level. The Commission spends a considerable amount of time working with Caltrans and regional agencies to ensure that project oversight is appropriate and transparent. Our view is that the enhanced reporting and accountability will become the norm for transportation infrastructure projects.



4. *Because of the state's poor fiscal condition, the State Treasurer has indicated that allocations to projects funded by the historic infrastructure bond package of 2006 need to cease. How many projects would be affected? How would the CTC decide which projects to move forward with and which will be stalled?*

Based on the action taken by the Pooled Money Investment Board (PMIB) to suspend disbursements, Caltrans notified the Commission and regional agencies that they had suspended awards of State-administered bond-funded construction contracts and that the situation could also have an impact on ongoing construction projects. Caltrans is evaluating the cash flow situation to determine if they can continue State-administered projects that have been awarded. Caltrans advised regional agencies not to enter into any new construction, or agreements or contracts that would be funded from State bonds until further notice, and that the State will not be able to reimburse them for expenditures on bond-funded projects already underway until authorized by the PMIB.

Given the state's precarious cash position, lack of bond proceeds may result in the Commission re-evaluating how much Proposition 1B funding can be allocated for the balance of the 2008-09 year, and beyond. This would negatively impact project baseline agreement schedules and fail to provide any economic stimulus through increased construction activity. The Commission's re-evaluation will be done through a consensus effort with Caltrans and the regional agencies as has been done in the past when state transportation funding has been suspended.

5. *Are there enough eligible projects ready to go within the Governor's proposed time constraints if expedited Proposition 1B funds were made available?*

Yes, there are enough eligible Proposition 1B projects ready to go. However, these projects depend on the state's ability to sell bonds. If the state can not sell bonds in any given year, these projects will be at risk.

6. *Are there additional projects, above and beyond those identified by the Governor that could be advanced with an earlier appropriation of bond funds? Please provide some examples.*

The Commission staff worked with Caltrans staff to develop the lists of projects identified by the Governor. Our general impression is that bond projects that are scheduled for construction during the first six months of the 2009-10 fiscal year may be able to come in earlier for construction allocations if increased bond appropriation levels are approved for the 2008-09 fiscal year. However, this assumes that project sponsors are on schedule to begin with and are in a position to expedite final approvals.

7. *Critics fear that in order to accelerate funds for infrastructure projects, the state will waive key environmental regulations. How would you respond to those concerns?*

Even though the Governor has proposed CEQA waivers as part of the state's economic stimulus plan, my understanding is that in practice project-level environmental considerations and mitigations would continue, although the administration's desire is for review and permit processing relief. For a project to even be considered for CTC programming, it must undergo an initial scoping document that identifies environmental impacts, admittedly at a lower level of analysis than an official environmental document. The issue, in mind, is not trading off

environmental regulations for project acceleration but how to achieve streamlining in both areas that ensures that appropriate environmental impacts are mitigated and mobility benefits are achieved earlier. One way to achieve this streamlining is through agreements on the front-end of plan development, such as proposed by SB 375. Another way is to build impact avoidance into project design, which happens frequently but is often unrecognized.

### **Transportation in a Post-AB 32 World**

8. *Given the climate change goals of AB 32 and SB 375, as well as evidence of the negative health effects of air pollution from mobile sources, how do you recommend incorporating air quality and climate-change concerns into the planning and programming of transportation projects?*

In 2007 the Commission led a consensus-building effort to incorporate AB 32 objectives into regional transportation plan guidelines. In May 2008, the Commission adopted an addendum to the 2007 Regional Transportation Plan (RTP) Guidelines addressing climate change and GHG emissions during the RTP process. The addendum included guidance for smart growth, land use and transportation modeling. The Commission's effort predated SB 375 but was ultimately in concert with the overall direction of the bill.

Passage of SB 375 left several unanswered questions for the transportation community, questions the bill's author has indicated a willingness to answer in 2009.

In reviewing this legislation, the Commission composed a letter to the Governor highlighting two issues that should be addressed in clarifying legislation: 1) that transportation sales tax measures passed by 2010 should be exempt from evaluation under SB 375 requirements, and 2) that GHG analyses should be done at the program level and that individual project environmental documents tier off from the program analyses.

In 2009, the Commission will have an opportunity to begin incorporating SB 375 and AB 32 in its regional transportation plan guidelines, 2010 fund estimate, and 2010 STIP guidelines. While the Commission stands ready to facilitate the transportation community's efforts in this regard, we need to advise you that without reliable, sustainable, and increased transportation funding in the next decade the transportation community will not meet its AB 32 reduction targets.

9. *What role do you think CTC should play in helping to achieve the goals of AB 32 and SB 375?*

As provided in #8, the Commission will incorporate the requirements of AB 32 and SB 375 into its RTP Guidelines and 2010 fund estimate, and 2010 STIP guidelines. Our general view is that regional agencies and Caltrans will have every incentive to comply with AB 32 and SB 375. As a result, reducing greenhouse gas emissions will become part of implementing transportation. The Commission's role as an allocation body would remain the same; the emphasis of the projects to which allocations are made will evolve to incorporate greater air quality considerations.



10. *What is the CTC doing to implement the requirements of SB 375? For example, has the commission begun assessing travel-demand models in an effort to have those models better respond to land-use decisions?*

As the Commission does not have the staff expertise or resources available to assess travel-demand models to better respond to land-use decisions, the Commission will rely on Caltrans and the regional agencies during the transportation planning process.

### **Federal Economic Stimulus and Transportation Reauthorization**

11. *How can the state's transportation sector best be positioned to take advantage of any economic stimulus package passed by the federal government in 2009? Has the CTC or Caltrans begun identifying projects or programs that it would focus such federal dollars on in California? If so, could you identify those priorities?*

The Commission has been involved with ongoing discussions with Caltrans and state and local partners regarding the proposed economic stimulus package since early December. Discussions have revolved around the disbursement of the funds through existing state laws and federal transportation funding requirements. Key issues such as formulas and restrictions, as well as subjective preliminary policies, have also been discussed.

Caltrans has been tasked with combining project lists with ready-to-go projects submitted from its partners in an effort to position California as ready to implement federal funds when available. The key issue the group is facing is the size of the list emerging; many cities and counties are asking for funds for all projects they deem as important to their respective areas. Discussion has emerged of a formula-based disbursement through existing programs that would, in essence, increase appropriation levels for these programs. The benefit of this approach is that all regions of California would participate in the stimulus: some regions by virtue of having projects funded immediately and others by having needed projects funded later with the increased appropriation.

This idea is being considered so California is assured that funding is not lost to other states for failure to deliver. No projects have yet been chosen, and the disbursement of funds to any projects would be impacted by the requirements set forth by the federal government and all existing state laws. The proposed idea is to use current state law in regards to existing programs, and not developing new programs. The Commission's role would carry broad authority to assure that funding is focused on projects that provide short-term economic stimulus with longer term benefits. An agency that did not get stimulus funding now would still get an increase in other formula funds later, while an agency that got a project now would get an adjusted amount toward their shares later.

Priority projects would be those projects that can be ready for construction within 120 days of the funds being available. The most likely projects will be pavement rehabilitation and maintenance projects at the state, county and municipal levels. If the stimulus includes funds for projects ready to go to construction within a year, we would expect to fund Proposition 1B and STIP projects.



12. *With respect to SAFETEA-LU reauthorization, what programmatic changes are the CTC advocating for and why? What are the state's priorities for the next round of multi-year federal transportation funds?*

The Commission supports the Consensus Principles developed by Caltrans and the regions. The Commission has also participated in field hearings held by the Environmental and Public Works Committee in recent months. The principles include an emphasis on Goods Movement as a national priority, enhancing mobility within and through major metropolitan areas, rehabilitating and preserving the infrastructure already in place, and reducing congestion and its impacts, sustainable funding and establishing funding and performance criteria. —

California is already implementing these principles through the Proposition 1B programs, as well as through the implementation of SB 375. The Commission along with other transportation stakeholders in California should be working to achieve a reauthorization package that provides funding and legislative flexibility that supports California's efforts. Interestingly, the voice that is often not heard in these discussions is the Legislature's. We would encourage the Legislature to participate in the reauthorization discussions here and in Washington, D.C.

13. *How could California become more effective in competing for federal discretionary transportation funds?*

California has been very effective over the years in competing for federal discretionary transportation funding. Each year during the August re-distribution California has received a significant amount of money from the federal government. Historically, the state has received over \$20 million, and in recent years the amount received has been closer to \$100 million which supports and is a reflection of California's willingness and ability to use any available funds that come its way. The passing of the High Speed Rail bond, the GMAP, and Proposition 1B bonds are significant examples of California laying the groundwork to programs that can offer guidelines and resource for funding that becomes available.

An example of how California is currently working with other like-minded states, specifically Oregon and Washington, with similar objectives, by beginning a multi-state effort aimed at exploring and testing the possibilities of alternative approaches to our transportation system and funding structures, such as congestion pricing. Studies completed by our neighboring states have also concluded that a vehicle miles traveled (VMT) fee structure appears to nicely compliment several priorities shared amongst the West Coast States – namely: reducing congestion, reducing greenhouse gas emissions, increasing the use of alternative transportation modes, and identifying a sustainable, long-term transportation funding source. VMT and congestion pricing are two alternative funding sources that have potential to warrant the interest and support of federal government funding options.

### High Occupancy Vehicle Lanes, Tolls Roads, and High Occupancy Toll Lanes

14. *Is the AB 1467 program working as intended? Have any public-private partnerships, as authorized by that bill, come before the CTC for evaluation or approval? Do you have any suggestions for statutory changes to the program?*

On October 27, 2007, the Commission adopted the Public Partnership High Occupancy Toll Lane Guidelines and Application to implement the requirements of AB 1467. In order for the Commission to consider a project eligible for consideration by the Legislature, a nominating agency was required to submit an application in accordance with the guidelines and provide evidence that the project is consistent with Streets & Highways Code Sections 149-149.7; that there is cooperation with Caltrans and consistency with state highway system requirements; that the project is technically and financially feasible; that the project is consistent with the Regional Transportation Plan; and that there are performance measures established for project monitoring and tracking.

Subsequent to adopting the HOT Lane Guidelines, the Commission received two eligible applications, both from Southern California. On December 13, 2007, the Riverside County Transportation Commission (RCTC) submitted its *Public Partnership Application for HOT Lanes for the Interstate 15 Corridor and HOT Lane Project in Riverside County* to the Commission. The Commission found the RCTC application eligible for consideration by the Legislature on April 9, 2008. The Northern California hearing was held on April 10, 2008 and the Southern California hearing was held on April 24, 2008. AB 1954 authorizing the RCTC project was passed by the Legislature in August 2008 and signed by the Governor on September 27, 2008.

On March 31, 2008 the Los Angeles County Metropolitan Transportation Authority (LA Metro) submitted its application for the *Los Angeles Region Express Lanes Project* to the Commission. The Commission found the LA Metro application eligible for consideration by the Legislature on July 23, 2008. The Southern California hearing was held on July 23, 2008 and the Northern California hearing was held on July 28, 2008. Senate Bill 1422 authorizing the LA Metro project was passed by the Legislature in August 2008 and signed by the Governor on September 28, 2008.

As agencies achieve more success with public-private partnerships, the Commission would hope that the Legislature would reward the transportation community with increasing partnership powers.

15. *Although numerous bills authorizing individual toll facilities, toll roads, and HOT lanes have been passed, critics argue that the state lacks an overall policy on developing and financing toll facilities. What recommendations would you make to the Legislature in forming a statewide policy on toll roads and HOT lanes?*

The passage of AB 1467 signaled the state's willingness to re-enter the public-private partnership fray. The bill contains several implementation challenges, the most noticeable of which is the prohibition against auto tolls. Without the ability to toll automobiles, it is unclear whether truck tolls can generate enough revenues to enable truck-only toll lanes to be built.



The Commission recommends that the Legislature and administration revisit public-private partnership in 2009. The success of other countries and other states with similar political, demographic, environmental, and transportation challenges suggests that the institutional challenges to public-private partnerships can be overcome.

A key threshold question that needs to be answered in the policy debate is where will the funding come from to build the transportation capacity a California with 40 to 45 million people will need. Proposition 1B is a much-needed shot in the arm for transportation funding; however, the resources in Proposition 1B are inadequate to deal with the capacity needs of 2015 and beyond. Based on the experience of other countries and states, gas and sales taxes cannot be raised high enough to meet these needs; tolls and user fees are necessary to pay for the needed mobility.

However, the Commission recognizes that the current political and transportation environment requires developing a new California approach to public-private partnerships. Such an approach might emphasize the need for public-public-private partnerships in which the State and regional agencies enter into agreements that the private sector implements with appropriate public-sector oversight on toll rates, procurement, and implementation. And, the next iteration of public-private partnership legislation needs to include design-build authority for at least the public-private partnership projects.

16. *Do you agree with criticisms of HOT lanes? How would you proposed to address equity concerns raised by opponents of HOT lanes?*

Based on patronage data from the managements of the 91 Express Lanes and the 125 Southbay Expressway, Joe the Plumber and Sue the Soccer Mom are as likely to travel those tolled facilities as the executive in a Lexus. HOT Lanes are about paying for transportation choices, which we have precious little of in transportation in California. The HOT Lanes that have been built in California and are proposed for future consideration all have "free" alternatives that compete with these facilities. I think rational pricing of transportation with suitable alternatives provides Californians at all economic levels with the ability to choose the travel option that best works for them. As the owner of a trucking firm, my drivers often don't have the choice of when to travel over certain highways, our customers determine when and where we need to be. But, if my drivers could pay to avoid congestion, pay for a guaranteed travel time, they would do it in a heartbeat.

#### **State Transportation Improvement Program**

17. *Do you have any concerns with how public transit funds are distributed in the STIP process? Do you have any suggestions for how these funds might be distributed more efficiently?*

Public transit funds are not distributed any differently than the other funds in the STIP. The problem with transit funds is not in the distribution formula but the unreliable and unstable funding source from which these funds come from. The PTA is a transit-only funding source, and yet \$1.3 billion in funds have been diverted away from transit in the past year. Proposition 42 funds are more flexible as far as distribution to both transit and highway projects, yet these funds teeter on the verge of being raided at any time. All STIP funds are flexible to the regional priorities, but the average amount of money available through the STIP has declined as well. Transit funds from the STIP are distributed based on what the regions view as their priorities.



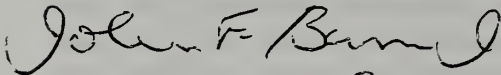
Transit has an opportunity to play a very important role in reducing congestion, enhancing mobility and partnering with alternative modes of travel in the reduction GHG emissions. It is up to the Legislature to define and support the role of transit to our state and provide secure and reliable sources of funding for it to be successful.

18. *Do you have any concerns with how STIP funds are distributed among urban and rural areas? How do you describe your approach to balancing the transportation needs of rural and urban areas?*

The biggest concern for the STIP funding program is not the distribution or distribution formulas of the funds but the funding system itself. The threat of borrowing from programs like Proposition 42 and the PTA leave the STIP as an unstable and insufficient funding source to meet both the urban and rural area needs. The key to providing a balanced approach to addressing rural and urban needs is to not divert or take away any further funding to this program or the other programs that flow into the STIP.

Where urban and rural, or smaller, counties do differ significantly in addressing their funding needs is over sales tax measures dedicated to transportation. Nearly all of the state's urban counties have transportation sales tax measures. Some even have more than one. Those counties have a distinct advantage in terms of advancing their regional priorities and making those priorities competitive for STIP funding. Having just chaired a losing sales tax measure effort in Stanislaus County—a small, more rural county—I can tell you how difficult it is to achieve the two-thirds vote requirement for these tax measures. We missed winning by hundreds of votes, having garnered over 66 percent of the vote, but not the required 66.7 percent. If the two-thirds vote requirement could be changed, to say 60 percent, smaller counties would be better positioned to address their regional transportation challenges.

Sincerely,



R. KIRK LINDSEY *lev*  
Commissioner

Enclosure

# Alice Dowdin Calvillo, Public Employment Relations Board

Prepared December 29, 2008

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## Goals and Responsibilities

1. *What do you hope to accomplish during your tenure as a member of PERB? How will you measure your success?*

PERB is a quasi-judicial agency charged with overseeing public sector collective bargaining in California while promoting harmonious labor relations among employees, employers and employee organizations. To this end, PERB administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them.

As a Board member, the majority of my time is spent reviewing appeals from determinations made by Board agents filed by employers, employees and employee organizations. More specifically, the Board reviews appeals from: 1) dismissals of charges found insufficient by the General Counsel's office to show that an unfair labor practice occurred; 2) proposed decisions of Administrative Law Judges following evidentiary hearings on unfair labor practice complaints; and 3) findings regarding representation petitions.

The Board itself issues precedential decisions that make up a large and important part of the body of law governing public sector collective bargaining. Therefore, it is imperative that I, whether as author or panel member,<sup>1</sup> issue decisions that not only correctly apply the law to the evidence presented, but also provide clarity and guidance to better enable the parties to meet their collective bargaining obligations. I take this charge very seriously and work hard to produce clear, concise and legally sound decisions.

In addition, it is my goal to help reduce the Board's appeal backlog. Until last year, the Board functioned with less than five members resulting in more appeals assigned to each Board member. I am a proponent of the adage that "justice delayed is justice denied," and work tirelessly to complete as many cases as possible. Although first appointed in January 2008, I was on maternity leave until the end of March. Since that time, I have authored 18 decisions and participated in multiple others as a panel member. Although new appeals are assigned weekly,

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<sup>1</sup>PERB appeals, using an already established, neutral process, are assigned to panels of three Board members with one member designated as the author of that decision. The remaining two panel members also review the record to ensure the decision is compliant with the law and addresses the issues and merits of the case. This results in all three panel members being responsible for the final decision once it is issued.

**Senate Rules Committee**

DEC 31 2008

**Appointments**

Alice Dowdin Calvillo  
Senate Rules Committee  
Confirmation Hearing Date  
January 14, 2009



sometimes daily, to date I only have six appeals and one motion for re-consideration on my personal docket.

I also strongly support PERB's outreach to constituents by enhancing the resources of the agency available to them. In recent years, the Board developed a process for filing unfair practice charges on-line and since then has expanded and enhanced the offerings available through its website. PERB has conducted two very successful conferences in the past few years, providing union and management representatives insight into PERB processes and available resources such as mediation. Finally, PERB's Advisory Committee, composed of key members of the public sector labor and management communities, plays a valuable role in developing recommendations in areas relevant to PERB's mission of promoting harmonious public sector employer-employee relations in California. Meeting with this group enables the Board to explore ideas for enhanced services and receive input from our constituencies on where we can do better. Receiving feedback from our constituencies is a good measurement of our success.

During my tenure at PERB, I hope to ensure justice is served by issuing timely and well-reasoned decisions and being an effective Board member by being responsive to my peers as well as our constituency. My success in these areas can be measured by the reputation I hold among my colleagues and throughout PERB's constituency regarding productivity, neutrality, fairness, and responsiveness.

2. *What is your understanding of PERB's role in labor relations? What do you believe is the board member's role within the framework?*

PERB's primary role in the scheme of public sector labor relations is to resolve labor disputes by investigating and adjudicating unfair practice charges in a fair and impartial manner. PERB's efforts to facilitate voluntary settlement of disputes are an important but often overlooked aspect of this process. I believe that PERB has had great success in this area. For example, traditionally half of the cases filed with PERB result in voluntary settlement by the parties. PERB also plays an important role in safeguarding the statutory right of employees to have union representation, or to not have union representation, by conducting elections, processing unit modification petitions and verifying proof of support in "card check" cases.

The main function of the Board itself is to issue timely legal decisions on appeals from determinations made by Board agents. These decisions must provide clear guidance to public employers and public employee organizations regarding their rights and obligations under the seven collective bargaining statutes PERB administers. In addition, it is the Board's responsibility to ensure that public employers and employee organizations have a clear understanding of how PERB administers its collective bargaining statutes. We do this through effective outreach (e.g., participating in labor relation conferences) and communication. Finally, the Board is also responsible for adopting sound regulations to implement the statutes it administers to ensure that its mission of promoting harmonious labor relations is realized.



3. *Based upon the types of complaints PERB reviews and adjudicates, what, in your view, are the most important labor relations issues facing employers and employees? What challenges do you see PERB facing during your tenure?*

In my opinion, the most important labor relations issues facing both public employers and employee organizations today stem from the significant reduction of revenue available to public agencies due to the downturn in the economy. While PERB to date has not seen a noticeable trend of increased filings on any one issue, there are several that are likely to produce more charges in the near future. Negotiations over salary increases, which are often conducted yearly in connection with the State budget, are more contentious as government revenues decline. This will likely result in more charges being filed over bargaining conduct and implementation of wage agreements and, correspondingly, more job actions and requests for injunctive relief. The cost of health care benefits for both current employees and retirees is the subject of several charges currently before PERB. Additionally, because most of the State's bargaining units are currently without collective bargaining agreements, PERB has seen an increase in filings by unions representing State employees. Finally, if employers are forced to make staff reductions, PERB could see charges based on the way in which the reductions are implemented, as well as charges that particular employees were laid off unlawfully. But of course, even a charge involving a single employee is important to the parties involved.

The financial crisis facing the State also provides a challenge to PERB itself in ensuring that it can adequately manage its workload and carry out its statutory charges. PERB is a General Fund agency, which means that we must compete for funds with many other State agencies that provide important services to the public. As the pie gets smaller, PERB's slice is reduced, resulting in our having to make difficult choices as to how we ensure all of our constituent needs are being met. The elimination of PERB's fact-finding allocation in the last budget is a prime example of this. To address the allocation elimination, the Board reduced the contract amount it pays fact-finding panel chairpersons. PERB recognizes that more budget cuts are likely on the horizon and will continue to do its best to make sure it can carry out its mission.

#### **Budget-Balancing Reductions**

4. *What steps has the board taken to address the deletion of funding for fact-finding, given that the mandate was not eliminated, and what impact will this have on PERB and its constituencies?*

Fact-finding is part of the mandatory impasse resolution process under both EERA and HEERA. During fact-finding, the parties present their proposals and financial information to a three-member panel, chaired by a neutral member selected either by PERB or by the parties (under EERA, if the parties elect to go with their own chairperson, then they, not PERB, pay for his or her services). If the chairperson is selected by PERB, PERB is required by statute to pay costs of the services of the panel chairperson, including per diem fees, if any, and actual and necessary travel and subsistence. However, the law is silent as to what the per diem rate shall be.

As a result of today's tough financial times, PERB's budget for fiscal year 2007-08 was enacted without an allocation for fact-finding services. However, the statutory requirement for fact-finding remained. Therefore, PERB was tasked with finding monies to pay for the contract amount for neutrals serving as fact-finding panel chairs while continuing to provide essential services to the remainder of its constituencies.

PERB's annual budget for this year is \$6.26 million and \$5.12 million or 81 percent of that is dedicated to salaries and benefits given that this agency's "product" is service. Of the \$5.12 million, the majority of this goes to pay for rent at PERB's three offices located statewide. This leaves very little to pay for other essential services such as fact-finding. As a result, at its October 27, 2008 public meeting, the Board voted to divert funds from other PERB vital functions to pay for fact-finding services at a maximum rate of \$100 per day for a maximum of three days (a reduction from \$800 per day with an overall contract cap of \$4,000). The Board did this in an attempt to balance, to the extent fiscally possible, its statutory obligations with the invaluable services provided by fact-finding chairpersons. This is not the first time the Board has taken such an action. The rate was reduced to \$100 per day in fiscal year 2002-03 and was not increased until fiscal year 2004-05 when financial times for the State improved.

The result of this reduction is that of the 46 individuals who were eligible to receive fact-finding chairperson appointments, seven people directly communicated to PERB that they were willing to serve as fact-finding panel chairpersons at the newly reduced rate. Some of PERB's constituencies contend the reduction in the pool of applicants will lead to delays in the fact-finding process that could result in further confrontation between the parties. However, PERB notes that since the rate reduction, three requests for fact-finding services have come to PERB, and of those one is pending and in two cases, the parties chose and will pay for their own fact-finding chairperson.

It is my thought that when the State's financial crisis is over and there are more monies available in the General Fund, PERB will again seek an augmentation to its budget to cover fact-finding services.

### **Meyers-Milias-Brown Act**

5. *Do you feel the staffing level at PERB is sufficient to meet current workload requirements? If you do not believe the staffing level is adequate, how would you propose to address this issue considering the current budget deficit?*

I am constantly amazed that an agency as small as PERB can and does accomplish so much important work. Charged with administering seven collective bargaining statutes, one would easily think this agency must have a large staff to be as successful as it is. However, with just slightly more than 40 people statewide, we are fortunate to have experienced, hard-working staff who are sincerely dedicated to PERB's mission.



When the Legislature gave PERB jurisdiction over the Meyers-Milias-Brown Act (MMBA) in 2001, budgetary conditions precluded the addition of new staff to accommodate the new workload. Instead, PERB got creative with its existing resources. We cross-trained our staff, allowing our specialists in representation, for example, to train regional attorneys. Regional attorneys have also gained experience mediating settlement conferences, conducting formal evidentiary hearings on representation matters and handling litigation. Veteran staff are able to mentor less experienced staff. The cross-training and skills have broadened the staff's depth of understanding of collective bargaining and labor relations and stretched our resources to cover increasing workload.

Since 2001, as the number of unfair practice charges increased and State funding restrictions eased a little, PERB sought and received authorization for additional staff. PERB made certain that consistent workload increases supported the requested resources as opposed to asking for new staff before the workload was realized. PERB does not have excess staff by any means of the word, but we have been responsive in difficult fiscal years by waiting until additional staffing requests were fully justified. And in light of our current fiscal crisis, our main objective now turns to preserving PERB's existing staff so that we can continue to provide a high level of service while being responsive to continued budget cuts.

6. *Do you think the law in this area needs to be changed or clarified? Why or why not? If yes, what changes would you recommend?*

The issue in question is whether or not PERB has exclusive initial jurisdiction over essential employee strikes under the MMBA. The term essential employees is used to designate employees whose absence from their jobs would threaten public health and safety. The issue of PERB's jurisdiction over essential employee strikes under the MMBA first arose in 2006. Between June 2 and September 7, 2006, the City of San Jose, and the counties of Contra Costa and Sacramento each sought injunctive relief from the superior court to prohibit certain essential employees from going on strike. PERB intervened in each case, claiming that it had exclusive initial jurisdiction over the threatened strikes because they potentially constituted unfair practices or, alternatively, were protected conduct under MMBA. The court in the San Jose case agreed with PERB; the other two courts disagreed and issued injunctions prohibiting the essential employees from striking. All three cases were appealed.

Decisions were issued in the three appeals this year. Two courts of appeal, in the San Jose and Sacramento cases, held that local agencies must come to PERB when seeking to enjoin a strike by essential employees. The court in the Contra Costa case held that local agencies could go directly to superior court for such injunctions.

On June 18, 2008, the California Supreme Court granted review in the San Jose case (*City of San Jose v. Operating Engineers Local Union No. 3* (2008) 160 Cal.App.4th 951, review granted June 18, 2008, S162647). The Court has since granted review in the other two cases, but those cases are on hold pending the decision in *City of San Jose*. PERB, like so many others, is actively watching these cases and anxiously awaiting the Court's ruling.



The fact that two Courts of Appeal ruled in favor of PERB's jurisdiction, while a third ruled against it, is a strong indication that this area of the law needs clarification. I am hopeful that the Supreme Court, in its review of *City of San Jose*, will provide a definitive and clear statement of jurisdiction for essential employee strikes under MMBA to alleviate any future confusion. Until the Supreme Court rules, I believe it is counterproductive to make any changes to the statute.

**BOARD OF PAROLE HEARINGS**P.O. BOX 4036  
SACRAMENTO, CA 95812-4036**Senate Rules Committee**

DEC 29 2008

**Appointments**

December 29, 2008

The Honorable Senator Darrell Steinberg  
Senate Pro Tempore  
State Capitol, Room 400  
Sacramento, CA 95814

Attention Nettie Sabelhaus

Martin N. Hoshino, Executive Officer  
Board of Parole Hearings  
Post Office Box 4036  
Sacramento, CA 95812-4046

Dear Senator Steinberg,

I appreciate the opportunity to provide the Senate Rules Committee with the following information in preparation for my confirmation hearing on my appointment as the Executive Officer of the Board of Parole Hearings (BPH). I look forward to appearing before the Senate Rules Committee on Wednesday, January 14, 2009 at 1:30 to respond to any other questions the Committee may present.

In addition, I have reviewed the Form 700, Statement of Economic Interest, which was attached to your letter dated December 9, 2008, and there are no changes.

I have prepared the following written answers in response to the questions submitted December 8, 2009.

**Statement of Goals****1. *What are your goals and objectives as the Executive Officer of BPH? What are the top priorities for your tenure?***

My goals, objectives and top priorities are:

- Develop or amend BPH programs to produce timely and fair parole suitability and revocations hearings.
- Establish an accurate baseline of BPH operations in the areas of missions performance, staffing, budget, and working conditions.

- Develop a workforce and change management function to guide and control corrective actions and to self-identify, coordinate solutions and prevent problems.
- Develop a leadership structure and recruit a management team to better serve the BPH and provide for stable leadership succession.
- Increase and balance BPH collaboration and coordination with partners, suppliers, stakeholders and other interested parties.
- Increase operational support for commissioners and deputy commissioners including enhanced training, legal advice, and availability of scientific and evidentiary information for stronger decision making.
- Develop strategies for three class action lawsuits.
- End the wasteful cycle of multiple hearing postponements for life term inmate hearings.
- Reduce the backlog of life inmate suitability hearings.

**2. *To date, what are your accomplishments and how do you measure your success?***

The following is a list of what I consider to be accomplishments by the Board since my arrival:

**Organizational**

- Developed management controls to reconcile BPH positions to accurately identify vacancies and manage BPH's budget.
- Reorganized the BPH structure to increase promotional opportunities within the BPH, increase leadership stability, and manage change.
- Participated in ensuring all Commissioner positions were filled.

**Lifer Suitability Hearings**

- Reduced and ended the cycle of hearing postponements.
- Reformed processes associated with parole suitability hearings to control and reduce the backlog of hearings.
- Developed exit strategy for *Rutherford* litigation.
- Increased the meet and confers with *Rutherford* plaintiffs' counsel in an attempt to come to agreement on outstanding issues of the lawsuit.
- Created a scheduling backfill process in order to optimize the ability to have full hearing days



- Redesigned lifer training curriculum for Commissioners.
- Contributed to filling all vacant Commissioner positions (first time full since 1989 except for 3 months in 1998).
- Filled new psychologist positions.
- Trained psychologists and Commissioners in use of the assessment tools.
- Eliminated backlog of psychological evaluations.
- Changed the decision review process to expand reviews of life term parole suitability hearing denials as well as grants. All decisions to grant parole and a percentage of the denials are being reviewed by BPH and legal staff to ensure that decisions are soundly based in fact and law.
- Initial implementation of Proposition 9 (Marsy's Law) related to the hearing process for inmates sentenced to life with the possibility of parole
- Provided training to additional Deputy Commissioners (DC) and retired annuitants in the lifer process with the new training unit.
- Continued deployment of reliable data system for the tracking and reporting of lifer events (LSTS).
- Developed monitoring of lifer hearings to ensure quality and due process.

#### Revocation Hearings

- Participated in development and roll out of Parole Violation Decision Making Instrument (PVDMI).
- Finalized the process for revocation and treatment of the mentally ill parolees.
- Continued negotiations for a decision review process for revocation hearings.
- Implemented a monitoring/compliance unit to oversee identified problems and take corrective action to remedy problems.
- Trained DCs on discharge process so more parolees are discharged if appropriate.
- Continued the Cooperative Personnel Services study of discharges, improving the numbers.
- Hired additional DC retired annuitants to ensure compliance with *Valdivia* timeframes.
- Conducted regular supervisor staff meetings with field Associate Deputy Commissioners (ACDCs) to allow the field more participation in decisions and increase input into field problems.
- Increased communication with the field staff through conference calls, site visits and mailings.
- Continued to modify the scheduling and tracking system for the revocation hearings in order to provide more accurate and efficient data to courts.
- Currently in the process of filling vacancies (the process has been slowed or delayed due to budget difficulty).

## Other

- Increased number of Foreign Prisoner transfers
- Increased timeliness of Foreign Prisoner transfer investigations by setting performance and review measures

I measure success by monitoring progress against performance objectives set by law, court orders, policy or management. Where no performance objectives exist, I develop measures consistent with our goals. I survey staff, partners, stakeholders and critics of the BPH for input, whether negative or positive. I review intended management reports and reports issued by courts, special masters, CDCR's office of Court Compliance and external oversight agencies.

## Training and Quality Control

BPH is governed by Title 15 of the California Code of Regulations, yet changes occur in law and/or court decisions that affect the board's proceedings.

3. ***The Rules Committee has encouraged BPH to improve training of commissioners to prevent errors and heighten consistency in hearings. What inroads have you made toward that goal? Whose job is it to examine hearings for consistency?***

Shortly after coming to BPH I evaluated the quality of the Commissioner training program. To begin improvements to the BPH training program, BPH conducted a gap analysis to identify training needs. This analysis utilized interviews of hearing participants and interested parties, a survey of Commissioners, a review of past training protocols and a comprehensive review of hearing transcripts. The results of this analysis provided BPH with the necessary information to develop a new training and monitoring methodology. It was clear that the training could be more effective if more comprehensive. In May 2008, at the conclusion of the evaluation, I assigned staff to begin the development of a more comprehensive training academy, focusing on all portions of the Commissioner's job with special focus on the areas identified by the Commissioners as needing more training and clarification. The development of the training academy included development of training modules that could be used in all future training academies to promote consistency in the training of each new Commissioner. The new training model was first implemented in July and August 2008. One of the most significant needs identified was the need for more practical training. To address this, the training academy condensed the headquarters training to 2.5 weeks, including several days of mock hearings. The new Commissioners were then assigned to lifer hearings at institutions with experienced Commissioners and Deputy Commissioners for two weeks. During this two-week period, the new Commissioners observed and then participated in the hearings as a third panel member with the guidance of the experienced Commissioner and Deputy Commissioner. Based on participation in the headquarter training, prior training and professional backgrounds,



the trainers identified areas of strengths and weaknesses of the new Commissioners. The training group provided individual assessments of the new Commissioner's skills in order assist the new Commissioners' to improve in weak areas. After the two-week period in the field, the new Commissioners were assigned to hearings with experienced Deputy Commissioners for a 3-4 week period. During this period they were provided phone numbers in order to receive any necessary support from the legal and training units at BPH headquarters. This practical and individualized approach provided our new Commissioners with a more solid foundation in which to begin their tenures at the BPH.

In addition to the new Commissioner training, the semi-annual training for all Commissioners was restructured by the training unit to address new and emerging issues and policies on a more real time basis. Based on the continuous reviews of decisions, the training modules for the semi-annual training focused on identified systemic problems and practical applications of new policies or laws. The semi-annual training covers changes in regulation, policy, Title 15 compliance legal updates and refresher sessions in decision making skills. For example the May 2008 semi-annual training emphasized integrating facts into the suitability consideration factors found in Title 15 when issuing decisions. The second semi-annual training in December 2008 included changes in the law resulting from the passage of Proposition 9.

In order to ensure hearings are conducted consistently and in accordance with the laws and regulations governing lifer suitability and rescission hearings, monitoring protocols were developed and implemented. Pursuant to Title 15 § 2041(h), BPH legal staff reviews all grants and 1-10% of denials. BPH randomly selects denial cases on a monthly basis and conducts a thorough review of the hearing transcript. This review encompasses Title 15 compliance, including but not limited to whether panels afforded prisoners with procedural rights, compliance with the Americans with Disabilities Act, and whether the panel addressed all legal objections. This random review of denials also includes a determination of whether there exists an error of law or fact within the hearing itself and whether the panel used the suitability factors found in Title 15 §§ 2402, 2281 in making a decision of unsuitability.

The training unit's subject matter experts also participate in the monitoring effort. The training unit reviews hearing transcripts with a focus on the quality of the hearing. The subject matter experts also monitor the Lifer Hearing database, called the Lifer Scheduling and Tracking System (LSTS). Staff reviews entries daily, which provide real-time guidance on developing issues for panel members in the field. The board addresses isolated individual challenges by re-training and develops new training modules for systemic issues. Finally, the BPH headquarters' training and legal staff is available for guidance and support during case preparation and hearings.



**4. How are board members and deputy commissioners notified when there is a change in law or a court decision that affects board proceedings?**

Commissioners and Deputy Commissioners receive information from the Board regarding changes to the law or court decisions affecting the board proceedings in a variety of ways. When laws change, the Board's training unit, together with the legal unit create training modules, and present the material to Commissioners and Deputy Commissioners during semi-annual training seminars (Note: due to the *Valdivia* Permanent Injunction and the vacancy rate the BPH has been unable to train all Deputy Commissioners at the semi-annual training and instead must use regional training where the trainers go to the field). Many changes in the law immediately affect Board proceedings. In these instances, the Board outlines the changes and typically provides the information by email to Commissioners and by email, voicemail and hard copy in weekly mailings to Deputy Commissioners. The BPH then drafts instructional memos for distribution to all affected staff. When the change is particularly complicated and requires immediate implementation the Board employs other means, such as group conference calls for Deputy Commissioners, and short training modules during Board meetings for Commissioners, to assure that members have the tools they need to effectively implement the change while continuing to provide fair hearings and protect public safety.

For example, in August 2008, the California Supreme Court's *Lawrence* and *Shaputis* decisions had enormous impact on parole suitability hearings in that it changed the standard required to evaluate life term inmates for parole. In anticipation of these decisions, the BPH, at the semi-annual training in May, emphasized the importance of applying the facts of an individual case to the suitability or unsuitability factors found in Title 15. The training specifically stressed the need to provide decisions that go beyond the commitment offense. The training included use of a revised worksheet to render decisions and to provide Commissioners with a practical tool to facilitate application of the law. After the Court rendered the decision, the BPH provided copies of the decision with an overview via email to the Commissioners. The Deputy Attorney General who supervised and argued the case was invited and appeared at the next Board meeting to discuss the decision and answer questions. The Board also prepared an instructional memo for Deputy Commissioners related to changes in the Lifer hearings that included *Lawrence* and *Shaputis*, as well as Marsy's Law and other related topics. We followed the issuance of the memo with a conference call to provide direction and answer questions. At the semi-annual training for Commissioners in December, the BPH dedicated an afternoon to applying the new standard given by the Court in *Lawrence* and *Shaputis*. This comprehensive approach to changes in the law provides our Commissioners and Deputy Commissioners the information and tools that they need to make sound decisions.

**5. *The use of multi-year denials in lifer hearings seems to vary significantly among commissioners. Are all members and deputy commissioners expected to follow similar guidelines or policy?***

During training the Commissioners and Deputy Commissioners are instructed on the general guidelines set forth in Title 15 §2402 and §2281, respectively, that outline factors demonstrating suitability and unsuitability. These factors are used to determine if the prisoner remains a danger to society if released to the community. If the prisoner is found unsuitable the panels then consider the amount of time reasonably necessary for the prisoner to become suitable and to correct any identified deficits. The regulations give each panel member the discretion to assign relative weight to the suitability and unsuitability factors. Depending on the weight the panel attaches to the particular case factors, such as the prisoners progress in available programming, the panel determines the proper denial length. Given that the weight provided to each factor is within the discretion of each panel member and that the composition of panels change weekly, some variance in denial lengths are to be expected. Each panel considers all circumstances related to a prisoner's case when coming to a decision on the amount of time needed for the prisoner to become a stronger candidate for parole.

**6. *The Rules Committee in the past has found fault with the quality of the audio taping process at lifer hearings, the timeliness of the transcripts, and the timeliness and quality of psychological evaluations, all of which result in greater expense when hearings must be postponed or re-done because of these problems. What progress have you made to improve these aspects of the hearing process?***

Upon coming to the Board in February 2008, there were a number of issues and problems already identified as in need of a remedy. The three issues in this question were three of those problems. Regarding rehearings due to equipment problems, the review revealed that many of these mistakes are attributed to human error. In response, hearing panel members all received training on the use of the recording equipment. The equipment also had instructional cards attached to remind staff of proper use. The training emphasizes the importance of checking the equipment prior to each hearing, and re-checking the equipment during the hearing. When hearing equipment malfunction necessitates a re-hearing, the Scheduling Unit notifies the responsible panel members and provides re-training on proper use of the equipment. A comparison of re-hearings due to recording equipment malfunction between calendar years 2007 and 2008 shows a reduction from 59 cases in 2007 to 28 cases to date in 2008.

The investigation into the timeliness of transcripts determined most of the problem was due to the increase in the number of hearings. The sole transcriber used could not keep up with the increase within the timeframes prescribed. In response, contracts with additional vendors were issued, resulting in timely transcriptions. All transcripts are now available for every inmate, upon their request. It should be noted, pursuant to Penal Code Section 3041.5(a) (4): *The prisoner shall be permitted to request and receive a*



*stenographic record of all proceedings.*” Furthermore, California Code of Regulations, Title 15, Division 2, Section 2254, states: “... *The prisoner is entitled to a copy of the record of the hearing upon request.*”

The third issue, timeliness and quality of Psychological Evaluations, was probably the largest and most significant issue facing the lifer hearing process. The timeliness of the evaluations accounted for the majority of the postponements attributed to the Board. In turn, these postponements sometimes created multiple postponements and added to the already overwhelming backlog of hearings. Part of the remedy to the problem was set in motion prior to my arrival, but efforts had stalled or slowed for a variety of reasons.

The *Rutherford* project management team tackled the problem by:

- Working with the scheduling unit to develop a process that would give more notice prior to the hearing if a psychological evaluation was needed.
- Additional contract psychologists were hired until permanent staff could be put in place
- Additional psychologists were hired and trained.
- LSTS entries regarding postponements and psychological evaluation protocols were monitored in real time and remedied where necessary.

As the additional staff became competent to do the evaluations they were immediately deployed to the field (resulting in a smooth transition from contract psychologist to BPH psychologist doing the evaluations). Postponements related to psychological reports, previously the largest contributor attributable to the state’s reasons for postponement, were reduced between March 2008 and October/November. This in turn resulted in a significant decrease in the overall postponement rate attributed to the state by October 2008. Extensive training was provided to Commissioners on the appropriateness of postponements based on the psychological evaluations. A scheduling “backfill process” was developed and implemented in May 2008. The “backfill process” required staff to review lifer hearing packets well in advance of the scheduled hearing. This allowed for cases not ready for a hearing, due to missing or invalid psychological reports, to be removed from the calendar. The hearing removed from the calendar was replaced by another case that was ready to be heard. This process made it possible to avoid losing the time allotted for a hearing.

The BPH’s believes that the quality of psychological evaluations has increased due to a number of factors. Prior to my appointment, BPH developed a separate Forensic Assessment Division (FAD) to address issues of quality and consistency. In order to determine best practices relative to the report, the Board at that time received input from internal and external stakeholders, as well as experts in the field of psychology. For my



part, I ensured that FAD clinicians completing psychological evaluations were given training in the use of one consistent format with clear expectations for the quality of their work. In addition to the interview with the prisoner, the clinicians were trained in use of three-assessment tools. To create consistency, the Board expanded the FAD by hiring additional clinicians, creating a supervisory structure, and streamlining the report format. As a result, the Board recently issued a new Psychological Report guideline, effective January 1, 2009. The new guideline standardizes the scope of the report, the appropriate use in parole suitability hearings, the report format, including use of three risk assessment instruments, and the review process.

**7. *What training do commissioners and deputy commissioners receive about the psychological evaluations and the tools for evaluating them?***

To expand the understanding and consistent use of the reports, Panel members received training on the new format, including the assessment tools relied on by clinicians in forming opinions as to prisoners' risk of future violence. Training on the psychological reports is a part of the permanent training modules used for Commissioner and Deputy Commissioner training. Panel members also received training as to the relative importance of psychological reports in their determination of parole suitability, with emphasis on how the clinicians' opinions relate to the panel's obligation under Title 15 to assess a prisoner's mental state and attitude towards the crime. Finally, panel members were trained on the use of opinion evidence, such as psychological reports, including the necessity of determining reliability based on a review of all the evidence and case factors, and assigning relative weight to the reports accordingly.

**8. *Your predecessor indicated that when the BPH forensic unit was started to oversee psychological reports, including those done by contract psychologists, they were to be reviewed and cosigned by senior psychologists. Eventually, the senior psychologists were to commence a random sampling of reports. Is this random sampling being done and, if so, what are the results?***

Prior to my appointment to the BPH, a process existed that required the senior psychologists to review evaluations prior to hearings if a new evaluation had not occurred or there was insufficient time to do a new evaluation. With the implementation of the scheduling backfill plan and other coordinated efforts the need for the senior psychologists to sign off on a prior report was reduced. Since the filling of the vacant psychologist positions the need for contractors and the inability to provide a new psychological report has been reduced. All reports are now signed off by supervising clinicians - eliminating the need for random samplings.

## Risk Assessment

**9. CDCR has focused much attention on developing and implementing new tools for risk assessment. What risk assessment tools does the BPH employ in parole suitability hearings for lifers or revocation hearings for parolees? How have board members and deputy commissioners been trained to use the tools?**

In the lifer process the BPH employs licensed clinical psychologists, who are trained in the use of standardized risk assessment instruments. The BPH clinicians use standardized risk instruments when they prepare psychological reports for prisoners scheduled for parole suitability hearings. The BPH clinicians use standardized risk assessment to assist them in determining the prisoner's risk for future violence should the prisoner be granted parole and released into the community. The risk assessment instruments most used in this process include the following:

- Psychopathy Checklist-Revised (PCL-R)
- History-Clinical-Risk 20 (HCR-20)
- Level of Service Inventory- Revised (LSI-R) / Level of Service-Case Management Inventory (LS/CMI)
- Static 99 - a supplement to other tools when there is a history of sexual offending, or sexual overtones in the life crime.

The following is a brief description of each of the instruments:

### Psychopathy Checklist-Revised (PCL-R)

The PCL-R (also known as the Hare) is a psychological assessment instrument first developed by Dr. Robert Hare in 1991 to operationalize and quantify the identification of psychopaths (extreme anti-social personality disorders). Research indicates that the 20-item scale not only identifies such individuals, but also has strong predictive value for violence. Advantages of the instrument are that it has been extensively validated on prison inmates, is utilized in many other risk measures, and identifies individuals who are the most seriously violent and least likely to change. Disadvantages are that it requires clinical psychologists to administer and interpret, has significant training costs, and is limited to identification of a relatively small population of offenders whose extreme personality profile is the primary basis of their criminality.

### History-Clinical-Risk 20 (HCR-20)

The HCR-20 is an instrument developed in 1997 to account for some of the inherent limitations in the PCL-R (above), while maintaining a high level of reliability and predictive validity. Based upon a comprehensive review of the research literature, the developers identified 20 risk factors that had been shown to have a significant relationship to violence. In addition to 10 "static" factors, 5 clinical variables and 5 future



risk variables were identified. Advantages are that it contains both static and dynamic (changeable) factors, is very easy to administer and score, has been validated on a population of mentally ill subjects, and is low cost. Disadvantages are that it was not primarily designed as a tool for prediction of violence and derives most of its validity from the same factors covered in the PCL-R.

Level of Service Inventory- Revised (LSI-R) / Level of Service-Case Management Inventory (LS/CMI)

The LSI-R is a structured judgment personality inventory tool first developed in 1995 in Canada and subsequently implemented and validated in widespread jurisdictions throughout the United States (not California) and other countries. The most recent derivative of the original instrument is the LS/CMI, which has been adjusted to consolidate some variables, and enhance the case management component of the analysis. The advantages are that it has a much greater value for assessing causative factors in criminal behavior, developing treatment and management programs to deal with this behavior, and measuring change over time. It requires extensive training, but can potentially be administered by non-clinicians.

Static 99

This is a 10 item checklist of factors found to be most predictive of recidivism in a study of rapists and child molesters in Canada. The actuarial type instrument has subsequently been widely utilized for this purpose in Canada, Great Britain, and the United States. It is a key indicator used for identification of Sexually Violent Predators in California. It will be utilized in this program as a supplement to other tools when there is a history of sexual offending, or sexual overtones in the life crime.

The BPH provided training for the Commissioners and Deputy Commissioners on the use of psychological reports in the life term parole suitability hearing process. The Senior Psychologist Supervisors conducted the training. The training included the history and use of each of the instruments above. The senior psychologist supervisors during training explained that part of the intent is to ensure consistent quality and adherence to specified forensic mental health standards in the psychological reports used in the life term parole suitability hearing process. In training it was explained that a primary benefit of the new assessments is that they are based upon valid and reliable instruments developed and implemented in prisons and mental hospitals both in this country and internationally, rather than the simple opinion of a particular evaluator.

The training also included the new report format and emphasized that assessment of risk is one of the factors to be considered in determining parole suitability, but is not the only factor in considering parole suitability.

In the revocation process a risk assessment tool (the California Static Risk Assessment [CRSA]) has been incorporated into the Parole Violation Decision Making Instrument



(PVDMI). After approximately 18 months development the department rolled out a pilot using the PVDMI which was designed to reduce the risk of recidivism, enhance success on parole, and utilize resources in the most effective manner. The PVDMI is also expected to make the dispositional recommendations to the BPH from parole agents more consistent. The PVDMI utilizes the CRSA tool combined with the severity of the violation to reach the appropriate recommendation for disposition of the charged violation. The BPH line staff and management participated in the training on how to use and interpret the PVDMI. The Associate Deputy Commissioners and Deputy Commissioners were trained in how the BPH should use the PVDMI in conjunction with the guidelines set forth in the California Code of Regulations for violation assessments. If validated, the PVDMI could prove to be an invaluable tool for both the department of Adult Parole Operations and the BPH in determining the best disposition for a parole violator.

### **Proposition 9 – Victims rights and Protection Act**

Under the recently approved Proposition 9, inmates would be entitled to fewer parole hearings and the number of people permitted to attend and testify at the hearings would increase. Changes would occur in both lifer and parole revocation hearings.

#### ***10. What changes in hearings do you foresee as a result of passage of Proposition 9, and how will they impact the board's workload? How are you training board members in the wake of Proposition 9?***

In summary, Proposition 9 amends and or adds to both the State Constitution and penal code. The Proposition expands the legal rights of crime victims and the payment of restitution by criminal offenders, restricts the early release of inmates, makes significant changes to the life parole consideration hearing procedures, and makes significant changes to the parole revocation hearing procedures. Proposition 9 will impact the BPH by requiring procedural changes to both the life parole suitability and parole revocation hearing processes, and in doing so, impacts both the *Valdivia* and *Rutherford/Lugo* stipulated agreements/court ordered remedial plans. The statutory changes of the Proposition will require regulatory changes to BPH's Division of California Code of Regulations.

The impact to the BPH's workload as a result of Proposition 9 requires some speculation. We anticipate minimally additional staff work due to the expansion of the notification to victims, the need for law and regulatory changes and the need for training. Lengthier hearings are likely due to the increased rights of victims in both parole consideration and revocation proceedings.

Specifically in the parole revocation process, Proposition 9 changes the requirement for appointment of counsel which will result in the BPH Deputy Commissioners being required to assume some of the duties that the attorneys had been performing. The Proposition reduces the time frames for conducting probable cause which will require

the BPH to change the present process and advance the hearing in which probable cause is found. The timeframes for the revocation hearing is lengthened - having no real impact on present process. It provides additional protections for victims or percipient witnesses, which will require additional staff work for notification and longer hearings due to added victim participation.

Specifically in the life term parole consideration hearing process, the change in available denial periods when a prisoner is found unsuitable has been changed from 1-5 years to 3, 5, 7, 10 and 15 year denials. Although the longer denial lengths may seem to reduce the number of hearings, the future workload for these hearings will depend on denial lengths; because the number of prisoners eligible for suitability hearings continues to increase yearly, the Board anticipates no significant short term drop in the number of hearings required. The expansion in the definition of a victim and victim's next of kin, the creation of greater obligations for notice to victims, (90 days prior to the hearings, 30 days prior to the hearings and then the date and time of the hearing shall be confirmed at 14 days prior to the hearing), and the provision that all victims shall also be notified when a prisoner makes a request for an advanced hearing (which may occur once every three years following the prisoner's denial of parole) will increase the workload associated with the notice requirements, and the expansion of victim participation in life parole consideration hearings, including uninterrupted statements by victims, may substantially increase the length of each hearing reducing the number of hearings that can be conducted daily. Additionally, all victims have the right to request and receive stenographic records (transcripts) of the hearings. There will likely be increased BPH workload associated transcriptions services, prisoner petition for advanced hearings, and reconsideration hearing workload. Further, the proposition requires the creation of a process for prisoners to petition to advance hearing dates, and the reconsideration of parole grants. The current process has only been available to 5 year denials so the workload connected to this new process is unknown.

In December 2008, Commissioners were trained on the new denial scheme requiring three to fifteen years between suitability hearings, including emphasis on the requirement to show clear and convincing evidence in order to give less than a 15 or 10 year denial. Commissioners also received training on the expanded scope of what qualifies as a victim or a victims' next of kin and their participation in our hearings.

### **Parole Suitability (Lifer) Hearings**

There are about 30,570 life-term inmates who have the possibility of parole. In 2007 BPH scheduled 3,790 lifer hearings. Of those hearings, 86 percent were subsequent hearings, meaning that it was at least the inmate's second parole eligibility hearing. From January to September 2008, the hearing total was 3,065, and 81 percent were subsequent hearings.



**11. You indicated at the October BPH meeting that there has been a dramatic reduction of the hearing backlog to 20 percent in September compared to 48 percent in the first six months of calendar year 2008. Please describe what you have done to drive down these numbers. Also, describe how the board is currently calculating the backlog. Please explain the current status of the backlog, the expected timeframes for its elimination, and how you will monitor progress.**

The BPH defines "backlog" as all cases that are late due to the fault of the State. The Lifer Scheduling and Tracking System (LSTS) tracks the backlog based on an assigned "no later than date" (NLT) which represents the last day to schedule the hearing in order to be timely. When cases are not scheduled prior to the NLT, or when cases are postponed for reasons under the State's control or if there is not a Commissioner available to hear the case, LSTS reports the case on the Backlog Report. At this time, the BPH believes it may eliminate the current backlog by June 2009 and reduce the ongoing backlog to 10% percent or less. The BPH plans enhancements to LSTS' reporting functions during 2009 in order to more closely monitor hearing delays and specific causes.

In order to tackle the backlog of Lifer hearings, the BPH identified the primary factors contributing to the backlog. The analysis indicated that the BPH and CDCR had gaps in the processes that support the Lifer hearings and showed that the vast majority of hearing postponements, which drive the backlog, were caused by issues with psychological evaluations, panel unavailability and inmate requests to delay their hearings. The BPH undertook to address each identified challenge. To clarify the premise for this question, at the October BPH public meeting, I announced that the postponement rate of hearings had dropped from 48% to 27% in September 2008. Additionally, it is worth noting that the backlog decreased from 1456 in May of 2008 to 744 in November 2008. The postponement rate is directly related to the "backlog" of hearings, but is not the same deficiency.

The BPH and the Division of Adult Institutions (DAI) began meeting twice a month to address issues related to Lifer hearings. The group first worked on identified deficiencies, such as the need for additional copy machines at the institutions for records staff that compile Board packets for Lifer hearings. The joint taskforce then began to address coordination and gaps between the divisions at the institution level. As communication improved between the divisions, the leadership at both BPH and DAI were able to re-direct staff and make modifications where needed.

In order to address postponements due to psychological reports, the BPH restructured the Forensic Assessment Division (FAD), streamlined the reports and created realistic expectations for all stakeholders as to the proper use of the information contained within the reports. The FAD now has an internal structure that includes a Chief, four Senior Psychologists to act as first line supervisors, and a work force of clinicians to complete the necessary assessments prior to the hearing. The newly developed structure enables



the BPH to have more control over the timeliness and quality of the reports. The BPH's past reliance on subcontractors and institution clinicians with competing workload made it difficult to have accountability. Additionally, the BPH undertook to align the scheduling function at FAD with the scheduling of Lifer hearings to establish a prioritization of cases. The prioritization is focused on inmates with calendared hearings. The development and implementation of a backfill process where staff reviews upcoming hearing calendars is to ensure that the scheduling unit assigns a clinician to complete the psychological report and that the clinician completes the report on time. BPH staff review cases as the hearing date approaches to ensure that the necessary documents, reports and notices occur on time prior to the hearing. Finally, the BPH provided extensive training to panel members about the scope and use of psychological reports during hearings; then distributed a new guideline to all partners and stakeholders to be implemented on January 1, 2009.

With respect to panel unavailability, the BPH currently has 12 presiding Commissioners. This is not only the greatest number of Commissioners assigned to the BPH, but it is the first time since 1989, when there was only a possibility of nine Commissioners, that the BPH has had a full complement of Commissioners. The BPH worked with the Governor's office, and the CDCR's Secretary's office to fill vacancies, and to minimize time between appointments when Commissioners are not confirmed, retire or resign. The BPH also streamlined its training program to reduce the time required to place Commissioners on calendars after appointment. We are also exploring means to reduce the number of locations where the BPH conducts hearings in order to control our scheduling functions. This will require resources and coordination with DAI, but could eliminate postponements and prevent future backlogs due to the fact that there are Lifers who need hearings every week at 33 locations, but there are only 12 Commissioners available. Of course, panel unavailability represents significant risk to the BPH's ability to control the backlog.

Our analysis also showed that many cases postpone because the inmates are not ready to proceed. Postponements that occur at hearings, regardless of the reason, create an undue burden on the system, because other cases that are ready to go, are not heard. The required documents, reports and notices for each case must occur well in advance of the hearing date, making it impossible to place a different case on the calendar where a postponement occurs on the day of the hearing. To address the competing interests of scheduling cases in a timely manner and allowing delays for prisoners that are not ready to proceed, the BPH amended its regulation. Specifically, Title 15, §2253 was amended to allow prisoners the ability to voluntarily waive hearings when the request is made 45 days in advance of the hearing date; and to postpone hearings only where the prisoner informs the BPH of the need at the earliest possible date. Historically, prisoners had to admit that they were not suitable for parole in order to avoid a hearing in situations where the inmate was unprepared to go forward. The BPH implemented the new regulation on November 1, 2008.

- 12. *Your predecessor said he was researching the lifer and parole revocation processes used by other states. Are you continuing the research begun under your predecessor? What has your office learned about national best practices that could help you with California's backlog as well as training policies, quality assurance, consistency, and/or oversight?***

I am not aware of any research of this type occurring prior to my appointment. I have been informed by staff that a prior *Rutherford/Lugo* taskforce developed ideas of possible changes to the lifer process based on research by individuals on the taskforce. However, the current Rutherford workgroup has contacted other states to research the structure, workload, tenure of parole commissioners and composition of parole panels. Similarly we are currently engaged in research about life prisoner suitability hearing processes and types of hearings. We are also having dialogue with the Association of Paroling Authorities International (APAI) on a regular basis on periodic issues.

There has been no research into how other states conduct their revocation process since the process in California is controlled by the *Valdivia* Remedial Plan and is far more restrictive than any other state in the United States. In the past the BPH has attended the U.S. Parole Commission seminars held in various parts of the United States yearly, but in the past two years due to the budget crisis in California the Board has been unable to send a representative to the seminars.

### **Postponements of Lifer Hearings**

The number of scheduled hearings has increased from about 4,500 in 2004 to almost 7,000 in 2006, and over 30 percent of these hearings continued to be postponed in 2006. In 2007, 6,252 hearings were scheduled and 2,335, or 37.3 percent, were postponed. From January to September of this year there were 5,582 scheduled hearings and 42.4 percent were postponed. The postponements represent a loss of taxpayer dollars and additions to the backlog, as well as being inconvenient and costly for victims, families, inmates, and attorneys who have prepared for the hearing.

- 13. *Many postponements have been the result of board members determining on the day of the hearing that the file is incomplete. Who is responsible for ensuring that the files are complete and updated and when should the determination be made? Does this problem continue to result in significant numbers of postponements? Please be specific.***

In our Lifer workgroup with the Department of Adult Institution (DAI), we have reiterated the importance of timely documents. The institutions currently complete a hearing checklist prior to sending the packets to the Board. Additionally, the BPH reviews cases prior to the hearing to ensure that packets include the necessary documentation. Due to improved communication with DAI, BPH staff now work with DAI staff to remediate missing documentation prior to the hearing in many cases. Historically, the largest contributor was psychological reports which the BPH has largely rectified.



**14. To the extent that hearings are postponed due to incomplete files or information not provided in a timely manner, how do you track these occurrences so you can identify if there are particular problems at certain institutions? How do you communicate this information to CDCR?**

Currently, BPH staff must review hearing transcripts and LSTS entries to identify postponements and trends at certain institutions. BPH and DAI have a bi-weekly workgroup meeting in order to identify problems and reach a solution together. The BPH staff complete a monthly Executive Summary Report identifying each postponement specifically by issue, reason and institution. The results are discussed at our bi-weekly DAI workgroup meeting. The BPH plans enhancements to the reporting functions in LSTS that will improve our ability to pinpoint and correct at specific institutions.

**15. The Rules Committee has heard testimony about psychological evaluations that were too old to be useful. How old can an evaluation be and still be valid in the hearing so postponement is avoided?**

The policy prior to January 1, 2009, was a three-year validity period on psychological evaluations. Effective January 1, 2009, our new Psychological guidelines require a Comprehensive Report every five (5) years and a Subsequent Report prior to every hearing. However, existing reports before the implementation of the guideline will remain valid for three (3) years.

### **Stipulations**

In addition to postponements, 20 percent of the board's denials in the first nine months of 2008 and 17.8 percent last year were the result of a stipulation in which the inmate "voluntarily" agrees to postpone his/her hearings on the grounds of unsuitability for parole. By declaring himself or herself unsuitable, an inmate takes himself out of consideration for one to five years because he believes he is not ready to be reviewed.

**16. In 2007 there were more than 646 stipulations and 581 in the first nine months of 2008. Prior to 2000 there were less than 100 per year. What is the reason for the change? How do you track the reasons for stipulations? Has the policy or training changed in a way that would impact stipulations?**

Stipulations present an opportunity for inmates who recognize that they are not yet prepared to parole, the opportunity to request the BPH to schedule another hearing at a future requested time. A review of the increase in the number of stipulations does not clearly show a particular reason or trend. The reason for the increase is speculative, it may be due to the fact that the number of hearings conducted has doubled since 2000. The increase in prisoner litigation that tests the parameters of the Board's and the



Governor's jurisdiction may also contribute to the increase, as inmates look for courts to weigh in prior to participation in hearings.

The Board, due to a recent regulatory change, anticipates a significant decrease in the number of Stipulations in the coming years. The modification in BPH policy is reflected in Title 15, §2253. Specifically, the Board by regulation created a voluntary waiver that allows the prisoner to waive the parole hearing for one to five years without making an admission to unsuitability. The Board presumes valid waiver requests made 45 or more days prior to the hearing. The Commissioners and Deputy Commissioner have been trained in the change of regulation and the implementation of the new regulation.

The ability to track the number of stipulations has been available for years, but the tracking of the reasons for stipulations was only recently developed through the Lifer Scheduling Tracking System. The process remains the same: inmates request stipulations by filling out a form that states the reasons for the request and the panel's findings when granting or denying the request. CDCR retains a copy of the form in the prisoner's central file. Additionally, panel members and Board staff record the disposition of all scheduling hearings, including Stipulations, in the LSTS database.

**17. *The Valdivia lawsuit has resulted in significant changes in the parole revocation process with the goal of providing fair and timely hearings. How do you measure your success in complying with Valdivia?***

Parole Revocation Hearings

The heart of the Valdivia Remedial Plan requires the BPH to meet specific timeframes not only in conducting return to custody assessments, probable cause hearings and revocation hearings, but also requires the BPH to ensure that each parolee is appointed counsel at a specific time in the revocation process. The remedial plan additionally requires the consideration at every step of the process to placing the parolee into a remedial sanction. The BPH Deputy Commissioners are required under the remedial plan to only use hearsay in the hearings if the introduction of the hearsay evidence meets a case law standard. In order to ensure that the BPH is in compliance we maintain various systems to measure compliance with the *Valdivia* remedial plan. The primary system used by the BPH is referred to as the Revocation and Scheduling Tracking System (RSTS). With the assistance of an outside contractor, BPH developed RSTS, which is a real time database designed to assist with management of daily workload and with the monitoring of compliance with the remedial plan. The BPH has continued to upgrade RSTS by adding new reports to more accurately measure levels of compliance with various components of the Injunction. RSTS is also used as a management tool to assist the BPH with other requirements such as remedial sanctions.

The RSTS system contains detailed information about each case in the system and is capable of producing a number of reports tailored for management purposes and it

allows the BPH to measure how it comports with requirements of the injunction. These reports allow for the examination of performance standards of individual staff. The reports can also alert managers of approaching deadlines. In addition RSTS generates several reports that measure timeliness in the various *Valdivia* steps in the revocation process. According to a recent *Valdivia* timeliness report in RSTS, the BPH averaged 95.6 % compliance with timeliness at the probable cause and parole revocation hearing steps between January 2008 and November 2008. The BPH considers this substantial compliance and discussions have begun with the Special Masters appointed by the *Valdivia* Court, to define how the Court measures "substantial compliance".

Probable cause and revocation hearings are conducted by deputy commissioners. Given the large number of hearings conducted in the revocation process (in 2007 there were 91,063 probable cause hearings and almost 22,000 parole revocation hearings) BPH considers the 95.6 % to be successful implementation.

**18. *What do you believe are the biggest challenges for BPH in the revocation process?***

Currently, the biggest challenge for BPH in the revocation process is coordinating a *Valdivia* exit strategy with all parties pertinent to the class action. In order to begin this process the department must come to an agreement with the Plaintiffs' and Federal Special Masters on the definition and meaning of "substantial compliance" as it pertains to the requirements set forth in the Injunction. In addition, there are a few remaining issues that need to be implemented before the BPH can be completely in substantial compliance, for example implement the finalized mentally ill revocation process plan, and complete negotiations on the BPH decision review process.

**19. *Do you track consistency in revocation decisions? If so, please explain this process.***

In addition to utilization of RSTS reports, the BPH established a Quality Control Unit (QCU) and Monitoring Compliance/Review Units (MCRU). The purpose of the Quality Control Unit is to review a random 10% of all revocation decisions to ensure not only consistent decisions, but quality decisions. The regulation under the California Code of Regulations (CCR) sets forth guidelines for the BPH hearing officers to use when assessing whether a return to custody is warranted. The Quality Control Unit staff conducts random reviews on a percentage of all parole revocation hearing actions to ensure they comply with policies and regulation. The results of the random reviews and a subsequent analysis are forwarded to the Associate Chief Deputy Commissioner (ACDC) over the two units. The ACDC of Quality Control and Monitoring reviews and if appropriate forwards to the supervising ACDC and Deputy Commissioner (DC) that heard the case. These reviews are used to ensure quality, consistency, compliance with policy, identify systemic problems and for training purposes. These reviews help to supplement direct supervision. In addition to the random reviews, ACDCs are also required to perform routine monitoring and review of DC decisions. These reviews



assist the supervisors to ensure quality assurance and the information garnered from these systems also helps to guide with the development of remedial training. During the course of numerous meet and confers with plaintiffs' counsel and the federal special masters in *Valdivia* the court ordered the State to develop a self-monitoring unit. The self-monitoring unit goes to the field to monitor the department's compliance in the various areas of the remedial plan. At the conclusion of the monitoring tour, a report is compiled and sent to each division of CDCR with observation both negative and positive. In response, the BPH has developed a Monitoring Compliance/Review Unit. This unit reviews the portions of the monitoring reports by the self-monitors as well as all compliance reports submitted to the court by the Special Master and Deputy Special Masters that speak to the BPH's portion of the process, compiles the identified deficiencies and forwards to the appropriate ACDC of the area monitored. The ACDC then reviews and responds with a written corrective action plan. The monitoring unit follows up monthly and documents the results of the corrective action plan.

**20. *A deputy commissioner may choose to order remedial sanctions for a parolee rather than return the parolee to state prison. Are your deputy commissioners kept informed of the availability of remedial sanction options? Is it possible that remedial sanctions can be ordered but not provided due to lack of alternative programs?***

The Deputy Commissioners have been provided with the names and locations of all programs that have contracted with the state to provide remedial sanctions to parolees. The policies and procedures under *Valdivia* require that when a parolee is referred by the Department of Adult Parole Operations (DAPO) to a remedial sanction the availability of space is confirmed by a Parole Administrator prior to referral to the Deputy Commissioner. Further, if the Deputy Commissioner decides to place the parolee into a remedial sanction when the parolee was not referred for placement by DAPO the Deputy Commissioner contacts the Parole Administrator for confirmation of bed space. Daily availability in programs is provided by the Department of Addiction Recovery Services to the Parole Administrators and Deputy Commissioners.

In some cases the beds are full or the available beds are filled on the same day, but prior to the referral. There are occasions when parolees are ordered to a remedial sanction program and the remedial sanction program is no longer available when the parolee is ready for placement. In order to reduce and eliminate this problem the DARS, BPH and DAPO are increasing their coordination activities.

### **Coordination Between the Board and Department**

There are a number of issues related to coordination between BPH and CDCR where it is unclear who bears the ultimate responsibility for these issues.



**21. *At the Division of Juvenile Justice, parole board members have met regularly with superintendents of juvenile facilities, with both sides indicating the experience was positive. Do BPH members meet with wardens or other custody staff to improve coordination?***

In January of 2008, the BPH and CDCR established a workgroup to review the entire life parole consideration hearing process and to identify problems or inefficiencies, and to develop solutions. The Undersecretary of CDCR and the Executive Officer headed the workgroup. One of the first recommendations implemented is increasing communication between the Wardens and their designees and the Commissioners. The Undersecretary met individually with each Commissioner to hear their concerns. The Undersecretary directed the Wardens or their designees to meet regularly with Commissioners who were conducting hearings at their prisons to address any ongoing issues at the institutions.

In the revocation process the lines of communication are open between departments by way of a bi-weekly *Valdivia* taskforce meeting. All CDCR divisions are represented at the taskforce meetings. Additionally, there are regular meetings with BPH, DAPO, DAI and DARS staff whenever a problem with compliance is identified and needs resolution between departments. The open and frequent communication between departments has been pivotal in CDCR's success in compliance with the *Valdivia* Remedial Plan.

**22. *The department has taken steps to assess more inmates upon entry to prison and send them to appropriate educational or treatment programs in their final three years of incarceration. Has CDCR discussed with you the impact of this change on the ability of life-term inmates to participate in education and other programs, including drug treatment? How are board members informed of programs available to life-term inmates?***

The state's current fiscal crisis creates significant challenges for CDCR as it relates to providing programming for inmates. As resources for education and drug related programs are reduced, programs directly available to the Lifer population diminish accordingly. CDCR faces specific challenges related to the Lifer population as the timeframes for these inmates' releases remain unknown, making allocation to Lifer programs difficult given the competing interest of funding programs aimed at serving prisoners within three years of release.

In order to keep the Commissioners apprised of the CDCR's policy surrounding prisoner programs, the BPH invited Carol Hood, Chief Deputy Secretary, CDCR Programs, to present an overview of the AB900 implementation related directly to prison programs at the September 2008 Board Meeting. Additionally, the Commissioners were provided a field guide of programs available by institution during our semi-annual training seminar in December 2008

## **Compensation and Monitoring of Attorneys**

Compensation for attorneys who conduct parole revocation hearings is governed by the *Valdivia* lawsuit in which a federal court found that delays in the parole revocation process violated due process protections. Attorneys receive a flat fee of \$185 per case for these parole revocation hearings. Compensation for those who handle lifer hearings has not been adjusted in recent years. These attorneys receive \$30 per hour, with a cap in most cases of six to eight hours including travel time to the prison.

### **23. *Who decides to request an increase in compensation for lifer attorneys? Is that your responsibility, the BPH chair, or CDCR?***

In my opinion, the first line responsibility to request a salary increase for lifer attorneys rests with the Executive Officer of BPH. Like any request for increased funding, it should be based on reasoned public policy, should either solve or prevent a problem, and be based on sound fiscal analysis. In response to previous questioning on this subject, the BPH agreed to analyze the issue. We learned the thirty dollar per hour rate for lifer attorneys had remained unchanged for roughly ten years and that the BPH was having difficulty funding attorneys for this work both in general and in certain geographical areas of the state (central valley and southern desert). When compared to similar markets (e.g. counties, public defenders), we found that our thirty dollar an hour rate was below market. Our survey suggested a fair and competitive market rate would approximate fifty dollars per hour. The BPH and CDCR recommended this increase as part of the state's budget proposal. The CDCR concurred and forwarded the recommendation to the Department of Finance for consideration.

### **24. *BPH had a salary structure that gave little incentive for deputy commissioners to seek promotion to the supervisor level because they receive a more generous retirement than their supervisors (2.5% at 50 and no deductions for social security as opposed to 2% at 55 with deductions for social security) that results in several hundred dollars monthly less take home pay. Has this problem been addressed? Are there other issues of salary compaction at BPH? Please explain.***

The BPH salary compaction problem between Deputy Commissioners and their supervisors has existed for approximately eight years. BPH and CDCR recently proposed a number of options to remedy the problem and we are actively working with DPA on a viable solution.

### **25. *How is the quality of attorney representation monitored for both parole revocation and parole suitability hearings?***

In the revocation process the BPH has a contract with the McGeorge School of Law to provide attorney representation for parolees statewide. The division of McGeorge that provides the attorneys is called the California Parole Advocacy Program (CalPAP). The



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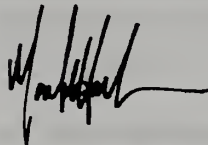
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contract between McGeorge and the BPH requires CalPAP to be responsible for the training and oversight of the attorneys to ensure quality representation to parolees during the revocation process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Hoshino', with a long horizontal flourish extending to the right.

Martin N. Hoshino, Executive Officer  
Board of Parole Hearings



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December 15, 2008

Honorable Darrell Steinberg, Chair  
Senate Rules Committee  
State Capitol, Room 420  
Sacramento, CA 95814

~~Senate Rules Committee~~

DEC 18 2008

~~appointments~~

Dear Senator Steinberg:

Thank you for considering my reappointment to the Managed Risk Medical Insurance Board (MRMIB). I have enjoyed serving two Governors, the Insurance Commissioner and the people of California in that capacity. I have endeavored below to answer the questions posed to me by the Rules Committee.

**Goals**

- 1. You have a long history of working for and with MRMIB. For five years you were deputy director at MRMIB, and previously attended MRMIB meetings representing Insurance Commissioner John Garamendi as a voting member. Please provide us with a brief statement of your goals. What do you hope to accomplish during your four-year term as a board member of MRMIB? How has MRMIB changed over the years from its initial formation and the creation of HFP?*

I have been honored to both work at MRMIB and serve on the Board these last five years.

As you know, MRMIB is frequently looked to for its policy expertise in the health insurance area and, as important, its facile and prompt implementation and smooth operation of its health insurance programs. One of my primary goals is to sustain this capacity during the difficult period of the state's fiscal impairment. Another long standing policy of the Board is to provide guidance to staff from the perspective of good government. While there are appointees on the Board from the Governor, the Senate and the Assembly, the Board works very effectively as a team because the members all have the same goal; ensuring that our programs provide cost-effective, high quality coverage to our subscribers. I will continue to work in this co-operative, principled partnership as we seek to enroll all eligible children into Healthy Families. It is also my goal to achieve universal coverage for children and to implement comprehensive health insurance reform such that the necessity for the Major Risk Medical Insurance Program ceases to exist.

I think the Board's role and philosophy has been consistent over the years. While its program responsibilities and staffing has grown, it has always focused on providing cost-effective, quality health care using the latest technology (delivery practices and medical homes). And it has always sought to be a voice for covering the uninsured, a role it takes very seriously.

2. *What do you see as the biggest challenges before the board?*

I am hopeful that as California and the country continue to wrestle with the need to enact comprehensive health reform, MRMIB will be able to be of service. I was, of course, disappointed by the failure of AB 1X and had looked forward to the Board's role in implementing many of its provisions. AB 1X presented many implementation challenges but I felt that the Board would have been able to handle the challenges effectively. The Board's public decision-making forum, the fact that Board members have the confidence of the Legislature and the Governor, and the Board's track record of listening to all but making timely decisions would have produced a good result. In the context of the Board's current programs, I especially valued the provisions of AB 1X that would have eliminated the need for a separate program for medically uninsurable people and covered all children.

In addition, as all of the Board's programs are heavily dependent on state funding, the state's fiscal crisis may mean that the programs will struggle for sufficient funding. Of course this is the case for all of the state's General Fund supported programs, but having to manage programs without additional funds will be a major challenge.

## **SCHIP**

3. *How much would SCHIP need to be increased if the costs of California's current HFP and AIM and expected program growth were to be covered?*

The amount of SCHIP needed will vary depending on the reauthorization period. The California Health Care Foundation contracted with Harbage Consulting to update a report released last spring titled Funding California's SCHIP Coverage: What Will It Cost. Harbage Consulting is currently updating the figures included in that report which is scheduled for release early in 2009. According to the first report, the estimated federal contribution needed for Healthy Families Program (HFP) is between \$4.7 billion to \$5.7 billion over the next five years. This amount reflects federal dollars only and is based on HFP costs per child, the growth in enrollment, and the costs for severely emotionally disturbed children and other programs funded through S-CHIP dollars. . It was Mr. Harbage's assessment that the first bill vetoed by President Bush, referred to as CHIPRA, would have provided this level of funding to California.



The estimated amount needed for the Access for Infants and Mothers (AIM) is between \$566 million to \$695 million in federal funding over the next five years. This amount is based on the growth in payment rates and enrollment. Funds needed for AIM were included in the CHFC report.

The Board will continue to advocate the appropriate amount to fulfill its long-term enrollment projections.

4. *Has the board taken any position regarding SCHIP reauthorization? Is it working with the Governor's office or the California Congressional delegation on reauthorization or looking into other options to address the shortfall?*

The Board has taken a very active role in working for SCHIP reauthorization. It solicited assistance from the California Health Care Foundation for an analysis of California's funding requirements. Harbage Consulting, which issued this analysis last May, is in the process of updating the figures right now as noted above. MRMIB's Executive Director is part of the SCHIP Director's workgroup on reauthorization. Representing by far the largest SCHIP program in the country, she has testified before Congress and conducted several briefings with Congressional staff. In January, she will be speaking on SCHIP to new Congressional staff at the National Health Policy forum. She participates in periodic meetings with California advocates and stakeholders who are tracking SCHIP reauthorization. I would add that the Governor himself has been very involved in ensuring that California's interests are addressed in SCHIP reauthorization.

### **Healthy Families Program**

5. *How much has recent caseload growth differed from the board's original estimated caseload? Does HFP have any historical data to draw from the estimate caseload in recessionary times?*

The most recent budget estimates assumed enrollment of 905,486 as of June 30, 2009. This included an expected caseload reduction of 30,362 children due to the implementation of a premium increase for families with incomes above 150 percent of federal poverty level (FPL). Research has documented caseload decreases when premiums were increased. However, given the severe decline in the economy, it is not known whether or not this enrollment decline will occur. The caseload estimate without the projected decrease would have been 935,848.

MRMIB has historical HFP caseload data going back to its inception, but MRMIB has never done an analysis examining caseload during times of recession. There does not appear to be consensus on when California's economy was in a recession.

<http://Recession.org> indicates that the most recent recessions were: April 2000 to

October 2001 and October 2008 to present. Another source indicates that the most recent recessions were March 2001 to November 2001 and December 2007 to present.

During the period April 2000 to October 2001, HFP caseload increased from 271,738 to 489,257 children (an 80 percent increase). It is unclear what percentage of this growth was due to the recession or the fact that there was a significant media budget and campaign underway at that time and that the program was still relatively new. Between December 2007 to November 2008, HFP experienced caseload growth from 866,031 to 894,009 children (a 3.2 percent increase). As a result, it is hard to draw any conclusions (yet) from the available data.

6. *Although the board is required to operate HFP within its budget, it is not precluded from requesting additional funds from the Governor. Has the board discussed any other options for funding?*

The Board directed the Executive Director to assess and pursue alternate funding possibilities. The Board worked closely with the California Health and Human Services Agency to seek funds from the California First Five Commission. Thankfully, the State First Five Commission voted to provide the funding necessary to forestall a waiting list in this fiscal year. Additionally, two members of the Board, Doctors Chang and Crowell, sent the Governor and the Legislative leadership a letter requesting assistance so that the Board did not have to establish a waiting list.

### **Major Risk Medical Insurance Program**

7. *Historically, MRMIP has been funded annually with \$40 million of Proposition 99 funds, but the program has had ongoing waiting lists. This year Proposition 99 funding was reduced to \$36 million. With the additional \$10 million from the Managed Care Administrative Fines and Penalties Fund, what does MRMIB estimate will be the number of subscribers it will be able to enroll? Will this additional funding eliminate the waiting list? What does MRMIB estimate the level of transfer will be from the Managed Care Administrative Fines and Penalties Fund for the next five years?*

Due to declining Proposition 99 revenues, the proposed 2008-09 Governor's Budget did reduce funding for the Major Risk Medical Insurance Program (MRMIP) to \$36 million. However in the May Revision, the proposed funding level for MRMIP was increased by \$2.9 million. This action was approved by the Legislature and resulted in a total of \$38.9 million for MRMIP in 2008-09.

The \$10 million transferred to MRMIP as a result of SB 1379 (Ducheny) allowed MRMIB to offer slots to 915 (all) potential subscribers who were on the wait list as of October 2008. However, the wait list immediately started rebuilding.

At the Board's November 18, 2008 meeting, the Board set the MRMIP enrollment cap based on an analysis PricewaterhouseCoopers (PwC) conducted using the most recent enrollment and cost information. PwC recommended that MRMIP enrollment immediately return to an enrollment level of 7,100 through normal population attrition once the enrollment from the 915 offers had occurred. PwC further recommended that no additional slots be offered beyond the 915 unless needed to sustain the 7,100 enrollment target. As of December 7, 2008, 213 individuals were waitlisted due to the enrollment cap.

SB 1379 provided a one time transfer of \$10 million to MRMIP. In future years, however, SB 1379 provides for the transfer of any DMHC fine revenues that exceed \$1 million to MRMIP annually each September. The table below shows the history of fine revenue collected by DMHC in past years:

<b>Fiscal Year</b>	<b>Fines Collected</b>	<b>Fine Revenue Over \$1 million</b>
2000-01	\$ 409,000	0
2001-02	\$ 640,000	0
2002-03	\$ 2,116,000	\$ 1,116,000
2003-04	\$ 779,000	0
2004-05	\$ 1,141,000	\$ 141,000
2005-06	\$ 965,000	0
2006-07	\$ 3,907,000	\$ 2,907,000
2007-08	\$ 7,018,000	\$ 6,018,000
2008-09	\$13,000,000	\$12,000,000**

\*SB 1379 actually transferred \$10 million to MRMIB in 2008-09

There is no way to predict what DMHC fine revenues might be available to MRMIB in the future. A simple average would indicate that had this bill been in place, MRMIB would have received an average of \$2.5 million in fines over the past nine years. However, the fine revenue collected in 2008-09 is twice the amount ever collected due to the unusual circumstances surround the HMO rescission issues. Therefore, an average of the previous eight years would be \$1.3 million. The real solution is to enact the Governor's proposal to offer guarantee issuance of individual coverage coupled with an individual mandate so that persons with high-risk conditions do not have to rely on declining (tobacco tax) or unstable (fines) funding sources to assist in spreading their medical risk.



Honorable Darrell Steinberg, Chair  
Senate Rules Committee  
December 15, 2008  
Page 6

5. *The Governor vetoed AB 2 (Dymally) that would have stabilized MRMIP by creating two new funding sources for the program. AB 2 would have required carriers in the individual health insurance market to accept for coverage all persons assigned to them for MRMIP or pay a fee, and included program changes to enable MRMIP to be eligible for federal funds. MRMIB took a support position on AB 2. Will you, as a board member revisit this issue in 2009?*

I am immensely concerned that persons wishing to purchase coverage in the individual market are left uninsured because they have a condition viewed as risky by an insurer. The rest of the Board and I will revisit this or any other proposal as put forth by the Governor or the Legislature. The bottom line is that the Board stands for coverage of all individuals and will carefully review any and all means of achieving this goal.

Thank you again for your consideration of my re-appointment to the Managed Risk Medical Insurance Board. I am available to answer any questions.

Respectfully,



Richard Figueroa  
Board Member

CALIFORNIA LEGISLATURE

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**SENATE RULES COMMITTEE**

DARRELL STEINBERG

CHAIRMAN

December 18, 2008

Hon. John P. McGinness  
Sacramento County Sheriff's Department  
711 G Street  
Sacramento, CA 95814

Dear Sheriff McGinness:

The Senate Rules Committee will conduct a confirmation hearing on your appointment as a member of the Commission on Peace Officer Standards and Training (POST) on Wednesday, January 14, 2009. You are not required to appear, but we request that you respond in writing to the following questions. Please provide your responses by January 6, 2009.

We would also like to receive an updated Form 700, Statement of Economic Interest, by January 6<sup>th</sup>.

**Goals**

1. *Please provide us with a brief statement of your goals. What do you hope to accomplish as a member of the commission? How will you measure your success in meeting these goals?*

**Background**

After your election as Sacramento County Sheriff in June 2006, you made a number of changes in the Sacramento County Main Jail. Among your actions you:

- Pushed for an inspector general to provide independent oversight of the Sacramento County Sheriff's Department;
- Overhauled the Main Jail's command structure by putting the department's legal advisor in charge;

- Appointed a community liaison to help inmates and their families negotiate the system;
  - Opened the jail to public tours: "I want a jail with glass walls," you said of your goal of making jail operations "transparent."
2. *What lessons from your own experience as sheriff, especially in overseeing the jail, are useful as you help shape statewide law enforcement standards?*

### **POST Background**

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement. It consists of 14 members appointed by the Governor, plus the Attorney General. The POST organization, with more than 130 staff members, functions under the direction of an executive director appointed by the commission. POST coordinates a comprehensive training program, with hundreds of certified courses.

One major issue is recruitment of new officers. "For several years, California law enforcement professionals and POST academy directors have expressed concerns for the difficulties they are having in recruiting qualified police officer candidates. POST provides various recruitment-related assistance," according to the POST web site. In 2007 the *Contra Costa Times* reported that there were 15,000 vacancies among the 95,000 budgeted peace officer jobs in California.

3. *Please spell out the role the commission is playing to help departments recruit qualified candidates. Do you see a wider role for the commission in publicizing the need for police personnel?*
4. *The commission has considered raising entry-level qualifications to become an officer. What is the status of these discussions? If it is done, how would the change affect recruitment?*
5. *Are any efforts underway to diversify law enforcement agencies? If so, please describe.*



## Employment

The commission's strategic goals state: "The costs associated with subpar employee productivity, turnover, and counter-productive behavior are substantial, both from a monetary and public safety standpoint."

6. *What steps have you taken to help departments weed out potentially subpar employees before they are hired? What sort of training is available on this topic?*

## Training

In a July 18, 2008, memorandum, POST Executive Director Paul Cappitelli said that while POST's budget has remained relatively flat, the number of trainees for whom agencies could seek reimbursement climbed from 54,000 in 2003 to more than 68,000 in 2007, a 25.9 percent jump. "With no commensurate increase in revenues, this trend cannot be sustained," Cappitelli said.

7. *How is this impacting your training programs? Are you encouraging agencies to utilize more online courses?*
8. *One of your goals has been to develop a distance learning plan for delivery of Web-based training. What progress have you made toward this goal?*
9. *Some information on the POST Web site was last updated in 2007. Given an expected increase in Web use, what plans do you have to regularly update the Web site?*

Please send your written answers to these questions to Nettie Sabelhaus, Senate Rules Committee Appointments Director, Room 420, State Capitol, Sacramento, CA 95814.

Thank you for your help.

Sincerely,

  
DARRELL STEINBERG

DS:MG

cc: Commission on Peace Officer Standards and Training

## John McGinness Responses

1. My goal as a POST Commissioner is to continue the enhancement of the public image and professionalism of California law enforcement. We are in a very sensitive period of time in which we are suffering from diminishing resources and rampant turnover in the ranks of law enforcement professionals. If we fail to consider the totality of these factors in planning the future training and educational requirements, as well as fundamental needs in that regard, we will most certainly compromise the extent to which future generations of Californians will enjoy quality of life.
2. The veil of secrecy that has been the traditional model in law enforcement no longer works. The reality is the media and the public, especially members of special interests groups, demand to know what goes on within law enforcement agencies. The greater the resistance to transparency, the greater the likelihood of runaway perception of wrongdoing. The greatest casualty to such a practice within the law enforcement is the dedicated professionals who do good work yet have their reputations sullied by innuendo. We owe it to our personnel to create an environment that is open to the public, to the extent allowed by law and appropriate sensitivity, and fosters an element of confidence and trust on the part of the public.
3. The issue of effective recruitment has changed dramatically in the last few months. As a result of the fiscal crisis of late 2008, many qualified people have taken an interest in the law enforcement profession. During the economic boom time, however, a large segment of qualified people resisted law enforcement work for a number of reasons. Much of the resistance could no doubt be attributed to shift work and challenges associated with meeting the high standards critical to the appropriate practice of our profession. However, it has been my belief that the controversial nature of police work and the image of our profession as portrayed by the media, had a significant detrimental impact on hiring efforts. Notwithstanding the fact that we seemed to have evolved back into an era in which a strong interest in police work exists, we are well advised to look forward to the inevitable day when concerns about image discourage participation on the part of good candidates. Clearly, the best way to address that is through continued high standards and working with the media and the public in a way which showcases the good work of our officers and professional staff.
4. Given the current trends in terms of increased interest in law enforcement, I believe increasing the entry-level qualifications is worthy of consideration. With that in mind, due consideration must be given to ways to enhance the image of law enforcement long after the job market stabilizes and employment opportunities become readily available.
5. In my practice, we have sought to create a law enforcement agency which represents the community we serve, in terms of ethnic make up. While we have made significant strides, there continues to be room for improvement. The success we have had, and that which I believe to be most effective, is engaging in the community to encourage interest. At the risk of being redundant, the ever important issue of image is also critical in this regard. If the perception of law enforcement in the minority community is that police are oppressive and corrupt, highly qualified members of diverse communities are not likely to seek employment. If however, we are effective in illustrating the talent that exists within our ranks, the interest on the part of highly qualified candidates is likely to grow.
6. In my department we have taken extra steps to ensure the candidates for employment in peace officer positions are screened far beyond the extent required by law. Canvassing neighborhoods where candidates work and live has been a very effective tool in identifying behavioral trends in individuals that indicates a predisposition for anger management issues, hostility, homophobia or racism far more effectively than merely relying upon those references listed by the applicant.
7. We absolutely encourage our staff to participate in on-line training as well as semester courses or certificate courses offered at colleges and universities. We suffer from the same root fiscal

concerns as POST. However, we make reasonable effort to accommodate scheduling challenge and other resources to accomplish such critical educational pursuits. The exchange for our accommodation is that personnel are expected to share the benefit of their enhanced knowledge with their colleagues.

8. We have collaborated very effectively with CSU Sacramento and implemented an on-site Bachelor in Vocational Arts Degree program. The program has been very effective and has been published in education periodicals. The first band of students was limited to our own personnel. However, we have opened up to allied law enforcement agencies throughout the region. It has elevated our educational and professional profile as a law enforcement agency.
9. Recognizing the fact that Web based communication is extraordinarily popular, we should make every effort to update our Web Site consistent with Commission Meetings as well as periodically given the fluid nature of our business and related factors such as the economy. The rapid rate at which major developments have occurred in the past year is very critical. We will serve our constituency much more effectively if we reflect that pace.





CALIFORNIA LEGISLATURE

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SECRETARY OF THE SENATE

NETTIE SABELHAUS  
APPOINTMENTS DIRECTOR

**SENATE RULES COMMITTEE**

DARRELL STEINBERG

CHAIRMAN

December 18, 2008

Gil Van Attenhoven

Dear Mr. Van Attenhoven:

The Senate Rules Committee will conduct a confirmation hearing on your appointment as a member of the Commission on Peace Officer Standards and Training (POST) on Wednesday, January 14, 2009. You are not required to appear, but we request that you respond in writing to the following questions. Please provide your responses by January 6, 2009.

We would also like to receive an updated Form 700, Statement of Economic Interest, by January 6<sup>th</sup>.

**Goals**

1. *Please provide us with a brief statement of your goals. What do you hope to accomplish as a member of the commission? How will you measure your success in meeting these goals?*

**Background**

You have served since 1984 in various positions with the California Department of Justice, and are currently a senior special agent who manages, directs, and implements narcotic and law enforcement training programs for the Advanced Training Center.

2. *What lessons from your own experience in the Department of Justice are useful as you help shape statewide law enforcement standards?*

## **POST Background**

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement. It consists of 14 members appointed by the Governor, plus the Attorney General. The POST organization, with more than 130 staff members, functions under the direction of an executive director appointed by the commission. POST coordinates a comprehensive training program, with hundreds of certified courses.

One major issue is recruitment of new officers. "For several years, California law enforcement professionals and POST academy directors have expressed concerns for the difficulties they are having in recruiting qualified police officer candidates. POST provides various recruitment-related assistance," according to the POST Web site. In 2007 the *Contra Costa Times* reported that there were 15,000 vacancies among the 95,000 budgeted peace officer jobs in California.

3. *Please spell out the role the commission is playing to help departments recruit qualified candidates. What impact has the nation's slowing economy had on recruitment of officers? Do you see a wider role for the commission in publicizing the need for police personnel?*
4. *The commission has considered raising entry-level qualifications to become an officer. What is the status of these discussions? If it is done, how would the change affect recruitment?*
5. *Are any efforts underway to diversify law enforcement agencies? If so, please describe.*

## **Employment**

The commission's strategic goals state: "The costs associated with subpar employee productivity, turnover, and counter-productive behavior are substantial, both from a monetary and public safety standpoint."

6. *What steps have you taken to help departments weed out potentially subpar employees before they are hired? What sort of training is available on this topic?*



## Training

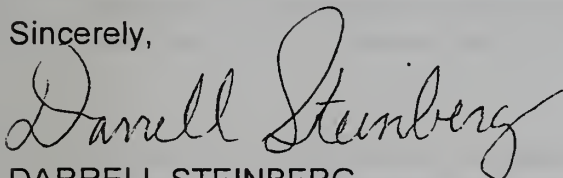
In a July 18, 2008, memorandum, POST Executive Director Paul Cappitelli said that while POST's budget has remained relatively flat, the number of trainees for whom agencies could seek reimbursement climbed from 54,000 in 2003 to more than 68,000 in 2007, a 25.9 percent jump. "With no commensurate increase in revenues, this trend cannot be sustained," Cappitelli said.

7. *How is this impacting your training programs? Are you encouraging agencies to utilize more online courses?*
8. *One of your goals has been to develop a distance learning plan for delivery of Web-based training. What progress have you made toward this goal?*
9. *Some information on the POST Web site was last updated in 2007. Given an expected increase in Web use, what plans do you have to regularly update the Web site?*

Please send your written answers to these questions to Nettie Sabelhaus, Senate Rules Committee Appointments Director, Room 420, State Capitol, Sacramento, CA 95814.

Thank you for your help.

Sincerely,



DARRELL STEINBERG

DS:MG

cc: Commission on Peace Officer Standards and Training



1. As a member of the POST Commission, one of my fundamental goals is to raise the standards for the selection of peace officer candidates. With the state of the current economy and the layoffs of numerous employees in the private sector, law enforcement agencies are going to see an increase in peace officer candidate applications. The Los Angeles Police Department (LAPD) is even advertising their police officer positions as being recession proof. This caused a 117% increase in police officer candidate applications from December 2007 to December 2008. The LAPD saw the number of applicants taking the written test increase from 401 persons to 870 persons.

During this critical time, it is important that law enforcement agencies maintain or raise their hiring standards and not settle for sub-standard candidates. POST has already developed a candidate pre-assessment package for prospective peace officer candidates and a candidate information page on their website.

As a member of the commission, I hope to continue to increase the quality of training made available to CA peace officers. With the reduction in budgets, sometimes training is the first area cut in many agencies. In my 28 (+) years in law enforcement, I have had the opportunity to travel throughout the United States and participate in training programs to numerous local and state law enforcement officers. California peace officers consistently receive more training and higher quality training than officers in other states in the country. One of my goals would be to ensure that officers continue to receive the training they need and require.

One way to measure the success in meeting these goals would simply be to check POST records to determine the number of officers that attended POST certified training classes during Fiscal Year 2008/2009.

2. As stated in the previous paragraph, I have over 28 years of law enforcement experience, working at first for a local agency and now with the California Department of Justice. In my role with the CA Department of Justice, I am responsible for narcotic and law enforcement training programs, whereby we present courses to local, state and federal law enforcement officers throughout California. Last year our unit trained over 6,000 officers. I have also had the opportunity to travel throughout the United States and meet with officers from other parts of the country and compare training courses and programs. I firmly believe that California law enforcement officers receive the finest training available, and that is due to the standards set forth by the POST Commission.

My role with the CA Department of Justice has helped prepare me to recognize quality training programs and I would utilize that experience when voting on POST Commission issues.

**Senate Rules Committee**

JAN 07 2009

**Appointments**



3. The POST commission has been addressing recruitment issues for the last several years and the topic is currently part of POST's Strategic Plan. POST has conducted five recruitment symposiums during the last ten years. Each symposium involved presentations by subject matter experts regarding recruitment and retention issues. These symposiums were attended by representatives from several hundred law enforcement agencies.

The slowing economy has led to an increase in peace officer applications, as evidenced by the increase in police officer applications for the Los Angeles Police Department. The slowing economy has also led to peace officer layoffs, and hiring freezes by many law enforcement agencies.

POST can assist law enforcement agencies with recruitment by providing recruiter training, enhancing the POST website to reflect career opportunities, develop best practices on recruitment, and provide pre-academy preparation materials for peace officer candidates. Most law enforcement agencies have a pro-active recruitment program in place due to a large number of vacancies because of retirements. Some of the issues concerning the difficulty in filling those vacancies are due to a lack of qualified candidates and the length of time it takes to complete the hiring process.

4. The commission addressed the issue of raising entry-level qualifications to become a peace officer in the 2006 Strategic Plan. There were three objectives that covered this concern:
  - Study the feasibility of raising the entry-level education requirement above a high school education or GED.
  - Study the feasibility of raising entry-level reading and writing requirements.
  - Study the feasibility of requiring reading and writing testing for entry into the basic academy.

The status of the discussions are:

- The commission approved staff's recommendation to not raise the education requirement because of the negative impact it would have upon law enforcement recruitment.
- The commission approved staff's recommendation to not raise the entry-level reading and writing requirement because of the negative impact it would have upon law enforcement recruitment.
- The commission approved the staff's recommendation to not establish a reading and writing requirement for entry into an academy.

After reviewing the feasibility discussions, the commission believed that the elevation of selection standards for peace officer candidates would be detrimental to recruitment efforts of law enforcement.

5. POST conducted several surveys during the last eight years and determined that for many law enforcement agencies there continues to be a need and interest in ensuring that agencies reflect the diversity of the communities they serve. POST however, does not have a direct role in the hiring decisions made by law enforcement agencies. POST staff did work with subject matter experts and law enforcement agencies as well as human resource professionals to develop best practices that agencies can use in addressing the need to increase diversity within law enforcement agencies.
6. POST has conducted statewide research regarding the selection and training standards for entry-level peace officers. This has included the development of valid selection tests used by law enforcement agencies to identify qualified candidates. The POST Commission also developed written and performance based tests to assess the knowledge and skill levels of all peace officer trainees in all of California's POST certified Basic Recruit Training Academies.

This helps ensure that the best possible candidates are hired by law enforcement agencies. This also makes certain that all standards and procedures are job-related and will hold up in court if challenged. POST staff also works closely with California Basic Recruit Training Academies to ensure that the trainees master the skills and knowledge required to become a peace officer.

POST does not make the hiring decision, but the commission does provide resources to law enforcement agencies that assists them in making hiring decisions. POST provides this assistance through reading tests, writing tests, background investigation procedures, and medical screening guidelines.

POST has established several basic training and assessment programs and projects that are designed to identify and screen qualified candidates. These ten programs are:

- On-going Basic Course Delivery Functions
- On-going Basic Course Cognitive Testing Program
- On-going Scenario Testing Program
- On-going Basic Academy Physical Conditioning Program
- Competency-based Training and Assessment Project

7. In July 2008, the POST Commission reduced the number of reimbursable Continuing Professional Training (CPT) hours for California peace officers to 40 hours per fiscal year. This was due to a \$2 million reduction to POST's

2008/2009 Fiscal Year budget. The impact of this ruling has reduced the number of attendees in many of the Advanced Training Center's (ATC) courses. During Fiscal Year 2007/2008, the ATC trained over 6,900 officers and we anticipate a reduction in the total of officers we will train during fiscal year 2008/2009.

The POST Commission is encouraging law enforcement agencies to utilize online courses. For example, the commission developed a First Aid/CPR course that is available through the POST Learning Portal. Many agencies are now utilizing this tool to certify their officers in First Aid/CPR.

8. POST has made excellent progress in the area of Web-based training programs. The POST Commission currently has five Computer Based Training Courses through the POST Learning Portal and there are others in the development stage.

There are over 17,500 registered users for the Learning Portal. There have been over 16,300 users that have completed training courses through the portal and there have been over 20,300 resource downloads through the portal. I believe the statistics show that the POST Learning Portal is a successful program.

9. POST made changes to their website last year and the website is current. If you were to log on to the POST website at [www.post.ca.gov](http://www.post.ca.gov) you will find a current site that lists events for January 2009. The site has been revised and it is easier to navigate and was last updated on December 30, 2008. The commission will ensure that the website is regularly updated and will remain current.



July 16, 2008

Nettie Sabelhaus  
Rules Committee Appointment Director  
Room 420, State Capital  
Sacramento, California 95814-4900

Dear Ms. Sabelhaus:

In response to your letter of July 14, 2008, please find below my responses to the questions posed by the Senate Rules Committee. It is my understanding that the hearing will occur on August 13, 2008, and that I am not required to appear.

## **Role of the State Bar**

The State Bar is governed by a 23-member Board of Governors (BOG), with six public, non-attorney members. The Board of Governors establishes policy and guides the operation of the State Bar. The State Bar is the administrative arm of the California Supreme Court in matters involving the admission, regulation, and discipline of attorneys. Californians rely on the State Bar to protect them from the unethical or unauthorized practice of law and to help uphold and improve the justice system.

## **Goals**

1. *Please provide us with a brief statement of goals. What do you hope to accomplish during your time on the State Bar Board of Governors? How will you measure your success?*

As one of the Public Members of the Board I see my role as advocate of the public interest and protection against illegal and improper practice of law in California. Since my arrival on the Board, my focus has been concentrated on public protection issues. This has become the common goal of the Public Members. My previous experience on the Committee of Bar Examiners and my many years of service on Corporate Boards has given me an accelerated start as a new member. I hope that during my term I will help to bring balance and fiscal responsibility for the citizens of California. As we move forward, I would like to see the Bar become respected and trusted, not only by the public, but also by its own members. This is critical to the support it receives from the State of California. Member oversight must be fair and balanced for this to happen. My success on the Board will be best measured by how the Legislature views the State Bar at the expiration of my term.

2. *How will the 14 years you have served on the State Bar Committee of Bar Examiners help you in your new role on the State Bar Board of Governors?*

**Senate Rules Committee**

AUG 05 2008

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During the 14 years I served on all of the committees of the Examining Committee, the majority of my time was spent on the Operations and Management Committee and the Moral Character Committee. The insight I gained from the many Informal Conferences and the difficult struggles during the darkest days of the Bar and its budget gave me a vast amount of experience during a very difficult time. Proposing and implementing a three year plan to bring the Committee back from the brink of financial collapse was my greatest challenge. My service on the Moral Character Committee gave me a great amount of understanding for the difficulties faced by applicants who were not fortunate enough to attend an ABA school. This experience has allowed me to jump start my service on the BOG. Knowledge of fundamentals and structure of the Bar has allowed me to solidify relationships with employees of the Bar and the members of the Board of Governors.

### **Disclosure of Professional Liability Insurance Proposal**

**3. *How does the State Bar propose to enforce the attorney disclosure requirement? How will the Board of Governors be kept informed of enforcement efforts?***

In May of this year, after a three year process, the board voted to recommend a proposed new Rule of Professional Conduct to the Supreme Court. The Supreme Court will ultimately decide whether to approve the proposal, alter it or reject it. Under the proposed rule, a lawyer who does not carry professional liability insurance must disclose that to a client (a) in, writing, (b) at the time of engagement and (c) if the representation will exceed four hours. Although the proposed new rule represents a compromise, I supported this rule because I believe it strikes an appropriate balance between the consumer's right to know whether their attorney is covered by insurance and realities of the attorney-client relationship.

If the Supreme Court approves the proposed new rule, the insurance disclosure requirement would be in a new Rule of Professional Conduct. The rule would require disclosure of the absence of insurance directly to the client, and not to the State Bar. The rule would be enforced like the other rules of professional conduct. If a client complained to the State Bar about a violation of the rule, investigation and enforcement would begin. If charges are brought against an attorney, that will become a matter of public record. The Board of Governors could also ask for confidential reports relating to the investigation of alleged violations of the particular rule, and receive periodic reports so it could monitor enforcement efforts relating to the new rule. While the proposal will increase the work of the

Regulations, Admissions and Discipline Committee (RAD), which I serve on, I view it as another step toward consumer protection.

4. *What is the State Bar doing to help make professional liability insurance more affordable and available to attorneys, particularly small firms and solo practitioners?*

I have been informed by State Bar staff that the Bar has made every effort to make the coverage available and affordable to sole practitioners and small firms. The State Bar sponsors a Professional Liability Insurance program which is designed for small firms and solo practitioners. The State Bar's program is managed by a group of volunteer attorneys through a committee of the Bar (COPLI) who review the program at quarterly meetings. Each of the committee members are experts in the professional liability business. Malpractice insurance in California is not easily obtainable and affordable, so the State Bar has developed a program which is managed by Lawyer's Mutual, and insures several thousand members, most of whom are solo or small firms. The affordability issue is always an issue with each professional occupation in California. As the number of insured's increases, assuming claims stay the same, the premium will decrease for new applicants. Due to all policies being written on a "Claims Made" basis, premiums for in force policies will increase each year due to the extended periods an insurer is exposed. Volume and claim management will significantly improve the affordability issue.

### **Access to Justice**

- 5 *With an influx of almost one million dollars this year to help increase access to justice, how does the State Bar plan to allocate these funds? What factors would you consider in prioritizing the granting of these funds?*

The support of the legal community for the new Justice Gap Fund has been extremely heartening, and the Bar is indebted to members of the task force that worked hard to set up the Fund.

When AB 2301 was enacted, it called on the Bar to establish the task force, with input from the legislature and the Supreme Court, to make a recommendation to the Board of Governors about how to implement the legislation. The bill was signed in September of 2006, and by the next month, the Bar had already set up the Task Force on Lawyer Support for Legal Services.



That Task Force deliberated over the next few months, received input from all relevant stakeholders, and recommended an implementation policy to the Board of Governors by July of 2007. With regard to who would be the recipients of the new funds, the Task Force recommended, and the Board of Governors concurred that the funds be distributed through the State Bar's Legal Services Trust Fund Program. Further, the policy recommended that the funds be distributed using the same statutory formula as the Interest on Lawyer Trust Account (IOLTA) Program.

The Board of Governors determined that it was best to use the statutory formula so that they would be evenly distributed throughout the state, based on the poverty population. Thus, nearly 100 local legal services programs that are eligible recipients of the Trust Fund Program will use the Justice Gap Funds to serve the low-income clients in their communities.

Following their policy recommendations, the Task Force did extensive outreach to bring the new Fund to the attention of various segments of the legal community, resulting in the nearly \$1 million in contributions. The staff and Board at the State Bar will work hard to increase that fund in future years. I strongly believe that all citizens should have access to legal assistance should the need arise.

**6 *What types of legal services is most needed by the indigent in order to ensure fair access to the justice system?***

Low-income Californians need legal help in a number of ways. Families need help when there is domestic violence and they don't know how to protect themselves and their children. They need legal help when they face eviction, and possible homelessness, especially when they are dealing with unscrupulous landlords. Grandparents need help establishing guardianships. Citizens existing just above the poverty line who are threatened by identity theft and unsavory lenders also need help to protect their identity and credit.

CALIFORNIA LEGISLATURE

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APPOINTMENTS DIRECTOR

**SENATE RULES COMMITTEE**

DARRELL STEINBERG

CHAIRMAN

December 12, 2008

Edward R. Olson

Dear Mr. Olson:

As you know, the Senate Rules Committee will conduct a confirmation hearing on your appointment as a member of the California Veterans Board on Wednesday, January 14, 2009. You are not required to appear, but we request that you respond in writing to the following questions. Please provide your responses by January 5, 2009.

We would also like to receive an updated Form 700, Statement of Economic Interest, by January 5<sup>th</sup>.

**Statement of Goals**

1. *What goals and objectives do you hope to accomplish during your tenure as a member of the Veterans Board? How should we measure your success?*
2. *What experience do you bring that will be helpful to the Veterans Board?*

**Roles and Responsibilities**

Section 72 of the Military and Veterans Code states that the California Veterans Board shall determine the policies for all operations of the Department of Veterans Affairs (DVA). The board also acts as an appellate body for veterans who wish to appeal a ruling made by the department. Yet the board has few staff of its own, relying almost entirely on DVA for its information. In June 2003 the California State Auditor issued a report on the Veterans Board. The report noted that in February 2003, DVA tried to challenge the board's authority and characterize the role of the board as "advisory."

3. *What training have you received for your role as a board member?*

4. *Do you view the role of the Veterans Board as one of policy setting for DVA or advisory? What is your experience with how the department views the board's role?*
5. *Please give an example, if possible, of a policy the board has set for the department in the time you have been a member.*

The auditor's report also noted that the board lacked independent legal counsel, and that using DVA lawyers in rulings on appeals of department decisions might introduce a conflict of interest. At the December 7, 2006, meeting the board decided that it would utilize the department's legal counsel when developing policy, but would conduct the hearing on its own without legal counsel when hearing an appeal. The board would only ask for outside independent counsel when it determined that the hearing was especially difficult. During 2007 and most of 2008, the board did not hear any appeals because all were settled by the department. However, at the October 2, 2008 meeting—for the first time since the new appeals policy was instituted—the board heard two appeals.

6. *Was the appeals policy adopted in December 2006 followed at the October board meeting?*
7. *Has the board made, or does it plan to make, any changes to the appeals policy?*

In April 2008 the California State Auditor issued a report on the Veterans Home of California at Yountville. The report noted that, although the auditor reviewed five complaints submitted to the board between June 2006 and December 2007, it was unable to determine how the complaints were resolved "because neither the Veterans Board nor Veterans Affairs could locate documentation concerning actions they took on complaints." The report further noted that "although the Veterans Board adopted a policy indicating the type of complaints it will process and those it will direct to Veterans Affairs, it did not specify a time frame for resolving the complaints it will process."

8. *Has the board adopted a policy specifying time frames for resolving complaints? If so, please describe. If not, why not?*
9. *Has the board established procedures for tracking complaints? If so, please describe. If not, why not?*

#### **Oversight of Existing Veterans Homes**

The department operates three state veterans homes in Yountville, Chula Vista, and Barstow. The new Franklin D. Roosevelt Annex Memory Care Center, which serves veterans with Alzheimer's and dementia, opened at the Yountville home in fall 2007.



10. *How do you stay informed of living conditions and staffing issues at the veterans homes in Yountville, Barstow, and Chula Vista?*
11. *Does the department seek the board's advice on any changes in policies with respect to admittance of veterans to a veterans home, definitions for the levels of care provided by the department at the homes, or other regulations that might impact the board's authority over the appeals from veterans who were denied admittance to a veterans home? Please provide examples.*
12. *Have there been significant successes or challenges in the first year of operation of the Yountville Memory Care Center? Is the center operating at capacity?*

### **Construction of New Veterans Homes**

The US Department of Veterans Affairs lists California as one of two states in "great need" of additional veterans homes. Proposition 16 of 2000, placed on the ballot pursuant to SB 630 (Dunn), Chapter 728, Statutes of 1999, along with subsequent legislation in 2002 and 2004, made funds available to build new veterans homes in Lancaster, Ventura, West Los Angeles, Fresno, and Redding. Construction is in progress on the Ventura and Lancaster homes, and is slated to begin soon on the West Los Angeles veterans home.

13. *What role does the board play in monitoring funding and construction of new veterans homes?*
14. *Are lessons learned from the building and inspection issues at the Yountville Alzheimer's/Dementia Unit transferable to the construction of the new veterans homes?*
15. *What are the expected completion and opening dates for each of the three new veterans homes?*

### **CalVet Loans**

Through the CalVet Home Loan Program, DVA provides California veterans loans to purchase farms and homes. The number of CalVet loans issued has dropped significantly in recent years, from 2,752 loans in 2000–01, to 1,116 loans in 2007–08. Since 1921 California voters have approved approximately \$8.8 billion of general obligation bond sales to finance the CalVet program. The department estimates that bond proceeds will run out in 2008. Proposition 12, placed on the ballot pursuant to SB 1572 (Wyland), Chapter 122, Statutes of 2008, was approved by voters this month

and will provide an additional \$900 million in general obligation bonds for the CalVet program.

16. *How does the board monitor the CalVet loan program?*
17. *Do you believe the loan program is adequately providing California veterans with lower cost loans? What changes, if any, would you recommend to make the program more effective?*
18. *As California and the rest of the country are experiencing a housing and economic crisis, has the CalVet Home Loan Program experienced any related problems? Do you anticipate an increase in CalVet Home Loan applications because of the difficulty in securing new mortgages from traditional private-sector lending sources?*

### **Homeless Veterans**

While veterans make up 11 percent of the adult population, the National Alliance to End Homelessness estimates that 26 percent of the homeless in the United States are veterans. In California there are more than 49,000 homeless veterans.

19. *What recommendations, if any, has the board given the department to try to assist homeless veterans?*

### **New Veterans**

A RAND study published earlier this year noted that, "As a group, the veterans returning from Afghanistan and Iraq are predominantly young, healthy, and productive members of society. However, about a third are currently affected by PTSD (Post Traumatic Stress Disorder) or depression, or report a possible TBI (traumatic brain injury) while deployed."


20. *Are there any policies, programs, or initiatives you believe the state should be implementing to help the younger generation of veterans created post-9/11?*

Edward R. Olson  
December 12, 2008  
Page 5

Please send your written answers to these questions to Nettie Sabelhaus, Senate Rules Committee Appointments Director, Room 420, State Capitol, Sacramento, CA 95814.

Thank you for your help.

Sincerely,

  
DARRELL STEINBERG

DS:ER

cc: California Veterans Board





Edward R Olson  
CalVet Board Member

January 2, 2009

Nettie Sabelhaus  
Committee Appointments Director  
Room 420 State Capitol  
Sacramento, Ca 95514

Edward Olson  
Veterans Board  
Responses

Dear Nettie Sabelhaus

The following are my answers to the questions asked by the Senate Rules Committee.

**Statement of Goals**

1-What goals and objectives-----

- a) *See attached current goals and objectives of the Board*
- b) Measure the success of the goals and objectives by a yearly review.

2-What experience do you bring-----

I am currently a member of the Veterans Home at Yountville. I have lived there for three and a half years and am the Vice Chair of the Allied Council. As we are largest Home with the most members in California and the most active Allied Council we are, I believe, a model and guide for the other homes existing and new to follow. I have intimate knowledge of the problems and needs of the veterans living at the home which help to understand the problems of all veterans young and old.

**Roles and Responsibilities**

3-What training have you received -----

As a Board Member I was sent a PowerPoint overview of the Department functions, and received a new member binder that covers all of the Department divisions, ethics training, Bagley Keene Open Meeting Act information, Appeal Process and the travel guidelines. The CDVA's legal counsel also gave an overview from each division as well as meeting individually with the executive staff.

4-Do you view the role-----

I believe that the Board to some degree is both Policy setting and advisory. I feel that the Board is putting effort into becoming more active and involved in the supporting all of the CDVA's issues with in the limits of time we are allowed.

5-Please give an example-----

The Board has set policy recently-*See Copy of policy C-12*

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6- Was the appeals policy -----

Yes the policy was followed in the October meeting.

7- Has the board made -----

There are no plans at this time to make changes to the appeals policy

8- Has the Board adopted a policy -----

Yes it has. *See attached complaint procedure adopted by the Board*

9- Has the board established procedures -----

Yes and again *See attached procedure*

### **Oversight of Existing Veterans Homes**

10- How do you stay informed -----

We stay informed by yearly tours of the Homes and the Secretary updates the Board at each meeting. As I am a member of the home at Yountville and Vice Chair of the Allied Council I am aware and involved with all the veterans living conditions which help with the reviews of the other homes. I am currently working with the CDVA's Deputy Director of Homes on standardizing the Allied Councils Constitution.

11- Does the department seek -----

Yes—the Deputy Director of Homes works closely with the Board's Policy and Procedures Committee, as well as the Committee on Homes, of which I am Chair, to identify and discuss areas for review and revision.

12- Have there been significant -----

The Memory Care Center is functioning very well. It has a capacity of 75, and there are currently 40 residents. The State budget did not allow for the addition of new residents. Therefore, the plan is to transfer existing residents in other SNF units to this new unit as they begin to exhibit memory or dementia issues.

13- What role does the board -----

Monthly updates are provided to the Board at each meeting. If any Item looks out of line we may question it and ask for more detail.

14- Are lessons learned from the building -----

The Department of General Services is responsible for the construction of all State facilities. A lesson learned, is that the Department needs to take a very active role with DGS. As such they are bringing on staff earlier and headquarters staff is making more frequent visits to the site to monitor the progress. From the planning perspective, the Department is diligent in working with VA and State agencies to improve the facilities to meet current standards of care and service. As an example, all skilled nursing facility rooms in the new homes will have private bathrooms as opposed to a shared bathroom in



the homes under construction. This is a new VA standard. Another example is that the new Homes will be more energy efficient.

15-What are the expected completion-----

Completion an opening dates

Lancaster: Completion-April 2009 and Opening --June 2009

Ventura: Completion-march 2009 and Opening May 2009

West LA: Completion-March 2010 and Opening June 2010

**Cal-Vet Loans**

16-How does the board monitor-----

Reports are provided at each Board meeting and the Board requested the Department's CalVet Loan Chief to present an overview of the loan process, which was given at the last meeting. I had asked, as a board member, that the Vet Loan Chief look at and be sure that when a Veteran is turned down for a loan that extra steps are taken to be sure the Veteran understands why and what his options are.

17-Do you believe the loan program----

The program is continually evolving. Re-financing options are the next changes that the program is pursuing. The Department just presented their program before Fitch and Moodys in New York and it will maintain its current rating (AA) (A+). The program is on solid footing.

18-As California and the rest of the country----

Foreclosures have increased, but are still less than VA or industry averages. Because the CalVet Program is the contract holder, they have better controls over the loan. The applications are controlled as much by the availability of funds as they are by the marketplace. It is possible because of the sever problems of the private setting that more Veterans will apply for CalVet Loans. Many people including Veterans are trying any thing and everything in the line of home loans.

**Homeless Veterans**

19-What recommendations, if any, has the -----

The Board has monitored the Department's outreach efforts for homeless veterans by having the Deputy Secretary of Veterans Services present a detailed report on the situation and what is being done to address it. The Stand Downs that the Department sponsors has been very successful and well attended by homeless veterans. At these Stand Downs, services are offered and several Vets have accepted admission to the Homes. The Board's Veterans Committee Chair is currently working with a homeless shelter that was closed due to safety violations, to help secure donation to re-open the shelter. We need to stay focused on the homeless Veterans problems as it will probable

be amplified by the current economy. All parts of the CDVA need to relate more to the Veterans that need the most help.

### **New Veterans**

20-Are there any policies, programs-----

The Board is proud of the Yountville Pathway Home Program established for younger veterans with TBI and PTSD, and the Board just toured it at their December meeting. I feel that the CDVA in all parts is constantly working on how to better provide for all the young Veterans that are and will be entering civilian life as the current conflicts come to an end.

## California Veterans Board

### Goals and Objectives

1. Goal: To work in concert and partnership with the Secretary and Department of Veterans Affairs.
  - a. Objective: Foster understanding & cooperation between CalVet Board & CDVA.
  - b. Objective: To identify priorities for Board and CDVA activities, advocacy and legislative indicatives.
  - c. Objective: Identify realistic, mutually agreeable objectives, based upon those priorities and founded upon available resources.
2. Goal: As required by law, to develop, institute, and monitor policies for the California Department of Veterans Affairs that complement the Department's stated principles and protect veterans' rights throughout California.
  - a. Objective: Review and update Board policies on a biannual basis, deleting outdated or unnecessary policies.
  - b. Objective: In concert with the Department, develop new policies that enhance the operations of the Department in the service of veterans.
3. Goal: To provide legislative advocacy for veterans' issues before the California State Legislature, the Governor of the State of California, the Department of Veterans Affairs, the U.S. Congress, and the President of the United States as appropriate and/or necessary to enhance and/or protect the rights and benefits of California's veterans.
  - a. Objective: Monitor and review federal and state legislative proposals that may enhance or detract from veterans' benefits.
  - b. Objective: Consider and enact appropriate resolutions in support for or against legislation that may affect veterans' benefits.
  - c. Establish Legislative Priorities for the Board:
    - 1) Veterans healthcare (especially mental healthcare)
    - 2) Veterans employment
    - 3) Veterans homelessness reduction and treatment
4. Goal: As dictated by law, to hear and render decisions on veteran's appeals.
  - a. Objective: Provide timely and considered Review of Records, Informal hearings, or Formal Hearings for all appeals
  - b. Objective: Provide timely decisions to the appellant and Department.
  - c. Objective: Maintain appropriate and accurate records of all appeals.
5. Goal: To ensure that the more than 2.1 million military veterans residing in California and their dependents are treated fairly and have access to all information relating to benefits authorized by state law.
  - a. Objective: Increase the per capita amount of Federal money coming into California.
  - b. Objective: Establish a network relationship with veterans' organizations; provide a forum for current dialogue about veteran issues and concerns that can be turned into CDVA policy and legislative advocacy as appropriate; and leverage those organizations to assist in both advocacy and the dissemination of information about veterans' issues and initiatives.
  - c. Objective: Increase and improve communications with the Veterans Service Organizations and individual veterans



- d. Objective: In partnership with the Department, institute a regular newsletter for veterans.
  - e. Objective: Work with the County Veterans Service Officers on informing veterans of upcoming Board meetings and veterans' activities.
6. Goal: To provide policy statements and guidance to ensure that the CDVA provides quality care and services in an environment of continuous improvement to ensure that the veteran's homes of the California system will be recognized as a model of excellence and innovation for integrated extended care for the aged and/or disabled California veteran.
- a. Objective: Meet periodically in each veterans home to monitor its practices, procedures, and patient morale
  - b. Objective: Monitor all issues, complaints, initiatives to ensure compliance with Federal and State regulations, the fair treatment of all patients, and the highest possible standards of care and treatment.
7. Goal: To Involve veterans' organizations in the Board meetings and improve the image and value of the Board with the veterans' community.
- a. Objective: Have veterans' organizations make presentations at the Board meetings.
  - b. Objective: Involve veterans' organizations in the ceremonial aspects of the Board meetings, e.g. Pledge of Allegiance, Color Guard, invocation.
  - c. Determine the expectations of the Board by veterans and Veterans Service Organizations by: Using a survey to gain feedback from veterans and veterans organizations; asking the attendees at Board meetings; reviewing past communications and suggestions.
8. Goal: To provide oversight to the Cal Vet Farm and Homes loan program.

**CALIFORNIA VETERANS BOARD****C-12**

<b>TITLE</b>	<b>CALIFORNIA VETERANS BOARD VETERANS HOMES POLICY</b>
<b>SECTION</b>	<b>C-12</b>
<b>ADOPTED</b>	<b>8/11/06</b>
<b>REVISED</b>	
<b>REVIEWED</b>	<b>04/12/07</b>
<b>SUBJECT</b>	<b>Resident Participation in Health Service Plans</b>

**PURPOSE:** The purpose of this policy is to maximize resident participation in federal, state, V.A., or private health service plans and to ensure that the Department seeks reimbursement for health care that is provided to the residents of the Veterans Homes of California.

**POLICY:** It shall be the policy of the Department that resident participation in federal, state, V.A., or private health service plans is maximized.

- Resident participation in federal, state, V.A., or private health service plans will benefit the Department by helping to ensure that all available resources have been utilized in the effort to reimburse the costs associated with providing high quality health care to our Veterans.
- Residents of the Veterans Homes of California shall make the administrations of the respective Homes aware of their participation in a health service plan or their eligibility for participation.
- Henceforth, non-veteran applicants must be participating in a federal, state or private health service plan to be admitted to the Home.
- Henceforth, veteran applicants, if eligible for federal, state, or VA medical programs, must apply for such programs in order to be admitted to the Home.
- Individuals admitted to the Home after the effective date of this policy will be required to maintain participation in the federal, state, V.A., or private health service plan if they remain eligible. If a member's eligibility lapses because of circumstances beyond his or her control, the member will not be discharged from the Home but he or she will be expected to reapply for coverage as soon as practical. However, any member who refuses to apply for and maintain coverage, but has the present ability to do so, may be discharged from the Home.

The Department shall determine the manner or method, and shall develop plans and establish procedures for implementation of this policy to achieve its purpose as fully as possible.





**Thomas A. Richards**  
**Lieutenant Colonel, USMC (Ret.), NC, MA, MBA**

21 January 2008

Senator Darrell Steinberg  
Senate Rules Committee  
State Capitol, Room 420  
Sacramento, CA 95814-4900

Dear Senator Steinberg,

Hereafter follow my responses to the questions proffered in your letter of 12 December.

1. What goals and objectives do you hope to accomplish during your tenure as a member of the Veterans Board? How should we measure your success?

I would like the California Department of Veterans Affairs (CDVA) expand its role to offer more support to more of the 2.1 M veterans who reside in California. The Department is currently funded primarily to supervise and maintain the Veterans Homes and provide farm and home loans to veterans via the CalVet Loan program. Those are both excellent programs and I believe they should be continued, but together they provide services for only a small fraction of California veterans. CDVA receives very little funding for additional programs and services beyond those, despite the fact that veterans have additional needs.

I have attached a copy of proposed veterans priorities that, at my behest, the Board adopted at the October meeting.

While, in light of the current State fiscal difficulties, it appears unlikely that the CDVA budget will increase in the near future to include additional services, I believe that low-cost opportunities exist for CDVA to provide more support to more veterans. I believe, however, that opportunities exist for CDVA both to improve support for veterans while, in long run, also increasing State revenues. For example, California ranks 38<sup>th</sup> in nation (on a veterans per capita basis) for receiving Federal Veterans Administration Disability Compensation. Improving that ranking will increase revenues from Federal government into California. I also believe that California can improve the employment environment for veterans, thereby increasing employment, and the levels of employment and increasing tax revenues.

I believe that CDVA can become more efficient and effective, in part, by improving its communications with and among veterans, informing them of their benefits and changes thereto, encouraging them to avail themselves of those benefits, and improving the rate (both *per capita* and in time) at which they do. CDVA can accomplish this in part by leveraging the support of veterans and veterans organizations which, at this time, are fragmented, to extend its voice and effectiveness. Improving communications can be accomplished, I believe, at very low cost and with a very high return, though the implementation will require concerted and dedicated efforts.

I also believe that those men and women who volunteered to serve "in harm's way" deserve to be employed upon the completion of their service, but also to be employed at a level commensurate with their skills and abilities. It is tragic and incomprehensible that young veterans suffer higher rates of both unemployment

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and underemployment than their peers and that a number on municipalities in this state, which enjoys a significant presence of military bases and service members, do not have current veterans hiring policies. While I do not advocate legislating this requirement, State officials can advocate at local levels and provide assistance in drafting those policies. Additionally, State officials can advocate among the corporate leadership of the State to hire veterans and also provide tax and other incentives for doing so.

While veterans healthcare is primarily a Federal responsibility, gaps in healthcare, especially mental healthcare, exist. If those veterans are to live healthy and productive lives, it is incumbent upon California both to ensure that they receive the VA benefits they rate and to provide interim care for them while they are awaiting VA treatment and compensation.

All time, effort, and money spent in this endeavor is an investment in the future of California and its veterans, and, indeed, all of its citizens, which, I am convinced, will pay dividends long into the future in many ways.

▶ **I would like my success can be measured by the extent to which CDVA expands its role address issues beyond veterans home and the CalVet loan program. I am fully aware that the State legislature must support and lead in that effort.**

2. What experience do you bring to the board that will be helpful to the Veterans Board?

I am an active volunteer/community servant and have gained invaluable knowledge and experience from those activities. I am the immediate past national commander of the Legion of Valor. I have participated as a member of the San Diego County United Veterans Council for more than ten years and have commenced my third year as chairperson of that body. Other current volunteer roles include: the secretary of the California State Commanders Veterans Council; a member of the Board of Directors of the San Diego Veterans Museum and Memorial Center; the senior vice commandant of the San Diego Bulldog Detachment 835, Marine Corps League; a member of the Marine Corps Committee of the San Diego Council of the Navy League; the coordinator of the Marine Corps Air Station, Miramar, Provisional Rotary Club; and as a mentor to the San Diego State University Student Veterans Organization. Additionally, I have served in a variety of volunteer/community service roles, including a number of boards of directors, all of which have valuable experience, some of it specific to veterans issues, some of it more pertinent to governance and leadership. I have attached a summary of my community service activities for your review.

3. What training have you received for your role as a board member?

I received a formal orientation from CDVA, including briefings by the secretary and each of the deputy secretaries. I have also received training regarding ethics and conflict of interest and have completed the California Ethics Interactive Training.

4. Do you view the role of the Veterans Board as one of policy setting for DVA or advisory? What is your experience with how the department views the Board's role?

#### MILITARY AND VETERANS CODE

*SECTION 72. The California Veterans Board shall determine the policies for all operations of the department.*

It is my opinion that the Secretary and the Department fully comprehend the both the Spirit and the intent of Section 72, above.

In my experience as a member of boards of directors, I believe that a critical responsibility of board members is to be able to comprehend the difference between strategic and tactical issues



and to refrain from micro-managing the organizational leadership and employees. The responsibility of the Board is to determine policies and the extent to which the Department implements those policies effectively and efficiently. It is not the role of the Board to dictate to the Secretary the methods of that implementation.

5. Please give an example of a policy the board has set for the department in the time you have been a member.

I do not recall that the Board has established a new policy. We did, however, discuss whether veterans with criminal records should be admitted to the veterans homes. After somewhat lengthy discussion, we determined that the issue was more tactical than strategic and suggested to the Secretary and the Deputy Secretary for Veterans Homes that the Department review its procedures to include more effective background checks for prospective residents, and to standardize the admissions procedures among all of the veterans homes, including future homes.

During my tenure, the Board reviewed all current policies and determined them to be sufficient. The Board intends to review its policies regularly to ensure that they are current, relevant, and necessary.

6. Was the appeals policy adopted in December 2006 followed at the October Board meeting?

Prior to hearing each of the two appeals during the October meeting, the Board received briefings and advice from the CDVA legal department. After hearing the evidence in each case, the Board determined in both cases that it could render decisions without further legal advice.

7. How has the board made, or does it plan to make, any changes to the appeals policy?

I have had the pleasure of working with the CDVA counsel, Robert Wilson, on several occasions and I find him to be both competent and fair. Further, I feel confident that he fully grasps the respective legally mandated roles of the Board and the Department and also feel confident that he and the CDVA legal division can and will properly support and advise the Board. I do recognize, however, that, in order to prevent the "appearance of impropriety," it might, under some circumstances, behoove the Board to seek independent counsel. The Board's budget, however, does not include the requisite funding to retain an independent counsel. If the legislature and the Governor desire that the Board be capable of fulfilling its role unencumbered by conflicts of interest, it should make provisions for the Board to be able to hire independent counsel if that need arises.

The Board does not currently have an agenda item to change the appeals policy.

8. Has the board adopted a policy specifying the time frames for resolving complaints? If so, please describe? If not, why not?

The Chairperson is adamant that appeals should be processed and resolved as expeditiously as possible. I concur with her sentiment and I believe that the other members do, as well.

The Board has not developed a specific policy regarding a length of time for resolving disputes. Currently, CDVA notifies the Board's executive officer (EO) when it receive claims and the EO notifies the Chairperson, who maintains a dialogue with the EO and CDVA regarding each appeal. If CDVA cannot resolve the claim expeditiously, then the EO and the Chairperson schedule the appeal to be heard at the next Board meeting.

Under Mr. Wilson's leadership, CDVA has been much more efficient in processing and resolving claims. Resultantly, claims have been resolved faster and fewer claims have required Board hearings. Mr. Wilson's competent management of claims has, I believe, obviated the need for a new policy.



9. Has the board established procedures for tracking complaints? If so, please describe? If not, why not?

In my opinion, the tactical responsibility for tracking complaints, recording hearing results, and for filing them, rests with the Board's EO. In my brief experience on the Board, I believe the EO has demonstrated competence in the handling of claims and she has, under the guidance and supervision of the Chairperson, established the requisite procedures.

10. How do you stay informed of living conditions and staffing issues at the veterans homes in Yountville, Barstow, and Chula Vista?

In the past, the Board has schedule most of its meetings to occur on a rotating basis at one of the veterans' homes. During each of those visits, the Board members receive a tour and a briefing about the homes, including any significant issues that had occurred, from staff members of the respective home. Board members have the opportunity to ask questions and probe on issues of concern. Additionally, the Secretary's briefings to the Board include "significant matters" which include issues of concern pertaining to the homes. The Deputy Secretary for Veterans Homes also attend Board meetings and offers additional comments.

At the December meeting, the Board agreed to conduct visits in groups of two to the veterans homes and report the results of those visits to at subsequent Board meetings.

11. Does the department seek the board's advice on any changes in policies with the respect to admittance of veterans to a veterans home, definitions for the levels of care provided by the department at the homes, or other regulations that might impact the board's authority over the appeals from veterans who were denied admittance to a veterans home? Please provide examples.

Please refer to paragraph #s 4 and 8, above.

I do not recall an occasion during my Board experience in which the Secretary/CDVA has solicited advice, other than as discussed in # 8, above, pertaining to a policy or prospective policy. The Secretary, though, at each Board meeting has provided the Board with ample opportunity to comment on significant issues and query CDVA leadership about effective policy implementation, and, if necessary, to suggest prospective policy changes. CDVA Counsel Wilson has advised the Board on matters pertaining to existing policies.

In my experience, the Board enjoys an excellent relationship with CDVA and all of its leadership staff members and I find the relationship between the Board and CDVA to be open, collaborative, and founded in mutual respect.

May I respectfully reiterate my belief that the Board should limit its business to strategic issues and leave the tactics to the CDVA leadership.

12. Have there been significant successes or challenges in the first year of operation of the Yountville Memory Care Center? Is the center operating at capacity?

I do not serve on the Homes Committee and have not received and information, either positive or adverse, regarding the Memory Care Center, other than that it exists. The Homes Committee has not reported any concerns to the Board.

13. What role does the board plan in monitoring funding and construction of new veterans homes?

CDVA provides updates at each Board meeting about the progress of construction of the new veterans homes. Although this is, of course, of interest to the Board, it seems to me that, once the policy decisions have been made to build additional homes, there is very little that the Board

can do to influence the contracting and construction processes. Indeed, it is my understanding that the design, contracting, and construction processes are managed and supervised by an agency(ies) external to CDVA.

14. Are the lessons learned from the building and inspection issues at Yountville Alzheimers'/Dementia Unit Transferable to the construction of the new veterans homes?

Intuitively, I must respond affirmatively, but, not being on the Homes Committee, I have not been briefed at the level of detail that would enable me to comment knowledgeably on this issue. Once again, the Homes Committee has not reported any concerns to the Board.

15. What are the expected completion dates and opening dates for each of the three new veterans homes?

The Department projects dedications of the Lancaster and Ventura homes in May or June of this year, with residents being admitted in mid-summer; it project the West LA home to follow about one year later.

The progress of the Redding and Fresno homes is currently dependent upon State finances and the actions of the Pooled Money Investment Board.

16. How does the board monitor the CalVet loan program?

At each Board meeting, CDVA provides as part of its briefing the status of the CalVet loan program, including current interest rates, and other relevant statistics. At the most recent meeting, the Deputy Secretary for the CalVet Loan program delivered a detailed and very comprehensive presentation about the program.

17. De you believe the loan program is adequately providing California veterans with lower cost loans? What changes, if any, would you recommend to make the program more effective?

I believe that the CalVet loan program provides the lowest interest rates possible. While those may not always be lower than market rates, the combination of interest rates and lower cost insurance will continue to make CalVet loans attractive to veterans.

I would like the program to include the capability to offer re-financing loans to veterans, rather than just initial financing of properties new to the veterans.

18. As California and the rest of the country are experiencing a housing and economic crisis, has the CalVet Home Loan Program experienced any related problems? Do you anticipate an increase in the CalVet Home Loan applications because of the difficulty in securing new mortgages from traditional private-sector lending sources?

Media resistance (albeit relatively few organizations opposed it) to the recent Proposition 12 bond initiative resulted primarily from the increasingly adverse market conditions. If that opposition increased in the future, it could pose the greatest potential threat to the program.

Increasingly adverse employment conditions in the State will make it more difficult for some percentage of veterans to qualify for loans.

In my opinion the potential increase of loan applications due to market conditions will probably be fairly small, but with the change in the law to enable the program to provide loans to post-Vietnam veterans will result in more applications.

19. What recommendations, if any, has the board given the department to try to assist homeless veterans?



The veterans homes accommodate a small percentage of homeless veterans, and CDVA staff members attend "Stand Downs" in the state, but CDVA, regrettably, does not receive sufficient financing to address veterans homelessness effectively. Veterans homelessness is a complex issue which is best accomplished by treating the symptoms; that is by preventing homelessness. Doing so requires a multi-facted solution, including improving mental healthcare (for combat stress/PTSD/TBI), improving veterans educational and employment opportunities, ensuring affordable housing, providing alternative sentencing and veterans courts, and supporting substance abuse treatment. If CDVA is to improve it efforts to reduce and treat homelessness, it must receive additional funding.

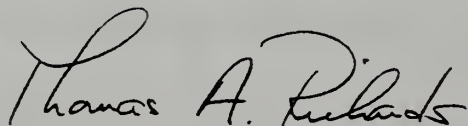
20. Are there any policies, programs, or initiatives you believe the state should be implementing to help the younger generation of veterans created post 9/11?

I believe that the substance of this answer to this question can be found above and in the veterans priorities, below.

California must strive to ensure that veterans of the "Global War on Terror" are not treated as my generation was, that is reviled, disrespected, and suffered benefit reductions due to the influence of anti-war activists. We must distinguish between war and the warriors, recognize their service, sacrifice, and contributions and reward them for them.

Our veterans are the very flower of their generation. They are the ones who accepted the call to duty and responsibility for defending us and our nation. They were healthy and fit for duty, capable both mentally and physically. They are the risk-takers of their generation. They accepted the risks of personal injury and even death, of personal and family sacrifice. In business and finance, risk is often rewarded. If we are to expect future generation to emulate the current one, we as Californians should reward our current veterans and honor them. That, too, is an investment in our future, the future of our State, our Nation, and, indeed, in the lives of all of us. They will be our future, our community and political leaders. We should do all we can to enable their success.

Respectfully submitted,



Thomas A. Richards

Lieutenant Colonel, USMC (Ret.)



## California Veterans Board Priorities

(Sequence does not connote priority)

- Veterans' Healthcare (especially mental healthcare)
  - ◆ Disseminating information to California veterans about their Federal VA healthcare benefits; the process of applying for VA disability compensation; and the appeals process.
  - ◆ Disseminating information to California veterans about combat stress, PTSD, and TBI; treatment options; and where and how to apply.
- Veterans' Employment
  - ◆ Develop legislative initiatives to improve the climate for veterans employment throughout California, including governments and municipalities at all levels and the private/corporate and non-profit sectors.
  - ◆ Develop initiatives to work with and encourage private and non-profit sectors to hire veterans.
- Veterans' Education
  - ◆ Develop legislative initiatives to ensure that all California colleges and universities provide information and assistance to all veteran students regarding Federal VA education benefits and how to apply for them.
  - ◆ Advocate for educational benefits for members of the California National Guard
- Veterans' Homelessness Reduction and Treatment
  - ◆ Develop legislative initiatives to help prevent veterans homelessness by:
    - Treating the root causes and thereby reducing its incidence among veterans
    - Improving veterans' employment opportunities;
    - Encouraging the full implementation of California's alternative sentencing law and establishing Veterans' Courts
    - Increasing substance abuse prevention programs and substance abuse treatment programs
    - Increasing funds for rehabilitation of homeless veterans
- Improving Communications with and among Veterans
  - ◆ Increasing the number of veterans receiving CDVA communications
  - ◆ Increasing veterans' enrollment in the Veterans Administration Healthcare System
  - ◆ Encouraging veterans' Membership in Veterans Service Organizations (VSO)
  - ◆ Communicating these priorities and resulting programs and legislative initiative to veterans at every opportunity, including speaking engagements by CDVA representatives and CalVet Board members.
- CalVet Home and Farm Loans
  - ◆ Disseminate information to California veterans to ensure the highest possible level of participation

Attachment (1)

## Lieutenant Colonel Thomas A. Richards, USMC (Ret.)

### Community Service Activities

LtCol. Richards retired from active duty at Washington, DC, in 1995 and returned to California—where he had served several active-duty tours—shortly thereafter. He had been active in serving his communities for nearly more than a decade. While living in Virginia, he served as the Programs' Chairperson of the National Capitol Chapter of the American Society for Quality, as Vice President of the Northern Virginia Chapter of the American Society for Quality and Productivity, and Programs Chairperson for the National Capitol Commandery of the Naval Order of the United States. In the latter capacity, he instigated changes that resulted in more events, events that more closely adhered to the mission of the organization, and events that attracted greater attendance than had previously been achieved. One of those events, a debate of the Kimmel-Short Pearl Harbor responsibility controversy between the famous WWII submarine skipper, naval hero, and best-selling author (*Run Silent, Run Deep*), Captain Ned Beach, and military historian, Dr. Joseph Strange, was extremely successful in promoting the Naval Order of the United States and the National Capitol Commandery. He has continued his affiliation with the Naval Order of the United States and in 2004 served on the planning committee for its National Congress, which was held in San Diego during Fleet Week in October, 2004.

A recipient of the Navy Cross, LtCol. Richards is active in the Legion of Valor (chartered by Congress in 1890, the Legion of Valor regular membership comprises recipients of the Congressional Medal of Honor and of the Navy Cross, Distinguished Service Cross, and/or Air Force Cross) in which he served as the National Commander for fiscal year 2008 and continues to serve as the Commander of California Chapter, the largest and most active of all Legion of Valor chapters. In his capacity as a national officer, he is spearheading an initiative to develop a national marketing strategy to gain greater recognition for the organization. In pursuit of that objective, in 2004 he coordinated the participation of thirteen Legion of Valor members (three Congressional Medal of Honor and thirteen service cross recipients) in the opening ceremony of the national convention of the Navy League of the United States. Additionally, he instigated Legion of Valor participation in Fleet Week, which resulted in the "Sea Services Salute to Heroes," a reception, coordinated jointly by Fleet Week San Diego and the Naval Order of the United States, on board the USS Midway on Friday, 15 October 2004. He also served as the chair of the Society's Museum Committee, which oversaw the staff of the Legion of Valor Museum in Fresno. As the Southern California Chapter commander, he implemented a new newsletter format, is regularizing the meeting schedule, improving the quality of the meeting programs, improving communications with Chapter members, and attracting greater attendance at the meetings. During 2005, he combined the two California chapters into one and now coordinates events and communications statewide.

LtCol. Richards served four terms as a member of the board of directors of the MCRD [San Diego] Museum Historical Society. During 2004, he served as chairperson of its strategic planning and marketing committees. That strategic planning process resulted in: a board of directors committee restructuring, including specific responsibility assignments for each of those committees; a capital campaign planning initiative; revised by-laws; and the board approval to hire an executive director of the Society. He assumed responsibility of chairperson of the board's Marketing Committee in July, 2004.

From 2003 to 2005, he served on the board of directors of Veterans' Villages of San Diego, co-chaired its strategic planning process, which developed provided a strategy for its growth in



its new facility. He also served as a member of VVSD's Capital Campaign and Finance Committees and worked to develop a board of directors' recruitment and orientation policy.

Widely known in San Diego for his service with Spirit of the Fourth, Inc., which produces the Independence Day celebration in Rancho Bernardo each year, LtCol., Richards is in his eighth year of participation on the committee, including five years as president and two as 1<sup>st</sup> vice president/immediate past president. The celebration includes a VIP reception, a community fair during the day, with a pancake breakfast, booths, vendors, entertainment, a vehicle show, a veterans' memorial service, a parade, and in the evening more entertainment and a grand fireworks show. As president, he reorganized the board of directors and the planning committee and recruited new members. During his tenure as president and 1<sup>st</sup> vice president, Spirit of the Fourth, Inc., has added activities to its schedule, improved the overall quality of the celebration, and increased both community participation and attendance at the event. As costs rose, he successfully spearheaded the efforts to increase revenues (from \$28,000 in 1999 to more than \$70,000 in 2006) which allowed the organization to have some reserve operational funds. He supervised the production of the annual magazine and improved its advertising revenues while also improving its content. Under his leadership, Spirit of the Fourth, Inc., continues to strive to improve the Independence Day activities. Finally, he coordinates the participation of the Legion of Valor in the memorial service and the parade and assists in coordinating active duty military participation in the celebration. He will serve again as president for the 2009 Independence Day celebration.

LtCol. Richards is active in the Rotary Club of Rancho Bernardo. In 2002, he served as on the International Committee as the Polio Eradication Campaign representative and raised \$6,500 (from 100 members) for Rotary's international campaign to eradicate polio from the Earth. In 2003, he served as the Club's coordinator for a three-club international grant of more than \$20,000 for a "Village Banking" project in Ecuador. Additionally, he coordinated the Club's participation in the Spirit of the Fourth Independence Day activities and as the coordinator of the club's sponsorship of Marine Wing Communications Squadron-38 at MCAS, Miramar. He served for three years on the Club's board of directors and also for two years on the board of directors of the Club's fundraising arm, the RB Rotary Foundation. He is currently the project coordinator of the effort to establish a Rotary Club on the Marine Corps Air Station, Miramar, which will be only the second service club on an active military base.

LtCol. Richards served three years on board of directors of the Rancho Bernardo Historical Society in 2004, which established a temporary museum facility at the Bernardo Winery early in 2005 and is planning for a permanent headquarters and museum. In 2005, he was re-elected to the board and as 2<sup>nd</sup> Vice President, in which he served until 2006.

On the environmental front, LtCol. Richards served for two years on the fund-raising committee of the Blue Sky Community Foundation, helping to plan the fundraising gala event. The 2005 Gala fund-raising event occurred in March and raised nearly \$50,000 for the Blue Sky Reserve and the 2006 raised even more. He served as co-chair of information systems and software representative on the committee and was appointed to its board of directors in 2007.

LtCol. Richards previously served three years as a vice commander of the General J.P. Holland Chapter of the Military Order of World Wars and for two years as a member of the board of directors of the Rancho Bernardo Veterans Memorial Committee, which produces three memorial services each year at the Veterans' Memorial in Rancho Bernardo. He served in 1997 as the marketing representative on the planning committee of the Four Chaplains'



commemoration which occurred at the Organ Pavilion in Balboa Park and attracted an audience of 700. And, he helps plan reunions of his Marine Corps Officers' Basic School class of 1974. For six years, LtCol. Richards has nominated panelists for and participated in annual San Diego NROTC's Combat Leadership Panel at the University of San Diego.

From 2005 to 2007, LtCol. Richards served as the Marine Corps Committee Chair of the San Diego Council of the Navy League. In that role, he coordinated the Council's award recognition for Marines and Sailors of the Quarter and Marines and of the Year, represented the Council at the award presentations, also presided as master of ceremonies at the Council's annual Marine Corp Birthday Luncheons. He continues to serve on Marine Corps Committee. He also serves as the senior vice commandant of the San Diego Bulldog Detachment 835.

LtCol. Richards also produces the "Band of Brothers Marine Corps Birthday Celebration" each year on 10 November. Active duty, former and retired Marines, members of the Marine Corps family, and sister service members are welcome at the event. Demographically, the 2003 event included attendance by three general officers, a former private first class, a reserve corporal, and all ranks between, including Marine veterans of Guadalcanal, Iwo Jima, Korea, Vietnam, Desert Storm, Somalia, and Iraqi Freedom, a Congressional Medal of Honor and four Navy Cross recipients, and two former Navy corpsmen and two Army Vietnam veterans. The 2005 event included twenty-one active duty members, including five Marines recuperating from combat wounds at the Balboa Naval Medical Center, and was the largest event to date.

In July, 2004, Fifth District City Council Member Brian Maienschein has asked LtCol. Richards to serve as the 5<sup>th</sup> District Veterans' Liaison. In that role, he met with staff members of the San Diego Housing Commission regarding low cost housing for veterans.

An active member of the San Diego County United Veterans Council, LtCol. Richards was recognized as the Marine Corps honoree at the first annual San Diego County Veterans' Ball in June, 2005. He served as the chair person of the first annual San Diego County Veterans' Seminar & Resource Fair, a full-day event in Balboa Park which occurred in June 2007 included: the Seminar with six hours of discussion forums; a luncheon with RADM Ronne Froman, USN (Ret.) as the keynote speaker; and the Resource Fair with more than seventy veteran-oriented vendor booths. He also chaired the 2007 event, partnering with the California Employment Development Department, which was even more successful. In November, 2006, he was elected to the chairpersonship of the San Diego County United Veterans' Council and was reelected for the 2008 term.

In 2007, LtCol Richards was elected to the board of directors of the San Diego Veterans Museum and Memorial Center in Balboa Park and he is the co-chair of its Marketing Committee. In 2006 he became a mentor to the San Diego State University Student Veterans Organization and continues to serve in that role. As a result of his advocacy of veterans' issues, he was appointed by Governor Arnold Schwarzenegger in February 2008 to a four-year term on the California Veterans Board, which establishes policy for the California Department of Veterans Affairs. In April, 2008, he was elected as the acting secretary of the California State Commanders Veterans Council (a non-profit organization comprising the State leadership of twenty veterans organizations) and in October was elected to a full term in that role.

During 2005, LtCol Richards delivered leadership presentations to the Southern California Military Order of World Wars' Youth Leadership Conference at the University of San Diego and to the Freedom Foundation of the Michigan National Guard in Alpena, Michigan. He also

delivered patriotic presentations at the Rancho Santa Fe Republican Womens' Club's "Salute to America" and monthly meetings of the Mission Valley Rotary Club and the DeAnza Chapter of the Daughters of the American Revolution. He delivered informational presentations about the Vietnam Veterans of San Diego homeless shelter to a Legion of Valor chapter meeting and a monthly meeting of the Navy League.

In recognition of his community service, LtCol Richards was selected in 2005 for membership in the Rancho Bernardo Hall of Fame, one of only ninety-selectees since 1974 and of forty-three living members. In 2007 he served on the selection committee for the 2008 nominees.

LtCol. Richards is a life member of the Legion of Valor, the Military Officers Association of America, the Military Order of World Wars, The Military Order of the Carabao, the 1<sup>st</sup> Marine Division Association, the Third Marine Division Association, the Naval Order of the United States, the Marine Corps Scout Sniper Association, the Military Order of the Purple Heart, the Navy League of the United States, and Veterans of Foreign Wars. He is an annual member of the Marine Corps Association, the Marine Corps Heritage Foundation, the Marines Memorial Association, the American Legion, the Marine Corps League, the Disabled American Veterans, the Society for Military History, the Sierra Club, the National Geographic Society, the Wilderness Society, the National Wildlife Society, the Highpointers Association, the American Hiking Society, the Professional Association of Diving Professionals, The San Pasqual Volunteer Battlefield Association, and more.





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Office of the Mayor  
Honorable Ronald V. Dellums  
Mayor

PHONE: 510-238-3141  
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December 11, 2008

The Honorable Darrell Steinberg  
Chairman, Senate Rules Committee  
California State Senate  
State Capitol Room 420  
Sacramento, CA 95814

Dear Senator Steinberg:

Thank you for giving me the opportunity to discuss with the Committee my short and long term goals as a commissioner on the Commission on the Status of Women. In the immediate future, I intend to highlight the concerns of women and girls in the Bay Area and specifically, in Oakland. In Oakland, women face such barriers to success as child prostitution, illiteracy, childhood obesity, asthma and much more. Many of these concerns have been captured in the legislative agenda recently voted on by the Commission. In the long term, I intend to focus on education. I believe that children should be allowed to establish the life-long love of learning that will provide them with the foundation to make informed life decisions and propel them into prosperous and productive future. I also believe that the Arts play a large role in providing an educational tool to teachers and students alike and can enhance all curriculums. Every child should have access to arts education at their respective campus. In Oakland and in California, our school system has not yet reached this potential. I intend to assist in making it so.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Dellums".

Cynthia L. Dellums  
First Lady, City of Oakland

**Senate Rules Committee**

DEC 16 2008

**Appointments**





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Certified Shorthand Reporter  
CSR No. 6713

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Appeals Board  
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MEMBERS PRESENT

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2  
3  
4 SENATOR DARRELL STEINBERG, Chair  
5 SENATOR GIL CEDILLO  
6 SENATOR SAMUEL AANESTAD  
7 SENATOR ROBERT DUTTON  
8 SENATOR JENNY OROPEZA  
9  
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STAFF PRESENT

12 JANE LEONARD BROWN, Committee Assistant  
13 NETTIE SABELHAUS, Appointments Consultant  
14 SANDY KENYON, Principal Consultant  
15 DAN SAVAGE, Assistant to SENATOR CEDILLO  
16 BILL BAILEY, Assistant to SENATOR AANESTAD  
17 CHRIS BURNS, Assistant to SENATOR DUTTON  
18 BRENDAN HUGHES, Assistant to SENATOR OROPEZA  
19

ALSO PRESENT

22 PHYLLIS W. CHENG, Ph.D., Director, Department of  
Fair Employment and Housing  
23  
24 CYNTHIA D. FLORES, Member, California State Lottery  
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1 CHAIRMAN STEINBERG: Item three. Let's get  
2 to the important stuff. We have governor's  
3 appointees appearing today. I'd like to ask  
4 Phyllis Cheng, who has been nominated or appointed to  
5 be the director of the Department of Fair Employment  
6 and Housing, and our colleague, Senator Carl Liu,  
7 will introduce the nominee.

8 welcome.  
9 SENATOR LIU: Thank you very much, Senator  
10 Senator Pro Tem Steinberg and members of the Rules  
11 Committee. I'm very pleased to introduce Phyllis  
12 Cheng, one of my constituents and the governor's  
13 nominee to be the director of the Department of Fair  
14 Employment and Housing, the largest state civil  
15 rights agency in the nation.

16 Phyllis is exceptionally qualified to be  
17 DFEH director. She holds a bachelor's degree, master  
18 degrees, a doctorate degree, and a law degree. She  
19 brings a balance of professional background and,  
20 therefore, great objectivity to her position.

21 As an attorney, she represented both  
22 employees and employers. She has been a Deputy  
23 Attorney General enforcing civil rights in  
24 employment, housing, and hate crimes; a research  
25 attorney at the California Court of Appeals, and a

2

CHAIRMAN STEINBERG: Good afternoon  
everybody, and welcome to the January 28th, 2009,  
meeting of the Senate Rules Committee.

I think we have a relatively brief agenda  
today, but an important agenda. Why don't we begin by  
calling the roll.

MS. BROWN: Senator Cedillo,  
Dutton.

SENATOR DUTTON: Here.

MS. BROWN: Dutton here.

Oropeza.

SENATOR OROPEZA: Here.

MS. BROWN: Oropeza here.

Anastad.

Steinberg.

CHAIRMAN STEINBERG: Here.

MS. BROWN: Steinberg here.

CHAIRMAN STEINBERG: Thank you very much.

We do have a quorum. Without objection, we'll begin,  
and the other members will hopefully get here  
expeditiously.

First of all, we have nothing at this point  
under the reference bills.

MS. KENYON: Yes, we have a packet here.

(Discussion off the record.)

1 member of the Fair Employment and Housing Commission

2 In the year she has served at DFEH as  
3 director, Phyllis has made significant reforms to  
4 civil rights enforcement in the improved efficiency,  
5 better use of technology, increased service to the  
6 public, and reduced court time and cost.

7 Given her exemplary background and  
8 outstanding record, Phyllis's continued leadership is  
9 essential to the civil rights of all Californians,  
10 and I enthusiastically support her confirmation as  
11 director of DFEH. I have never met someone so in  
12 love with her job. Thank you.

13 CHAIRMAN STEINBERG: That's a very nice  
14 commendation and a very nice opening. Thank you,  
15 Senator Liu.

16 Phyllis -- Ms. Cheng, I'm sorry. Please, if  
17 you would like to make a brief opening statement,  
18 that would be great.

19 MS. CHENG: Senator Liu, thank you so much  
20 for your gracious introduction. I am so lucky to  
21 have you as my senator.

22 Chairman Steinberg, honorable members of the  
23 Committee, thank you for this opportunity to appear  
24 before you. I was deeply honored when Governor  
25 Schwarzenegger appointed me director of the Department

3



1 of Fair Employment and Housing.  
2 After having had the honor and privilege of  
3 serving in this position for almost one year, I can say  
4 with the utmost conviction and enthusiasm that this is  
5 the best job in the world. I am proud to say that the  
6 DFEH is the largest and finest state civil rights agency  
7 in our nation. The department's dedicated and  
8 professional workforce is unmatched in civil rights  
9 enforcement. I consider it the highest privilege to be  
10 asked to lead such an outstanding organization and  
11 valiant staff.

12 Senators, in the year that I have directed the  
13 DFEH, I have seen the department carry on its proud  
14 tradition of civil rights enforcement into a new era.  
15 Using available technology, the department has improved  
16 its efficiency and effectiveness in serving the public  
17 by automating an online appointment system by  
18 transitioning from in-person to telephone intakes and by  
19 better targeting the right amount of resources to  
20 investigations using a case-grading system.

21 At the same time, the DFEH has reached out  
22 to employers, housing providers, and businesses to  
23 proactively prevent these violations. We have  
24 produced acclaimed videos to outreach to young people  
25 about their rights and responsibilities in the

4

1 workforce.

2 On this 50th anniversary of the Fair  
3 Employment and Housing Act, the department is  
4 collaborating with many groups to commemorate the  
5 half-century mark of California civil rights law.

6 If confirmed, I will devote myself to  
7 carrying out the department's noble civil rights  
8 mission for all Californians. I will provide the  
9 leadership, management, and energy necessary to  
10 enable my talented and dedicated staff to do their  
11 jobs as effectively and efficiently as possible.

12 Mr. Chairman, the governor has honored me  
13 with this appointment. You and the members of this  
14 committee have added to that honor by your courtesy  
15 in hearing my testimony today, and in my meetings  
16 with your staff.

17 Thank you, Mr. Chairman, for the opportunity  
18 to be heard. Thank you.

19 CHAIRMAN STEINBERG: Thank you very much,  
20 Ms. Cheng. We appreciate that.

21 Are there questions from members of the  
22 Committee? I know I have one or two.

23 Senator Oropeza, why don't you go first.

24 SENATOR OROPEZA: Thank you for being with  
25 us today. I just had one question with regard to the

5

1 backlog, which I understand -- I guess it would be  
2 called a backlog.

3 There are -- Complaints expire after a year  
4 if they're not concluded; is that correct?

5 MS. CHENG: Yes. Senator --

6 SENATOR OROPEZA: And when you started,  
7 wasn't there a great big backlog, and it was reduced  
8 over --

9 MS. CHENG: We don't have backlog in the  
10 traditional sense that, say, the federal government  
11 would have at the EEOC, because they do not have a  
12 statutory period that expires. So there are periods  
13 of backlog.

14 SENATOR OROPEZA: Right. I guess I should  
15 say expirations.

16 MS. CHENG: Yes.

17 SENATOR OROPEZA: There were more  
18 expirations.

19 MS. CHENG: We have a few cases that have  
20 gone beyond the 365 days, but not very many days  
21 beyond 365 days. It could be 366, it could be  
22 370 days. And the reason for that is sometimes we  
23 are trying to resolve these cases, and the parties  
24 cannot agree to a settlement. So we do work on  
25 those, but you cannot really force it beyond, you

6

1 know, even though the statutory period is ending.

2 So we do work on those in as timely manner  
3 as we can, and we have, in fact, reduced those cases  
4 that have gone beyond 365 days from over 80 cases to  
5 just over 60 cases.

6 SENATOR OROPEZA: That's what my  
7 understanding was. To what do you attribute that  
8 reduction, that improvement?

9 MS. CHENG: Staff effort, better efficiency.  
10 Having automated a lot of the work we do, we have  
11 more resources available to devote to settlement and  
12 mediation.

13 SENATOR OROPEZA: Do you think there will  
14 come a day when there will be no one whose  
15 application or appeal expires?

16 MS. CHENG: We certainly are working on  
17 that, Senator. I hope that day will come.

18 SENATOR OROPEZA: Yes. I was just wondering  
19 in the climate that we're in now, and I know the  
20 governor has asked for reductions from all  
21 departments, so I'm sort of asking in that context.

22 This is a really important department, as  
23 you know, and I was just wondering do you anticipate  
24 continuing to improve, or do you think it's going to  
25 be tougher, or --

7

1 MS. CHENG: Senator, I anticipate that we  
2 will improve. The staff is extremely motivated. We  
3 are putting in systems that make it more efficient.  
4 We're using technology, and I think that's why we're  
5 seeing the results of that right now.

6 SENATOR OROPEZA: Very good. Okay. Thank  
7 you.

8 MS. CHENG: Thank you.

9 CHAIRMAN STEINBERG: Thank you very much,  
0 Senator.

1 A couple questions myself. As I understand  
2 it, Ms. Cheng, the department has commissioned,  
3 essentially, a performance audit through UCLA and  
4 Rand to look at not only past accomplishments, but to  
5 make recommendations about the future. When will the  
6 study be completed, and will it be shared with the  
7 legislature?

8 MS. CHENG: Senator, yes. I have asked UCLA  
9 and the Rand Corporation, which has a public policy  
0 program, to devote its energies to studying the  
1 massive amount of data we have collected at the  
2 department. Just in the 12 years, we have almost a  
3 quarter million cases that have come through us.  
4 And, of course, the purpose of the study is to assess  
5 how far the law has come, what it has achieved, how

1 objective, necessarily, here, as the person that  
2 leads the agency, but if you can give us your  
3 perception whether or not practitioners and others  
4 feel the DFEH is still kind of a mill, a passageway  
5 where you have to go through in order to get to  
6 court, or whether or not you really are able  
7 resource-wise or otherwise to grapple  
8 administratively to resolve issues of discrimination.

9 MS. CHENG: Senator, the statute, the Fair  
10 Employment and Housing Act, provides that all  
11 employment complainants must exhaust their  
12 administrative remedies through the department, and  
13 that is the reason why all the complaints come to us.

14 CHAIRMAN STEINBERG: I know that.

15 MS. CHENG: Partly because of the success of  
16 the work of the department in prosecuting these cases  
17 both before the administrative body, which is the  
18 Fair Employment and Housing Commission, and in civil  
19 court. We have really developed the law in such a  
20 fashion that today, as compared to when we first  
21 started, the employment bar is gigantic. There's a  
22 huge professional corps of attorneys doing this work  
23 both on the plaintiff's as well as on the defense  
24 side.

25 So, naturally, because there is a very

1 it can perform even better, and which direction it  
2 may go in the future. And, yes, I will make every  
3 effort when that report is done, hopefully by the end  
4 of the year, end of 2009, to make that available to  
5 all policymakers and all stakeholders and put that on  
6 our Web site. And, hopefully, that will be an  
7 important document in the future for shaping the  
8 future of the Fair Employment and Housing Act.

9 CHAIRMAN STEINBERG: All right. Thank you.

0 The other question is this: I noted in the  
1 background file here that of the almost 20,000  
2 complaints filed last year, that for almost half of  
3 them, 9,300, a so-called right-to-sue letter was  
4 issued right away without there being any  
5 investigation. And it kind of harkens back, because  
6 I'm a former practitioner before your agency when I  
7 used to do labor law, and the reputation 15, 20 years  
8 ago of the DFEH was the following: Good people,  
9 understaffed, under-resourced, and, frankly, a bit of  
0 a mill. You know, you file your complaint, you've  
1 got to go through the administrative -- you know,  
2 you've got to go through the administrative process;  
3 but what you're really looking for is your ticket to  
4 go to court to file a discrimination suit.

5 And I'm wondering -- I know you're not

1 sophisticated bar, you're going to get a lot of people  
2 who are going to be approaching attorneys who are  
3 well-qualified and who advise them to come and seek a  
4 right-to-sue letter right away, because they don't  
5 intend to stay in the administrative system. That is  
6 why we've seen a growth in the number of right-to-sue  
7 requests, and that is why we responded to that by  
8 creating an automated system.

9 Now, half of the other cases still stay in our  
10 system. So of the other 10,000 or so cases that stay,  
11 some people will stay long enough to get the  
12 investigative evidence and then leave the system. We  
13 take care of the rest of these cases. About one-third  
14 of the cases will generally not have sufficient  
15 evidence, but of the remaining ones, we actually  
16 prosecute those cases very effectively -- that's still  
17 over 2,000 cases -- and we settle the vast majority of  
18 them, and we also prosecute them. And through our  
19 prosecution, we've reached very large judgments and  
20 settlements and -- that are very satisfactory to both  
21 the complainants involved as well as to the respondents,  
22 the businesses and landlords and employers, because it  
23 would have cost so much more had they been in court.

24 CHAIRMAN STEINBERG: How many successful  
25 prosecutions a year, on average?



1 MS. CHENG: Well, out of about 100  
2 accusations issued, I would say 95 percent or more.  
3 CHAIRMAN STEINBERG: So it's a hundred. A  
4 hundred is the base out of the 20,000 that go from an  
5 initial complaint to accusation?  
6 MS. CHENG: Yes, because we resolve nearly  
7 2,000 of them.  
8 CHAIRMAN STEINBERG: I understand.  
9 Last question. What is the average caseload of  
10 your discrimination investigators?  
11 MS. CHENG: I believe the average caseload  
12 varies, depending on whether they do housing or  
13 employment cases, but I would say about 75 to  
14 80 cases would be the average caseload for our  
15 consultants who are often investigators.  
16 CHAIRMAN STEINBERG: And is that -- I mean,  
17 think about different ratios to maybe completely  
18 inapplicable -- class-size reduction, social-worker-  
19 to-child ratios. What kind of workload is that for  
20 analysts? Can they spend the amount of time that  
21 gives you the confidence that they can be thorough  
22 with caseloads of 65, 70, 75 cases?  
23 MS. CHENG: Senator, and that is why we are  
24 now creating a new system of processing the cases  
25 which we're putting in place -- it's called a

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1 case-grading system -- so we can see at the outset  
2 how complex the cases are and what kind of time is  
3 required for the investigation so that the more  
4 complex cases will be assigned to more experienced  
5 consultants for investigation. We anticipate them to  
6 take more time. We'll have attorneys working with  
7 them at the outset.  
8 And for the cases which are more simple and  
9 straightforward, we would assign to our more junior  
10 consultants so that all the cases are dealt with in a  
11 manner that receives resources they deserve.  
12 CHAIRMAN STEINBERG: Okay. Thank you very  
13 much. I just wanted to make sure that you are  
14 leading an agency that has the capacity, if you will,  
15 to do all that the statute charges the agency with  
16 doing, and it keeps people out of court.  
17 Anyway, witnesses in support? Very briefly.  
18 Mr. Feuer, welcome.  
19 MR. FEUER: Thank you very much,  
20 Mr. Chairman, Mr. President, members of the  
21 Committee.  
22 I can tell in a moment where brevity is all  
23 but necessary here, but let me just underscore my  
24 constituent, Ms. Cheng.  
25 As you've heard, this marvelous --

13

1 CHAIRMAN STEINBERG: Can you introduce  
2 yourself for the record.  
3 THE WITNESS: Oh, yes. I'm sorry.  
4 I'm Mike Feuer. I represent the 42nd  
5 Assembly District.  
6 This marvelous, wide-ranging background, pretty  
7 much having done anything that might be relevant to this  
8 role, and she's done it all with great distinction, and  
9 it's no surprise that her role at the department has  
10 continued to exemplify the kind of leadership that all  
11 of us want there, firm, reform-minded, steady, balanced  
12 leadership designed to be cost effective, and, most  
13 importantly, from the standpoint of workers, very  
14 responsive. So I'm delighted to be here and to lend my  
15 voice in support for a candidate who undoubtedly can  
16 look at the total picture for the committee. Thank you  
17 very much.  
18 CHAIRMAN STEINBERG: Thank you very much,  
19 Mike. We appreciate it.  
20 Other witnesses in support?  
21 By the way, Ms. Cheng, is there any member  
22 of your family that you want to introduce, or anybody  
23 special -- anybody that you would like to introduce?  
24 MS. CHENG: Thank you, Senator. They're  
25 either at school or busy with other things.

14

1 CHAIRMAN STEINBERG: I just wanted to make  
2 sure you had the opportunity.  
3 MS. MALANA: Senator Steinberg and  
4 distinguished members of the Senate Rules Committee,  
5 my name is Jerri Malana, and I'm a partner with the  
6 law firm of Littler Mendelson in our San Diego  
7 office, and I'm here with other partners,  
8 Garry Mathiason and Bruce Sarchet.  
9 Littler Mendelson has over 760 lawyers  
10 nationwide, and in California we have over 240  
11 attorneys. And we're the largest law firm in the  
12 world devoted to representing management in  
13 employment and labor law matters.  
14 And Littler Mendelson proudly supports  
15 Phyllis Cheng's confirmation as director of the  
16 Department of Fair Employment and Housing. She is  
17 well-qualified to be the director. You heard already  
18 that she has a balanced background. She has the  
19 employer/management side background. She was a  
20 valued colleague in our Los Angeles office. Phyllis  
21 was an attorney in our L.A. office. She also has the  
22 employee side, as in her work experience she formerly  
23 worked as a plaintiff's attorney for the esteemed  
24 law firm of Hadsell & Stormer. So she has that  
25 background.

15



1 She's also worked as a neutral. Ms. Cheng  
2 has worked as a certified arbitrator, as well as a  
3 certified mediator. She also has public-sector  
4 experience along with her private-sector experience.  
5 You've also heard that she's worked as judge pro tem  
6 in Los Angeles County Municipal Court, and she's also  
7 served as a senior appellate court attorney for a  
8 Court of Appeal.

9 In addition to her job, she also gives back  
0 to the legal profession by being active with the  
1 State Bar of California. She served on the committee  
2 of bar examiners, as well as the executive committees  
3 for the labor and employment law section as well the  
4 public law section.

5 We've heard about her scholars -- and I know  
6 time is brief.

7 CHAIRMAN STEINBERG: Please.

8 MS. MALANA: I wanted to, on a personal  
9 note, let you know that along with my role as an  
0 attorney at Littler, I also am the president of the  
1 San Diego County Bar Association. We are the largest  
2 legal- related organization in the region, with over  
3 10,000 members, and Ms. Cheng has come to San Diego  
4 and addressed our labor and employment section and  
5 our members with regard to the initiatives and

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1 mission of the Department of Fair Employment and  
2 Housing, and we were pleased to have her in  
3 San Diego.

4 And I was also pleased to have her support  
5 at my own personal swearing in as president, because  
6 I'm the first Asian Pacific-American attorney to hold  
7 the position in 110 years in San Diego, and it goes  
8 to show that Ms. Cheng also supports and mentors  
9 others in the community and is dedicated to  
0 increasing diversity and inclusion in our profession.  
1 So on a personal note, I wanted to be here.

2 CHAIRMAN STEINBERG: Thank you very much for  
3 your testimony, and congratulations to you on your  
4 honors.

5 MS. MALANA: Terrific. And, again, Littler  
6 Mendelson proudly supports Phyllis Cheng's  
7 confirmation. Thank you.

8 CHAIRMAN STEINBERG: Thank you.

9 Next witness. Again, if you could be very  
0 brief.

1 MR. HOROWITZ: I will, of course, Senator.

2 Good afternoon, Senators. I'm Phil  
3 Horowitz. I'm here on behalf of the California  
4 Employment Lawyers Association, which is a statewide  
5 association of more than 850 lawyers who represent

17

1 employees in discrimination and other cases.

2 I'm here to enthusiastically support Phyllis  
3 Cheng as director of the Department of Fair  
4 Employment and Housing. She's smart, she's  
5 hardworking, she's very productive. I've known her  
6 for six years or so. We served together on the  
7 executive committee of the state bar's labor and  
8 employment law section when she was editor-in-chief  
9 of the *Law Review*. She did a great job on that. She  
10 still sends out case alerts about all the newly  
11 decided appellate cases in California -- a couple  
12 times a day they come out -- as continuing her  
13 volunteer work.

14 The automated right-to-sue-letter system  
15 that she set up helped very much. The lawyers do  
16 want to just get an immediate right-to-sue letter and  
17 go to court. It allows you to keep control of  
18 everything. It saves them time. And her idea of  
19 doing, basically, a case-triage system where she  
20 divides cases into ones that need a more thorough  
21 investigation versus ones that need fewer is a good  
22 step forward in efficiency for the department. We  
23 support her wholeheartedly.

24 CHAIRMAN STEINBERG: Thank you.

25 MR. HOROWITZ: Thank you. Good luck.

18

1 MS. PEREZ: Good afternoon, Senators. My  
2 name is Patti Perez, and I'm an employment attorney  
3 in San Diego. I'm also a newly appointed member of  
4 the Fair Employment and Housing Commission and am  
5 proud to be working with Phyllis as a commissioner.

6 I'm here, however, representing the section  
7 of -- the labor and employment law section of the  
8 California State Bar, as I serve as vice chair on  
9 that committee. Phyllis and I serve together on that  
10 committee, and, as Phyllis mentioned briefly, she did  
11 outstanding work on that committee on behalf of our  
12 6,000-plus members that represent the entire gamut of  
13 employment attorneys.

14 We recently did a membership survey, and the  
15 top two benefits that our members found to be of most  
16 value were the *Law Review*, which I can proudly say  
17 that Phyllis was the primary reason for its wonderful  
18 quality, and the second was specifically Phyllis's  
19 e-alerts. That's how we refer to them. So it is  
20 something that all of our members have benefited  
21 from, and these are members or attorneys who are key  
22 constituents to the Department of Fair Employment and  
23 Housing.

24 One of the points I thought was really  
25 relevant or really important that I've heard a lot of

19

1 our members talk about is that Phyllis has brought  
2 relevance back to the DFEH, and I think that's very  
3 important.

4 CHAIRMAN STEINBERG: Thank you very much.

5 SENATOR OROPEZA: Excuse me. May I ask you  
6 do you represent employers or employees?

7 MS. PEREZ: I actually have a consulting  
8 company, so I do neutral work.

9 MS. PEARLMAN: I promise I'll be brief, but  
10 I have to tell you this is --

11 CHAIRMAN STEINBERG: Your name first.

12 MS. PEARLMAN: Paula Pearlman, dear friend  
13 of Phyllis. I'm also the executive director of the  
14 Disability Rights Legal Center, so I'm really  
15 bringing diversity to this table as well, to this  
16 esteemed body, so thank you very much.

17 Phyllis has all the qualities you want,  
18 e-mails at two in the morning on the e-alert  
19 responding to mine, because we both became executive  
20 directors --

21 CHAIRMAN STEINBERG: And that's a good  
22 thing?

23 MS. PEARLMAN: It's fabulous. I know, of  
24 course, you want your public servants and your  
25 nonprofit lawyers to be working efficiently. We take

20

1 time off. Phyllis has a wonderful family. I can  
2 speak on their behalf. Maxwell is her son who has  
3 autism, and he volunteers for me, and he has for the  
4 past year, and I just brought him into a grant so I  
5 can pay him and not be a volunteer. And her daughter  
6 and --

7 We gave a reception for Phyllis, and those  
8 kids showed up. And they love their mom. So even  
9 though she's busy at two in the morning, they know  
10 that. Her family comes first, so don't worry about  
11 our personal lives.

12 CHAIRMAN STEINBERG: All right. I'm not. I  
13 promise.

14 MS. PEARLMAN: Really, it's a privilege to  
15 be here. There's unemployment with people with  
16 disabilities at an all-time high. The accessible  
17 housing stock is diminishing due to loopholes and new  
18 construction rules and accessibility statutes, and  
19 the DFEH is an essential institution for people with  
20 disabilities.

21 We have an options counseling line, over  
22 7,000 calls a year. We refer people to the  
23 Department of Fair Employment and Housing who have  
24 both employment and housing discrimination cases  
25 related to their disability. She's --

21

1 CHAIRMAN STEINBERG: Okay. Thank you.

2 MS. PEARLMAN: So she's fabulous. Thank you  
3 very much.

4 CHAIRMAN STEINBERG: Thank you very much.

5 Are there any witnesses in opposition to the nominee?

6 SENATOR OROPEZA: I'll move the vote in  
7 support.

8 CHAIRMAN STEINBERG: Moved.

9 It's obvious that you are well-respected,  
10 well-regarded, and well-liked, and I am pleased to  
11 support your confirmation. The only thing I ask is  
12 that you come to us if you feel the agency does not  
13 have sufficient capacity or resources to be able to  
14 genuinely protect people from discrimination, because  
15 we like to believe we have made great advances, and  
16 we have, but we know that we still have a long way to  
17 go, and I want to make sure that this agency is  
18 really working on behalf of the people who are such  
19 victims.

20 Please call the roll on the nominee.

21 MS. BROWN: Senator Cedillo.

22 SENATOR CEDILLO: Aye.

23 MS. BROWN: Cedillo aye.

24 Dutton.

25 SENATOR DUTTON: Aye.

22

1 MS. BROWN: Aye.

2 Oropeza.

3 SENATOR OROPEZA: Aye.

4 MS. BROWN: Oropeza aye.

5 Aanestad.

6 SENATOR AANESTAD: Aye.

7 MS. BROWN: Aanestad aye.

8 Steinberg.

9 CHAIRMAN STEINBERG: Aye.

10 MS. BROWN: Steinberg aye.

11 CHAIRMAN STEINBERG: Thank you very much.

12 Your nomination will go to the floor of the state

13 Senate. I believe we take it up --

14 MS. SABELHAUS: Next week.

15 CHAIRMAN STEINBERG: Next week.

16 MS. CHENG: Thank you very much, Senator.

17 CHAIRMAN STEINBERG: Thank you very much.

18 Senator Aandestad, my fault. We had a  
19 little time mix-up here, so we want to lift the call  
20 on the reference bills here.

21 SENATOR AANESTAD: Okay.

22 MS. BROWN: Senator Cedillo.

23 SENATOR CEDILLO: Aye.

24 MS. BROWN: Cedillo aye.

25 Aanestad.

23



1 SENATOR AANESTAD: Aye.

2 MS. BROWN: Aanestad aye.

3 CHAIRMAN STEINBERG: Very good. That  
4 measure passes.

5 Why don't we take number two here before we  
6 go to the next nominee. I understand Senator  
7 Aanestad has something to raise before we take a  
8 motion on the standing rules of the Committee -- the  
9 standing rules of the Senate. Excuse me.

0 (Discussion off the record.)

1 CHAIRMAN STEINBERG: All right. Very good.

2 Next we want to call up Cynthia Flores, who  
3 has been appointed as a member of the California  
4 Lottery Commission, and I want to welcome our  
5 colleague, Senator Denise Ducheny, to introduce her.

6 SENATOR DUCHENY: Thank you very much.

7 Mr. Chairman and members, I just wanted to  
8 take the opportunity to introduce one of our  
9 residents of the Coachella Valley, Cynthia Flores,  
10 who has been a member of the lottery commission since  
11 last March, so almost a year now.

12 She is a dean of students, associate dean,  
13 at Cal State University San Bernardino at the  
14 Palm Desert campus, and I've known her prior to that  
15 where she also served on the Imperial Valley campus

24

1 negatively to.

2 Having those committees, having a full  
3 commission who can then engage in that appropriate  
4 oversight can push the staff to give them the  
5 appropriate information when they seem reluctant to  
6 do so.

7 We hope they're listening. You know, it's  
8 something that would help us all on the budget  
9 committees and on the other issues with the lottery,  
10 and so -- particularly for that leadership on the  
11 audit committee -- in the hope that somebody with a  
12 little experience now can help keep that program back  
13 on line as we try to seek increased revenues and  
14 dedicate -- ensure that our education systems get  
15 what they're entitled to out of that system.

16 I recommend to you and am happy to be here  
17 to introduce Cynthia Flores.

18 CHAIRMAN STEINBERG: Thank you very much,  
19 Senator Ducheny.

20 Ms. Flores, welcome.

21 MS. FLORES: Thank you.

22 CHAIRMAN STEINBERG: Would you like to make  
23 a brief statement?

24 MS. FLORES: Sure.

25 CHAIRMAN STEINBERG: Or you don't have to.

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1 of San Diego State.

2 And for reasons that are still a mystery to  
3 me, she chose to apply for this job, but I think what  
4 she's been doing there has been positive. I think  
5 her interest actually stems from the side that gets  
6 money, which are the universities and the schools,  
7 and trying to make sure that the lottery is as  
8 effective as it can be in producing some income to  
9 those institutions and to education.

10 She's been concerned about the integrity and  
11 the fairness and the security of the system, and she  
12 has been -- and her most interesting accomplishment,  
13 I think over the year, that I want to point out to  
14 the Committee, as the Committee views others, and I  
15 know there was a discussion last year and a lot of  
16 you will remember some of the controversy around the  
17 problem with the lottery and how they were spending  
18 their money, and Ms. Flores was a leader in promoting  
19 an audit committee for the commission.

20 We encourage you to help encourage the  
21 governor to make sure we actually get a full lottery  
22 commission, because the public oversight, like  
23 Cynthia, is what can keep the directors and the  
24 systems from doing some of the things we saw last  
25 year that so many of us and the public reacted

25

1 MS. FLORES: Nice and brief.

2 CHAIRMAN STEINBERG: You're welcome to.

3 MS. FLORES: Good afternoon. I'm Cynthia  
4 Flores. I have the honor of serving on the lottery  
5 commission for nearly one year now. You need me.  
6 You need me in this position. You need me, quite  
7 frankly, because you need an educator as a  
8 commissioner on the lottery commission. It only  
9 makes logical sense to have an educator there.

10 I come with 32 years as a member of the  
11 California State University system. I've also served  
12 in the community college system for seven years. I  
13 was a high-school trustee, board member, earned my  
14 dues. So I feel that I represent different segments  
15 in education. And I come here for one simple reason:  
16 To try to increase revenues for the lottery.

17 When I left the commission meeting this  
18 morning, which I just came out of right now, I saw  
19 the individual that represents the California  
20 Teachers Association, and we spoke. And she said,  
21 you know, "We're going to lose 25,000 new teachers  
22 next year." Twenty-five thousand. She said, "Our  
23 classroom size from grades one through five is going  
24 up to 35." She said, "We can't afford to lose one  
25 penny in revenue that comes to education."

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1 And, yes, lottery seems to have, to the  
2 public, this magic big number, but it doesn't. What  
3 it translates to is a very small number, about \$145 a  
4 student. But yet that money can be used for upgrades  
5 in technology, et cetera, that's much needed. So we  
6 can't afford to lose anything in education. So I'm  
7 here to tell you, you need me, and I hope you'll have  
8 me. And I'm here to answer any questions that you  
9 might have.

10 CHAIRMAN STEINBERG: Thank you very much.

11 I'd like to begin very briefly by -- I'll  
12 tell you the number one thing on my mind when it  
13 comes to the lottery, and that is whether or not if  
14 the voters approve the securitization measure that  
15 will be on some battle in the future that the  
16 legislature approved as part of last year's budget  
17 solution, will we in fact -- Are you confident or do  
18 you know whether or not we will in fact have the  
19 potential to realize the five billion dollars or so  
20 that is plugged into the budget?

21 The reason why -- I know you're not a  
22 securities expert --

23 MS. FLORES: Thank you, because I'm not.

24 CHAIRMAN STEINBERG: -- or a bonds expert,  
25 but part of the success depends on whether we are

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1 will this affect education? Because that's what I'm  
2 concerned about. That's truly what I'm most concerned  
3 about. So that was the question placed to me this  
4 morning. So it's my understanding that the base will  
5 slightly increase for education under this plan, so I'm  
6 here to say that.

7 CHAIRMAN STEINBERG: I understand it's not  
8 your expertise. What I really want to know is  
9 whether or not -- Is there any buzz about this over  
10 at the lottery?

11 MS. FLORES: Oh, yes.

12 CHAIRMAN STEINBERG: In other words, are  
13 people talking about this, working on it, figuring  
14 out how do we get the whole five billion, or is it  
15 something that you're leaving to the Department of  
16 Finance and others? Is there a lot of talk about it?

17 MS. FLORES: Okay. On the -- Assembly Bill  
18 1654, the idea there is that we're going to try and  
19 increase our revenues, and we're going to increase  
20 our revenues by trying to find out what can we do to  
21 improve what we presently do.

22 For example, we have certain restrictions that  
23 are facing us now in the lottery. With AB 1654, some of  
24 these restrictions come off, and we have the ability to  
25 generate more funding. That's the part that is most

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1 marketing the lottery in the most appropriate,  
2 aggressive ways. You know, what's your sense of that  
3 very critical issue facing the legislature?

4 MS. FLORES: This morning when I was in  
5 Senator Aanestad's office, a similar question came to  
6 me, so I went to do my research as fast as possible.

7 CHAIRMAN STEINBERG: Good, good.

8 MS. FLORES: But it's my understanding that  
9 if this were to pass at some future time by the  
10 California voters, that the California State Lottery  
11 Commission would securitize our future profits, and  
12 that would mean that the State would issue bonds that  
13 would be backed by the lottery proceeds, and then  
14 it's estimated, what you said, that in '09-'10, we  
15 would have approximately -- bond sales that would be  
16 approximately five billion, and the following year  
17 another five billion.

18 Now, this proposal would establish what's  
19 been termed the debt retirement fund, and, no, I'm  
20 not a securities expert. That's why I'm reading a  
21 little bit here. But these moneys could go to the  
22 general fund, and then they could be used for  
23 whatever purpose.

24 Now, what I did was I asked the question that  
25 was asked of me earlier this morning. Will this -- How

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1 important to us at the Lottery. Yes, that's generating  
2 tremendous buzz.

3 CHAIRMAN STEINBERG: Okay. Thank you.

4 Other questions?

5 Witnesses?

6 SENATOR AANESTAD: I just have a question  
7 that I wanted to ask this morning, but I'd forgotten,  
8 and I don't even know if you can answer. But I know  
9 that the meeting this morning was out at the new  
10 site, talking about the new 150,000-square-foot  
11 building that Lottery is building, and the first  
12 thing that came to mind was: In these economic times  
13 with the State being in the position it is with all  
14 kinds of vacant office space available, why is the  
15 lottery commission going ahead with the building of a  
16 very expensive -- in fact, if you can tell us the  
17 cost. I don't even know what the cost is. Somebody  
18 told me it's many millions of dollars. Why do we  
19 need a brand new building for the lottery?

20 MS. FLORES: Yes. Thank you for your  
21 question.

22 I'm charged, as a commissioner, to protect  
23 the employees of the lottery, so I take that very  
24 seriously. We have approximately 300 in our  
25 headquarters. Right now, the building that we have

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1 has a sinking foundation, number one.  
2 Number two, it's not seismic compliant.  
3 Number three, it's not fire compliant, and  
4 it is not ADA compatible.  
5 We are taking samples -- and as I walk  
6 through the building, I have to go from office to  
7 office many times, because they're taking air samples  
8 for molds.  
9 So the building is deteriorating. It -- We  
0 own the land. It is much more efficient for us to  
1 build a new building. We have done analyses and  
2 studies regarding this.  
3 This morning we did -- we passed what we  
4 call the mitigation negative report, the  
5 environmental study to look at the situation. And  
6 so -- We support this measure. We believe that we  
7 are going to save millions of dollars, and we are  
8 going to provide 900 new jobs. We also help the  
9 rivers -- the Sacramento River build-up plan. I'm a  
0 Southern California girl, so you're going to have to  
1 excuse me. I don't know what this part -- the river  
2 district, upgrade that. So I think it's important.  
3 Yes, I understand that.  
4 CHAIRMAN STEINBERG: All right. Thank you.  
5 Other questions? Witnesses in support?

1 Witnesses in opposition?  
2 Senator Oropeza --  
3 SENATOR OROPEZA: Move.  
4 CHAIRMAN STEINBERG: -- makes the motion.  
5 Happy to support the nomination. Thank you  
6 very much.  
7 MS. FLORES: Thank you for your time.  
8 CHAIRMAN STEINBERG: Call the roll.  
9 MS. BROWN: Senator Cedillo.  
0 SENATOR CEDILLO: Aye.  
1 MS. BROWN: Cedillo aye.  
2 Dutton.  
3 SENATOR DUTTON: Aye.  
4 MS. BROWN: Dutton aye.  
5 Oropeza.  
6 SENATOR OROPEZA: Aye.  
7 MS. BROWN: Oropeza aye.  
8 Aanestad.  
9 SENATOR AANESTAD: Aye.  
0 MS. BROWN: Aanestad aye.  
1 Steinberg.  
2 CHAIRMAN STEINBERG: Aye.  
3 MS. BROWN: Steinberg aye.  
4 CHAIRMAN STEINBERG: Thank you very much,  
5 Ms. Flores. This will go to the floor.

1 Deidra Lowe, member of the Workers' Comp  
2 Appeals Board. Welcome.  
3 MS. LOWE: Thank you.  
4 CHAIRMAN STEINBERG: Before we get started,  
5 we're going to go off calendar just for a minute,  
6 because a gentleman just walked in the room.  
7 (Discussion off the record.)  
8 CHAIRMAN STEINBERG: Okay. Last but  
9 certainly not least we have Ms. Lowe, who's up for  
10 appointment as a member of the Workers' Compensation  
11 Appeals Board.  
12 Welcome.  
13 MS. LOWE: Thank you, Chairman.  
14 CHAIRMAN STEINBERG: Please.  
15 MS. LOWE: Chairman Steinberg, Vice  
16 Chairman Aanestad, and members of the Committee, I'm  
17 very pleased to be here this afternoon and would like  
18 to thank you for this opportunity to appear before  
19 the Committee.  
20 It's kind of fitting that my confirmation  
21 hearing should be held here in Sacramento this month,  
22 because it was here in Sacramento 30 years ago that I  
23 began in the field of workers' compensation, joining  
24 the well-known and very successful firm of Green &  
25 Azevedo, representing injured workers.

1 Over the next 30 years, I've been a  
2 practicing attorney in this area of law, and I've had  
3 the privilege and pleasure of representing both  
4 injured workers and employers and carriers.  
5 Because I devoted my professional career to  
6 this field of law, I was extremely honored and  
7 delighted to have been appointed to the Workers'  
8 Compensation Appeals Board. That board is vested  
9 with all the judicial powers concerning the workers'  
10 compensation system. Serving on the board provides  
11 me with an opportunity not only to use my many years  
12 of experience, but also, and more importantly, to  
13 serve the workers' compensation community and the  
14 people of the state of California.  
15 During my short time on the board, I have found  
16 the work to be extremely rewarding and challenging, and  
17 I would very much like to continue serving on the board.  
18 For this reason, I'm asking that the Senate confirm my  
19 appointment.  
20 I'd like to thank you for your  
21 consideration, and I'll be happy to take any  
22 questions you might have.  
23 CHAIRMAN STEINBERG: Thank you very much.  
24 Are there questions from the members?  
25 I have one or two, and that is, really, to



1 seek your assessment of the SB 899 reforms, which, I  
2 think it's fair to say, continue to be controversial.  
3 Your view of the positive of those reforms  
4 and maybe any concerns, or what you think have been  
5 negative consequences of the reforms.  
6 MS. LOWE: Overall in my experience as a  
7 practicing attorney for just a few years after SB 899  
8 was passed, and as a commissioner for almost a year  
9 now, I would say that for the most part the reforms  
10 are working as intended. And it's my understanding  
11 that the system as a whole is functioning very  
12 efficiently.  
13 I think upwards of 90 percent of injured  
14 workers do not even have litigated cases. Most of  
15 the cases are resolved on an informal-settlement-type  
16 basis. All settlements do have to go through the  
17 Workers' Compensation Appeals Board and be approved  
18 by a judge, so they all do get seen by a judge for  
19 the final disposition of the case. But overall, I  
20 feel the benefit delivery system has worked well.  
21 Medical care has improved; I think return-to-work has  
22 improved.  
23 CHAIRMAN STEINBERG: You are a fine nominee,  
24 and I intend to support your nomination.  
25 MS. LOWE: Thank you, Senator.

1 CHAIRMAN STEINBERG: But this forum here is  
2 always an opportunity for us to send, you know, an  
3 appropriate message to the administration, or at  
4 least any member to send an appropriate message to  
5 the administration, and I would like to use this  
6 opportunity to say we have some significant  
7 frustration about the lack of progress on fairly  
8 compensating permanently injured workers.  
9 This is an issue which has been sort of  
10 caught up in the political football for the last  
11 several years. The administration has put forward a  
12 16 percent increase, which I think is far too low,  
13 and even that, you know, has not happened.  
14 So while we're in the midst of this fiscal  
15 crisis, I think it is important to just say a word on  
16 behalf of injured workers who, when injured, are  
17 unable to receive the full benefit of their salaries  
18 and suffer great economic hardship. I don't know if  
19 there's anything that you can do about it as a  
20 commissioner. I know much of this is legislative,  
21 but I just wanted to say that.  
22 With that, are there witnesses in support?  
23 Witnesses in opposition?  
24 Motion to move by Senator Oropeza.  
25 Please call the roll.

1 MS. BROWN: Senator Cedillo.  
2 SENATOR CEDILLO: Aye.  
3 MS. BROWN: Cedillo aye.  
4 Dutton.  
5 SENATOR DUTTON: Aye.  
6 MS. BROWN: Dutton aye.  
7 Oropeza.  
8 SENATOR OROPEZA: Aye.  
9 MS. BROWN: Oropeza aye.  
10 Aanestad.  
11 SENATOR AANESTAD: Aye.  
12 MS. BROWN: Aanestad aye.  
13 Steinberg.  
14 CHAIRMAN STEINBERG: Aye.  
15 MS. BROWN: Steinberg aye.  
16 CHAIRMAN STEINBERG: Before you leave, I  
17 understand that you may have some family here. Would  
18 you like to introduce them?  
19 MS. LOWE: Yes. Thank you very much,  
20 Senator. My husband of almost 20 years and our son  
21 are here back in the third row.  
22 CHAIRMAN STEINBERG: Welcome.  
23 MS. LOWE: Thank you very much.  
24 CHAIRMAN STEINBERG: Why didn't you come up  
25 and testify?

1 MS. LOWE: I think it's better that --  
2 CHAIRMAN STEINBERG: You didn't say  
3 anything. I'm just kidding. Welcome and thank you.  
4 The nomination will go to the floor of the  
5 Senate tomorrow.  
6 MS. LOWE: Thank you.  
7 (Thereupon, the Senate Rules Committee hearing  
8 adjourned at 2:33 p.m.)  
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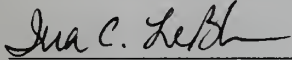


1 --o0o--

2 I, INA C. LeBLANC, a Certified Shorthand  
3 Reporter of the State of California, do hereby certify  
4 that I am a disinterested person herein; that the  
5 foregoing transcript of the Senate Rules Committee  
6 hearing was reported verbatim in shorthand by me,  
7 INA C. LeBLANC, a Certified Shorthand Reporter of the  
8 State of California, and thereafter transcribed into  
9 typewriting.

0 I further certify that I am not of counsel or  
1 attorney for any of the parties to said hearing, nor in  
2 any way interested in the outcome of said hearing.

3 IN WITNESS WHEREOF, I have hereunto set my hand  
4 this 30th day of January, 2009.

5  
6  
7 

8 INA C. LeBLANC  
9 CSR No. 6713

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1 APPENDIX

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**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**

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**Senate Rules Committee**

January 7, 2008

JAN 08 2009

Nettie Sabelhaus, Appointments Director  
Senate Rules Committee  
State Capitol, Room 420  
Sacramento, CA 95814

**Appointments**

Dept of Fair Employment & Housing

**Re: Response to Senate Rules Committee Questions  
January 28, 2009 Confirmation Hearing**

Dear Ms. Sabelhaus:

In response to Senate President Pro Tem Darrell Steinberg's request, I have prepared the below responses to questions posed by the Senate Rules Committee pursuant to the January 28, 2009 confirmation hearing on my appointment as Director of the Department of Fair Employment and Housing (DFEH). In addition, I have enclosed my updated Form 700, Statement of Economic Interest.

**STATEMENT OF GOALS**

1. **What are your goals as the director of DFEH? What do you hope to accomplish during your tenure, and how will you measure your success? What challenges do you anticipate to meeting your goals?**
  - a. **Goals as DFEH Director:**
    - 1) Improve delivery of public service.
    - 2) Vigorously enforce the law where violation is found.
    - 3) Expand outreach to stakeholders.
    - 4) Provide civil rights leadership.
  - b. **Measure of Success:**
    - 1) **Improve Delivery of Public Service.**
      - a) **Online Appointment System:** The DFEH established an automated appointment system for the public to maximize efficiency and convenience. Goal is 10 percent in the first year. Since its February 2008 inception, Achievement is 20 percent to date. (See [www.dfeh.ca.gov](http://www.dfeh.ca.gov).)
      - b) **Online Right-to-Sue System:** Working with the California Employment Lawyers Association (CELA), the DFEH instituted an automated right-to-sue system for complainants who are already represented by counsel. Goal is 20 percent in the first year. Since



its June 2008 inception, achievement is more than one-third (34 %) of all requests for right-to-sue letters to date. (See [www.dfeh.ca.gov](http://www.dfeh.ca.gov).)

- c) Telephone Intakes: To save on complainants' time and travel expenses, and to expedite intake processing, developed a pilot project to conduct telephone rather than in-person intakes. Goal is 40 percent of all employment district offices. Achievement is 40 percent to date. The system will be expanded to 100 percent of all employment district offices by the close of FY 2008/09. All housing district offices are already conducting telephone in-takes.
- d) Case Grading System: In process of launching a new system of triaging pre-accusation cases by significance, so that those having the greatest systemic impact are given the highest priority for investigation and prosecution. The system is expected to be in place in 100 percent of all district offices by the close of FY 2008/09.

## 2) **Vigorously Enforce the Law.**

- a) Vigorously enforce the laws under the DFEH's jurisdiction where violations are found (See press releases on 2008 settlements and judgments at <http://www.dfeh.ca.gov/announcements/pressReleases.aspx>) :
  - i. More Prosecutions: Goal is to increase the filing of accusations by 15 percent. In comparing the DFEH Legal Division's performance for the last six months of 2007 to the last six months of 2008, the Department has increased the number of accusations filed by 28 percent (42 to 54).
  - ii. Higher Settlements: Goal is to increase settlement amounts by 15 percent. During the same period above, the DFEH has increased the total dollar amount in post-accusation settlements by 18 percent (\$1,667,489 to \$1,970,826). These increases are impressive considering that they occurred during the spending freeze and when the Department experienced a 25 percent turnover in the attorney staff due to CEA appointments, retirements and transfers.
- b) Take a leadership role in advancing civil rights law and in shaping public policy. New initiatives:
  - i. Director's Complaints: Goal is to begin issuing one or more Director's complaints on high impact and/or underserved cases (i.e., pre-employment inquiry cases). No Director's complaints had been filed in the year prior to my tenure. In 2008, the Department achieved this goal by issuing a Director's complaints against respondents (Pacific Motor Trucking and Jack Cooper) engaged in a pattern and practice of unlawful pre-employment inquiries regarding disability and medical condition, and declining to hire and/or interview applicants with these conditions.

- ii. Class Complaints: Goal is to consolidate multiple individual complaints against the same respondent into one or more class complaints. In 2008, the Department filed and settled a civil class action suit, *Dept. of Fair Employ. & Hous. v. Plaza Court Apartments*, where multiple complaints were merged into a class of tenants who encountered familial status discrimination. The class action suit recently settled for \$618,000 and affirmative relief. In addition, the Department is currently litigating another employment class action/Director's complaint against a company's widespread and continuous use of a medical test designed to deny employment for individuals who allegedly have a propensity to develop Carpal Tunnel (Starcrest Products). There are several other class complaints under investigation.
- iii. Collaborate with Other Governmental Agencies: To optimize limited resources, consider opportunities to co-counsel and conduct joint investigations with the U.S. Equal Employment Opportunity Commission, Agricultural Labor Relations Board, and U.S. Department of Justice (US DOJ). The DFEH is currently in discussion with all these agencies and have participated in numerous joint training events with them. The US DOJ's Office of Special Counsel has additionally invited the DFEH to apply for a grant to eliminate immigration status discrimination in FY 2009/2010.
- iv. Special Investigations Unit: To better address systemic discrimination cases, in August 2008 reestablished the DFEH's Special Investigations Unit, which was discontinued in the 1990s. Currently, the SIU is investigating seven systemic discrimination cases that may be filed as individual, class action and/or Director's complaints.
- v. Education: To proactively prevent violations of the FEHA, in June 2008 developed a set of "Equal Rights 101" educational videos and a special Web site on employment discrimination for youth outreach under an EEOC grant. The videos have been posted on a special page on the DFEH Web site and on YouTube, where it has received over 3,000 hits and 4 ½ out of 5 stars. (See <http://www.dfeh.ca.gov/equalrights101/> and <http://www.youtube.com/califdfeh>.) The State Bar Labor & Employment Law Section recently awarded another grant to further develop and disseminate the video. Three additional sets of outreach videos will be produced in 2009 on housing, public accommodations and hate crimes. The DFEH is coordinating with the Department of Education to disseminate the DVDs and accompanying educational materials to all California public high schools.

### 3) **Expand Outreach to Stakeholders.**

- a) Expand Outreach and Technical Assistance: In 2008, I made 44 keynote speeches/presentations (see Appendix A: Director's Speaking Engagements Summary Log 2008); outreached to numerous groups and organizations; and the DFEH staff engaged in 40 presentations/outreach activities (see Appendix B: DFEH Staff Speaking Engagements & Outreach Events 2008) statewide to the following groups:
  - i. Civil and human rights organizations.
  - ii. Employee and employer groups.
  - iii. Tenant and landlord representatives.
  - iv. Plaintiffs' and defense bars.
  - v. Private and public sectors.
  - vi. All stakeholders in our diverse state.
- b) Revitalize the Employment Roundtables: In 2008, the Director continued active involvement with the Employment Round Table of Southern California, which sponsored four training meetings and an annual conference; and revitalized the Central and Northern California Employment Round Tables, which will sponsor training to employer groups during FEHA's 50<sup>th</sup> anniversary.
  - i. Southern California
  - ii. Central California
  - iii. Northern California
- c) Initiate Support for Fair Housing and Public Accommodations:
  - i. In addition to active participation in the Labor & Employment Section of the State Bar of California, I launched a new Fair Housing and Public Accommodations Subsection at the State Bar to develop the practice area.
  - ii. The new Subsection is planning two fair housing/public accommodations conferences to train attorneys on all sides of the issues.

### 4) **Provide Civil Rights Leadership.**

- a) Take a leading role in celebrating the 50th anniversary of the FEHA in 2009. To celebrate the Act's half-century mark, work in partnership with stakeholders to collaborate on events throughout California to celebrate the advancement of the law (see FEHA 50<sup>th</sup> Anniversary Brochure and Civil Rights Year Calendars for January-March 2009 at [www.dfeh.ca.gov](http://www.dfeh.ca.gov)):
  - i. Civil rights community.
  - ii. Unsung heroes.
  - iii. Model employers, businesses and housing providers.
  - iv. Plaintiff and defense bars, minority bars and neutrals.
  - v. Private and public sectors.



- vi. All branches and levels of government.
- b) Planning the Next 50 Years:
  - i. Conduct studies to take measure of the Act's accomplishments, its gaps, and to recommend policies for the future
  - ii. Invite academic and research institutions to study the FEHA:
    - (a) UCLA Law School-RAND Study.
    - (b) Loyola Law School Study.
  - iii. Provide the studies to policymakers and all stakeholders in late 2009.
  - iv. Recommend a blueprint on advancing the FEHA for the next 50 years in late 2009.
- c) Plan the Act's Renaissance in 2010:
  - i. Issue DFEH administrative regulations in 2010.
  - ii. Scope of regulations would cover intake to issuance of accusation.
  - iii. Hold regulatory hearings statewide.
  - iv. Invite public comments and testimony.
  - v. File with and seek approval from the Office of Administrative Law.
  - vi. Promulgate approved regulations as new sections in the California Code of Regulations.

**2. What have been your most significant accomplishments as director of DFEH?**

All of the above are significant accomplishments integral to moving civil rights and the Department forward. I believe the following are the most salient.

**Service to the Public.**

In the delivery of public services, the Employment Unit's online appointment, right-to-sue, and telephone intake systems have made service delivery more accessible for complainants and their counsel. Complainants' counsels have given rave reviews to the right-to-sue system. At the same time, they have modernized case processing, increased the Department's efficiency and reduced expenses at a time of state budget challenges. The new case grading system will further help to target cases requiring the most demanding investigation and prosecution efforts.

## Enforcement

### ▪ The Enforcement Division.

In the vigorous enforcement of the law, I am proud of the increased prosecution and better results in settling cases. With additional federal funding to add a limited term housing district office, the Housing Unit increased productivity by 35 percent. Even with a 10 percent staff reduction, on dual-filed cases with the federal government, the Enforcement Division brought in revenues of \$2.5 million from the EEOC and \$2.6 million from HUD, the latter the highest in the history of the Department.

### ▪ The Legal Division.

During my first year at DFEH, the Legal Division faced several significant challenges. First, my administration inherited an over 30 percent turnover in both the Legal Division's attorney and secretarial staff. Second, for nearly two months during the fall of 2008, a spending freeze due to the late approval of a state budget significantly hampered the Legal Division's efforts to prosecute its civil rights cases. Third, numerous vacant attorney and support staff positions remained unfilled for much of the 2008 in order obtain salary savings for the department.

Despite these obstacles, the Legal Division improved its productivity. After hiring a new Chief Counsel and implementing a more aggressive commitment to litigating the department's cases, the Legal Division increased both its new case filings and settlements. Specifically, when compared to the last six months of 2007, in the last six months of 2008 the Legal Division increased its filings of new Accusations from 42 to 54 (a 28% increase). Similarly, during this same timeframe the Legal Division increased its total negotiated settlement dollars from \$1,667,489 to \$1,970,826 (an 18% increase). In light of the Legal Division's significant challenges in 2008, these productivity increases in the second half of 2008 were impressive. The Legal Division anticipates continued increases in the future.

In addition to overall productivity increases, 2008 also marked several impressive individual settlements and victories by the Legal Division. For example, in *DFEH v. Plaza Court Apartments*, the Legal Division successfully negotiated a \$618,000 out-of-court settlement in a class action complaint against a large apartment complex that was discriminating against children. Specifically, the complex prohibited children from ever playing alone outside of their apartment units, and threatened to evict families who violated such discriminatory rules. As a result of the Legal Division's settlement, the complex was required to adopt written policies that would prohibit future familial status discrimination against tenants with families. In *DFEH v. Lakeshore Villas Homeowners Owners Association*, the Legal Division successfully negotiated a \$150,000 out-of-court

disability discrimination settlement with a condominium's home owner's association (HOA). In that case, the HOA wrongfully removed a terminally ill tenant's wooden ramp from a designated handicap parking space. As a result of the HOA's actions, the tenant could not access his van, and he was virtually house-bound for about ten weeks. Finally, in *DFEH v. Terra Linda Farms*, the Legal Division won a precedential employment retaliation decision on behalf of two seasonal farm workers before the Fair Employment and Housing Commission (FEHC). In a decision that awarded over \$111,000, the FEHC agreed with the Legal Division's arguments that Terra Linda Farms unlawfully retaliated against farm workers Maribal Rivas and Maria Santillan. (See press releases on these settlements at <http://www.dfeh.ca.gov/announcements/pressReleases.aspx>.)

▪ **Proactive Prevention of Violations.**

Under a grant from the EEOC and now a new grant from the State Bar Labor & Employment Law Section, the DFEH used mass communications technology to produce "Equal Rights 101" educational videos with its own staff. The videos, dedicated Web site and YouTube postings have received outstanding reviews from viewers. I have shown these to hundreds of persons at conferences; and the video has been viewed by thousands online. On YouTube, the videos have received over 3,000 hits and garnered 4 ½ out of 5 stars. (See <http://www.dfeh.ca.gov/equalrights101/> and <http://www.youtube.com/califdfeh>.) Three additional sets of outreach videos will be produced in 2009 on housing, public accommodations and hate crimes. The DFEH is further coordinating with the Department of Education to disseminate the DVDs, posters, locker magnets and cards to all California public high schools for use in a life skills class. In addition, the DFEH is coordinating with bar groups to develop a speakers' bureau for high schools.

**Outreach**

▪ **Outreach and Technical Assistance.**

In 2008, my 44 keynote speeches/presentations (see Appendix A: Director's Speaking Engagements Summary Log 2008), outreach to numerous organizations, and the DFEH's staff's additional 40 presentations/outreach activities (see Appendix B: DFEH Staff Speaking Engagements & Outreach Events 2008) created greater awareness of civil rights laws under the Department's jurisdiction among the following groups:

- Civil and human rights organizations.
- Employee and employer groups.
- Tenant and landlord representatives.
- Plaintiffs' and defense bars.
- Private and public sectors.
- All stakeholders in our diverse state.



- **Support for Fair Housing and Public Accommodations.**

Unlike the employment bar, which has developed a robust practice and a balance of plaintiffs' and defense counsel, there is nearly no private bar for fair housing and public accommodations. As a result, there is a dearth of case law and attorneys trained to guide landlords and businesses on how to comply with the FEHA and the Unruh Civil Rights Act. To remedy this deficiency, I approached the State Bar to initiate a new Fair Housing and Public Accommodations Subsection under the auspices of the Real Property Law Section. Bringing together a balanced representation of plaintiff, defense, government, and neutral attorneys, the Subsection was launched in December 2008 to develop the practice area. The new Subsection is planning two fair housing/public accommodations conferences during the FEHA's 50<sup>th</sup> anniversary year to train attorneys on both sides of the issues. The Subsection will make long-term contributions to the development of fair housing/public accommodations law in California.

**Civil Rights Leadership.**

- **50th anniversary of the FEHA.**

To celebrate the FEHA's half-century mark in 2009, I have worked in partnership with private and public sector stakeholders to collaborate on events throughout California to celebrate the advancement of the law (see FEHA 50<sup>th</sup> Anniversary Brochure and Civil Rights Year Calendars for January-March 2009 at [www.dfeh.ca.gov](http://www.dfeh.ca.gov)). A kick-off press conference is planned to honor civil rights heroes at the Capitol. The Department is creating a short introductory video on the anniversary that includes greetings from Senate President pro Tem Darrell Steinberg, Assembly Speaker Karen Bass, Senator Abel Maldonado, State and Consumer Services Agency Secretary Rosario Marin, DFEH Director Phyllis Cheng and FEHC Chairman George Woolverton. The video will be played before every keynote address at conferences and will be posted on the DFEH Web site and on YouTube. In addition to a review of the law and new developments, the conferences will also serve as forums to honor the civil rights community; unsung heroes; model employers, businesses and housing providers; plaintiff, defense, general and minority bar groups; private and public sector groups; and all branches and levels of government.

- **Policy analysis and planning.**

With approximately 19,000 complaints filed per year, the DFEH is a repository of rich statistical data that has been untapped for policy analysis and planning purposes. No research has measured the impact of the law on California. Accordingly, I invited academic and research institutions to study the Department's data. The UCLA-RAND Center for Law and Public Policy has been contracted to study the Act's accomplishments and gaps, and to recommend

policies for the future. The study is expected to be released in late 2009. The Department plans to make the results available to the Administration, the Legislature and all stakeholders, and to post the report online. In addition, the Department has shared disability discrimination data with Loyola Law School, which may undertake a similar study focused on disability and the FEHA. Hopefully, these studies will make long-term contributions to the future development of the FEHA.

### GENERAL GOVERNANCE

**DFEH is charged with enforcing California's civil rights laws and protecting people from discrimination in employment, housing, and public accommodations. DFEH is the country's largest state civil rights agency. The department is responsible for receiving and investigating discrimination complaints in its twelve district offices.**

**In general, between 16,000 and 20,000 discrimination complaints were filed with the department over the last ten years. The director's recent comments to the National Commission on Fair Housing and Equal Opportunity indicate that more than 80 percent of these complaints were employment related.[<sup>1</sup>] DFEH intake consultants first interview complainants and then draft formal complaints and accept cases for investigation.**

**3. How do you prioritize the department's responsibilities, particularly given current budgetary realities?**

I prioritize the Department's responsibilities in accordance with its mission to protect Californians from employment, housing and public accommodations discrimination, and hate violence. In response to the recent budgetary challenges, the Department has eliminated many top and middle management positions in favor of retaining investigative consultant and attorney positions directly engaged in the enforcement of the FEHA, Unruh Civil Rights Act, and Ralph Civil Rights Act.

- Under the budget-balancing reduction of 10 percent across all General Fund departments for FY 2008/09, the DFEH's reduction meant \$1.9 million, including 18 positions. After considering many alternatives, the Department determined that the most appropriate response to this budget challenge was to first eliminate a number of management positions that resulted in a reorganization of the Department.

Structurally, the elimination of these positions and the growth in the Department's housing program led to a division of the duties of the Enforcement Division

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<sup>1</sup> However, on the filing of DFEH Accusations, 60 percent are in employment and 40 percent are in housing.



between two Deputy Directors: one in housing; and the other in employment. Both positions report directly to the Director.

As described more fully below under item 11, the Department has instituted new case processing methods to timely investigate and triage complaints. In addition, the Department is considering a reduction in space rental as well as the institution of electronic transmission and scanning as a result efficiencies generated by its automation, telephone intake and case grading procedures.

**4. Do you attend meetings of the Fair Employment and Housing Commission? How do you keep yourself abreast of the relevant issues?**

My top staff and I regularly attend every FEHC meeting. Of the Commission's four meetings In 2008, I attended two, Chief Counsel Tim Muscat attended one, and Oakland Housing District Administrator Susan Sheftel attended one meeting. I believe it is beneficial for the Commissioners to meet as many of the Department's staff as possible, so that they have a better understanding of all functions within the DFEH. I have additionally met and collaborated with FEHC Chairman George Woolverton, other Commissioners, and Executive and Legal Affairs Secretary Ann Noel on non-litigated matters.

As a former two-term Vice Chair and Commissioner of the FEHC, I am well familiar with the work of the Commission. I ruled on 78 en banc FEHC decisions, issued 17 precedential decisions, and promulgated four sets of regulations during my Commission tenure. I have read every Commission decision since 1993 and the vast majority of all precedential decisions before that time. From 1999 to 2003, as a Deputy Attorney General in the Civil Rights Enforcement Section, I further represented the FEHC and DFEH as my clients before various trial courts and the Court of Appeal, winning all of these cases, including a published housing decision before the Court of Appeal. From 2003 to 2007, as a Senior Appellate Court Attorney at the Second District Court of Appeal, I further worked on numerous FEHA cases. Moreover, in private practice, I have litigated FEHA cases on both the plaintiff side at Hadsell & Stormer from 1993-1994 as well as the defense side at Littler Mendelson from 2007-2008.

Moreover, I am active with the State Bar and knowledgeable about labor and employment law. As a former member of its Labor & Employment Law Section Executive Commission, I launched and continue to prepare its "Labor & Employment Case Law Alert," an e-alert on breaking new case law, which is disseminated to nearly 7,000 members of the employment bar. To do this work, I must review each and every labor/employment published decision of the U.S. Supreme Court, Ninth Circuit Court of Appeals, California Supreme Court, California Court of Appeal, and the FEHC. I also continue to write a regular column on "Cases Pending before the California Supreme Court" in the bi-monthly *California Labor & Employment Law Review*, the official publication of the Section. To do this work, I must review each and every labor/employment



case pending before the California Supreme Court and be abreast of its status. I also edit a column entitled "Employment Case Notes," which summarizes recent labor employment case law. I further serve on the Law Review's editorial board, was Co-Editor-in-Chief of that journal, and have published numerous articles in this and other publications. In addition, I am a frequent speaker at the Section's Annual Meetings, Public Sector Conferences and Webinars.

Finally, as described under Item 2 above, I have launched a new Fair Housing and Public Accommodations Subsection under the State Bar Real Property Law Section, whose purpose is to grow these practice areas. I developed an E-Circle for this practice under the State Bar Web site for those interested in learning about the practice. I also forward to this group any and all new fair housing/public accommodations cases and articles. To do this work, I must review each and every case and article on these topics.

**5. DFEH consultants are responsible for conducting intake interviews and accepting complaints for investigation. How do you ensure that they are sufficiently trained?**

Keeping the DFEH staff informed and trained is a high priority. The Deputy Directors of Employment and Housing, and their respective District Administrators, ensure that all consultants are well trained.

In March 2008, I issued an *Update of the Case Analysis Manual*, refereed by practicing attorneys, to all DFEH consultants and District Administrators. The Manual guides consultants on case processing and investigations.

In August 2008, the Department launched an internal blog for all District Administrators, so that they can discuss and share strategies on the investigation of cases. The District Administrators and DFEH Staff Counsel also receive my "Case Law Alerts," "Cases Pending before the California Supreme Court," selected Daily Journal articles, and other new information to keep abreast of new developments. The information is passed onto investigative consultants to guide them in their work.

In December 2008, all District Administrators, attorneys and some senior consultants received a full-day of training from the EEOC on the investigation of systemic discrimination cases as well as a case grading system. The training material is further disseminated by the District Administrators to their investigative staff.

Further, HUD provides annual training to all new District Administrators and consultants in the Housing Unit.

I post a current PowerPoint of my EEO Legal Update on the Department's Web site that is accessible to everyone within and outside the DFEH, so that they can

keep current on the state of the law. I also receive every Webmaster posting from the public to ascertain the level of knowledge in resolving cases among the staff. The legal community and members of the public also e-mail me directly about case processing. I respond to and/or assign a manager to respond to every e-mailed or mailed complaint and monitor their resolution by the consultants.

In addition, during the 50<sup>th</sup> anniversary year of the FEHA, all educational programs will be videotaped and posted on the Department's Intranet as training tools for the DFEH staff.

**6. Your predecessor made use of volunteers because of lack of staff. What is the current mix of paid staff and volunteers and what functions do volunteers currently perform, if any?**

The Department utilizes unpaid interns/externs in its Contract Compliance Program, Legal Division and Volunteer Mediation Program. The current percentage of unpaid volunteers is nearly 0.5 percent (9 unpaid volunteers/211 paid staff).

Starting in January 2009, the Department will sponsor an unpaid, part-time Public Policy Intern at Headquarters. A graduate student in the California State University, Sacramento, Public Policy and Administration Program, the intern's primary assignment will be to assist the Compliance Program. He will help analyze and present the Department's statistical data in graphical formats that can be used for many purposes, including inclusion on our Web site and in a Department annual report. In addition, he will assist with Public Records Act requests and have the opportunity to observe and assist in the work of the Executive Team.

The Legal Division regularly sponsors two to three unpaid Legal Externs from various ABA-accredited law schools. These externs assist the Chief Counsel, Associate Chief Counsels and Staff Counsels with legal research on cases prosecuted by the Department.

The Volunteer Mediation Program currently utilizes five unpaid volunteer mediators in the Employment Unit: four in Southern California and one in Northern California. The Department will soon be entering an agreement with Loyola Law School Center for Conflict Resolution. In addition, the DFEH Volunteer Mediation Program is seeking experienced mediators to serve on its Northern California Volunteer Mediation Program panel. Selected applicants will be asked to participate in a full-day mandatory orientation tentatively scheduled for January 12, 2009 in Oakland. We hope to increase volunteer mediators from five to ten persons.

**7. At her confirmation hearing before the Senate Rules Committee on May 25, 2005, the previous DFEH director indicated that the department's call center equipment had been updated with state-of-the-art equipment to enable the department to track call volume and wait times. Please provide the committee with any statistical data or anecdotal information on this subject. Has the department had to redirect resources to address these needs—for example, to address high call volume?**

In the time since Director Ambrose was confirmed until the present, the Communication Center has made several improvements in order to best handle calls in an expeditious manner.

Although the Communication Center is working with less staff members, the Center is able to handle calls quickly with shorter wait times. Equipment which tracks the volume of calls and the length of time callers remain on hold, as well as how many disconnect prior to getting through to a representative, has been useful in scheduling staff to assure they are available during peak periods. A call status board, which shows the number of calls waiting and the wait time, has also been added which is visible to all Communication Center staff.

In early 2008, the Department additionally introduced an Online Appointment System which allows persons seeking services to schedule appointments at any time, day or night. Currently, over 20 percent of the appointments made are made through the online system. As a result, this has lowered the number of calls to the Communication Center.

### **PROCESSING OF COMPLAINTS**

**In the 1990s the department had a serious backlog in processing complaints. Because of this backlog the 1996 Budget Act required the Bureau of State Audits to perform a comprehensive audit of DFEH. The audit, issued in January 1997, found that 30 percent of discrimination complaints took longer to process than the one-year limit imposed by law. Following the audit the department instituted a number of reforms and the backlog was reduced substantially. The following table contains information provided by the department detailing an overview of complaints and the backlog.**



	FY 1995-96*	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08**	FY 2008-09 (7/1/08- 10/31/08)
<b>Filed for Investigation</b>	9,149	7,788	8,303	7,152	8,168	2,915
<b>Filing Purposes Only***</b>	N/A	2,070	1,738	1,518	1,598	565
<b>Immediate Right to Sue</b>	N/A	7,809	7,538	7,950	9,337	3,567
<b>Total Complaints Filed</b>	18,101	17,667	17,579	16,620	19,103	7,047
<b>Cases Exceeding 365 days</b>	2,727	38	62	203	156	21

\* The FY 1995-96 data is from the 1997 audit. It is included for comparison purposes.

\*\* DFEH notes that the FY 2007-08 statistics have not yet been finalized and may change when final statistics are subsequently produced.

\*\*\* Non-jurisdictional cases and those not supporting further inquiry.

The following table contains information provided by the department regarding the average caseload:

	FY 2004-05	FY 2005-06	FY 2006-07	FY 2007-08*	FY 2008-09 (7/1/08- 10/31/08)
<b>Average Nonhousing Caseload</b>	64.6	70.7	66.9	56.1	61.2
<b>Average Housing Caseload</b>	24.9	43.7	56	41.4	30.3

**8. In the last few years backlog in cases exceeding the one-year deadline has begun to increase with 203 such cases in FY 2006-07 and 156 cases in FY 2007-08. While the department has made substantial progress since the 1997 audit in reducing the backlog, what actions or policies could be instituted to further expedite and improve the department's processing of complaints?**

In January 2009, the Employment Unit will be introducing a "Case Grading" System. The system will place cases into various categories of processing depending on complexity and likelihood of a merit finding. This method will allow the Department to prioritize more complex, which generally take longer to investigate, and begin investigation immediately. In putting the focus on the development of cases, rather than on the "first in, first out" process currently used, it is anticipated that delays in case processing will be reduced. The Employment unit is also aggressively taking action to correct the performance of several employees who are responsible for approximately 40 percent of the cases closing after one year. The processing of cases assigned to them is being

closely monitored by their supervisors to ensure that agreed timeframes are met and that long delays in case processing are not occurring.

**9. Are there certain complaints that are more difficult to resolve in a timely manner? If so, why?**

Certain types of employment cases are more difficult than others and take a longer time to process. Cases involving disability discrimination, denial of leave, denial of accommodation, and some harassment cases often require securing medical records, locating witnesses, and conducting on-site visits. Delays may also be caused by recalcitrant respondents, who refuse to submit requested information or submit incomplete information. It is necessary in these cases to initiate formal discovery which requires time to prepare and causes delay in case processing. With rising caseloads, and based on the current "first in, first out" manner of processing cases, consultants may not begin investigating these more time-consuming cases until several months after the date of filing—and may run out of time before they can secure the evidence necessary to make a determination. It is anticipated with the new Case Grading system, which prioritizes case processing based on complexity rather than date filed, work on these more difficult cases can commence earlier in the process.

**10. There appears to be a general upward trend in the number of complaints filed with the department in the last two years. What might be the reasons for this increase in filed complaints?**

There is no clear factor as to why the number of filed complaints has increased in the last two years. Some of this increase may be attributable to the downturn in the economy, with people being let go from their positions or demoted. There does not seem to be a particular trend emerging to demonstrate an increase in any particular type of complaint being filed or a rise in complaints from any particular industry.

However, the literature on prior recessionary economies shows fiscal downturns and the excess supply of labor generate an increase in employment discrimination claims. (See Donahue & Seligman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle* (1993) 66 *So. Cal. Law. Rev.* 709.) In California, this trend has reemerged under the prolonged economic slow down. Total employment discrimination cases dual filed with the DFEH and the U.S. Equal Employment Opportunity Commission (EEOC) grew from 4,404 in FY 2006/07 to 5,229 in FY, an increase of 825 cases.

More than 20 labor and employment appeals, some pertaining to the FEHA, are currently before the California Supreme Court. Despite these fiscally challenging times and an increasing case load, DFEH continues to vigorously enforce the law wherever discrimination is found. As we approach the 50th anniversary of the FEHA in 2009, civil rights enforcement is proving to be more vital than ever.



wherever discrimination is found. As we approach the 50th anniversary of the FEHA in 2009, civil rights enforcement is proving to be more vital than ever.

**11. The average consultant caseloads have fluctuated over the last few years. What has been the impact of these changes on the department, complainants, and respondents?**

In March 2007, approximately 35 employment consultants, more than one-third, had been on the job one year or less. It takes, on average, between one to two years for a consultant to be trained to the point where they are fully producing. The challenge is to process the same number of cases with fewer consultants.

In FY 2005/06 the Employment Unit was augmented with eight new consultant positions. However, in FY 2007-2008 the Employment unit lost seven consultant positions as the result of budget reductions, most of which had been left vacant for more than six months to meet the expected cutback. Currently, in anticipation of FY 2008/09 budget cuts, the Employment Unit has left nine consultant positions unfilled in order to have the least impact on existing staff. Coupled with the reassignment of several consultant positions to the newly-created Special Investigations Unit, the Employment Unit has gone from 86 consultant positions in November 2006 to 78 positions in November 2008, 68 of which are currently filled.

The Employment Unit plans to meet this challenge with switching from in-person intake interviews to almost exclusively telephone intake interviews, and with the implementation of the Case Grading System. In offices where the lag-time for intake appointments is long, appointments are being redirected to other offices with shorter lag-times. Cases are redistributed between offices to try to equalize caseloads. These efforts are aimed at attempting to maintain the same level of service to the public while working with diminished resources. DFEH staff members are still available to provide assistance to employers and to conduct outreach activities.

### **CONSUMER ASSISTANCE AND OUTREACH**

**DFEH's statutory mandate requires the department to receive, investigate, and resolve complaints alleging discrimination in employment, housing, public accommodations, and hate violence. The department recently implemented an automated online appointment system allowing complainants to schedule intake appointments with DFEH consultants in cases of job-related discrimination or harassment. The department has also set up a system permitting complainants to request a "right-to-sue notice" online.**



**In addition to investigating complaints, DFEH also provides technical assistance to employers, businesses, and housing providers to help them better understand their responsibilities under California's civil rights laws.**

**12. Requesting a right-to-sue notice has important implications: if an individual requests a right-to-sue notice, the department will not investigate his or her complaint. The department's Web site currently advises individuals of this fact and suggests that waiving the department's investigation is advisable only if the individual has an attorney. What has been the feedback on the online right-to-sue notice system? Have any issues been raised about the advisement?**

Since the Automated Right-to-Sue System went online, the comments received have been overwhelmingly positive. Where issues are raised, they are more of the nature of difficulties encountered in filling out the form, problems printing, and recommendations for improvement. To date, over 2700 complaints have been filed using the automated system which represents approximately 34 percent of all cases filed to obtain the immediate right-to-sue notice during this period. The majority of the users are attorneys, and comments from them, particularly from the plaintiffs' bar, have been encouraging.

I hold monthly meetings with the California Employment Lawyers Association (CELA) and spoke at its 2008 Annual Conference. The comments I received on the Right-to-Sue System have been overwhelmingly positive.

**13. A recent visit to the department's Web site found that only the homepage contained a link to the online system permitting complainants to request a right-to-sue notice. Other areas of the Web site, such as the "Complaints" tab or "Right-to-Sue Notice" tab do not appear to contain a link to the system. Are there plans to update these other areas of the department's Web site to also include a link to this system so that complainants may request a right-to-sue notice online?**

The Automated Right-to-Sue system was developed with the intent of making it easier for attorneys or complainants with attorneys to obtain the "right-to-sue" notice from the Department. As noted above, the Department is careful in directing only those persons for whom this is the case to the Automated Right-to-Sue system. Care must be taken to assure that members of the public do not erroneously file complaints using this system thinking they are filing a complaint which will be investigated by the Department. Notice of the availability of this process online has been directed chiefly to the plaintiffs' bar and there is a general awareness of this system prior to them visiting the Department's Web site. However, a link to the automated system is appropriate for the "Right-to-Sue Notice" tab to explain that the packet may be completed and submitted online. Addition of this is currently underway.

**14. What resources are available to non-English speakers through your Web site or elsewhere regarding the activities of the department?**

DFEH publications regarding the laws the Department enforces and the services it provides the public are available on the Department's Internet Web site. Most publications are available in Spanish as well as English. Also available from the Web site is the Department's hate violence rights and remedies fact sheet that is published in Arabic, Bengali, English, Farsi, Gujarati, Hindi, Punjabi, Sinhalese, Spanish and Urdu.

The Enforcement Division has a policy directive which guides staff in the procedures for providing services to persons who are Limited English Proficient (LEP). When making appointments, Communication Center staff note any special language needs, and this information is automatically sent via email to the appropriate District Office informing them of the need for an interpreter. The District Office then makes arrangements to have an interpreter available using someone within the Department or contracting with a vendor. This same option is available for persons making appointments through the Department's Online Appointment System. Where an LEP individual presents himself/herself to a District Office, staff uses a "Language Identification Guide" to assist in determining the language spoken by the individual. Additionally, in the lobby of each District Office is a "Notice of Interpreter Services" in the four most commonly used languages of that service area. This informs LEP individuals that they may request an interpreter, and also presents contact information for those not satisfied with the interpreter services offered. Similar instructions are provided to staff ensuring that members of the public with hearing, speech, and vision impairments are provided full access to Department services.

### MEDIATION

The department received \$1 million in the 2000-01 budget for a pilot program to handle employment discrimination complaints through mediation. While ongoing funding of this pilot was not renewed in subsequent budgets, the previous department director indicated at her confirmation hearing before the Senate Rules Committee on May 25, 2005, that the department had begun to re-implement the mediation program. A recent visit to the department's Web site indicates that it is looking for volunteer mediators to serve on its Northern California Volunteer Mediation Program Panel.

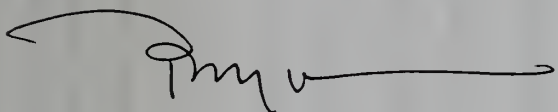
**15. Please update the committee on the status of mediation of employment discrimination complaints as an alternative to investigations of these complaints by the department.**

The Department has maintained a Volunteer Mediation Program for employment discrimination complaints since January 2006. To expand its current Southern

Angeles District Office, particularly those filed by low-income and/or mono-lingual Spanish employees and applicants. The Department also has expanded its panel of Northern California volunteer mediators and is conducting an orientation for new panelists on January 12, 2009, in Oakland. In 2008, the Department also implemented a mediation program for housing discrimination complaints.

Please let me know if I can answer any other questions. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Phyllis W. Cheng', with a long horizontal flourish extending to the right.

Phyllis W. Cheng  
Director

Enclosures:

Appendix A. Director's Speaking Engagements Summary Log 2008.

Appendix B. DFEH Staff Speaking Engagements & Outreach Events 2008.

Appendix C. Updated Form 700.



**Appendix A: Director Phyllis Cheng's Speaking Engagements ~ 2008**

Number	Date of Event	Location of Event:	DFEH 2008 Events:
1	2/13/08	Sacramento	Presentation at California Commission on the Status of Women meeting.
2	2/25/08	Los Angeles	Opening remarks at the 2008 EEOC National Conference.
3	2/26/08	San Francisco	Presentation at a Fair Employment and Housing Commission meeting.
4	2/28/08	Los Angeles	Presentation at the Employment Roundtable of Southern California Breakfast Seminar.
5	3/6/08	Laguna Beach	Presentation as honoree at Littler Mendelson's Class Action Summit.
6	3/7/08	Los Angeles	Presentation at the statewide Respect-ABILITY Conference.
7	3/12/08	Sacramento	Presentation as honoree at the SCSA reception at Leland Stanford Mansion.
8	3/27/08	Los Angeles	Presentation at the Los Angeles County Commission on Human Relations' Corporate Advisory Committee Conference, Los Angeles Times.

**Appendix A: Director Phyllis Cheng's Speaking Engagements ~ 2008**

9	4/23/08	Los Angeles	Presentation at the Housing Rights Center's 9th Annual Housing Summit, a celebration of the 40th anniversary of the Fair Housing Act, Los Angeles Times.
10	5/1/08	Fresno	Keynote presentation and proclamation at Fresno Fair Housing Conference.
11	5/5/08	Sacramento	Opening remarks at DFEH Fair Housing Training.
12	5/8/08	Carson	Keynote presentation at the Defense Contract Management Agency.
13	5/9/08	Sacramento	Keynote presentation at the Asian Pacific State Employees Association Leadership Conference.
14	5/16/08	Sacramento	Presentation at the California Civil Rights Officers Council Meeting.
15	5/13/08	Los Angeles	Presentation as honoree at reception hosted by the Disability Rights Legal Center and Winston Strawn.
16	5/22/08	San Francisco	Presentation as honoree at the EEOC for the plaintiffs bar and civil rights groups in the Bay Area, including the National and California Employment Lawyers Associations, Plaintiff Employment Lawyers Association, Asian American Bar Association Civil Rights Committee.
17	6/4/08	Fresno	Keynote presentation at the EEOC TAPS Seminar.
18	6/13/08	San Jose	Legal update presentation at the EEOC TAPS Seminar.

## Appendix A: Director Phyllis Cheng's Speaking Engagements ~ 2008

19	6/25/08	Los Angeles	Presentation as honoree at the Asian Pacific American Bar Association of Los Angeles (APABA) reception in Little Tokyo.
20	6/26/08	San Diego	Keynote address on FEHA legal updates at a luncheon of the Labor & Employment Law Section of the San Diego County Bar Association.
21	6/30/08	San Francisco	Presentation at the Legal Aid Society of San Francisco—Employment Law Center.
22	7/12/08	Newport Beach	Presentation at the Annual Retreat of the State Bar Labor & Employment Law Section's Executive Committee regarding collaboration on the 50 <sup>th</sup> anniversary of the FEHA.
23	7/29/08	Sacramento	Guest interview on Insight, a local news/interview program on Capital Public Radio, Sacramento's NPR affiliate, on discrimination based on religious garb in the workplace.
24	8/19/09	San Francisco	Presentation at the City & County of San Francisco, Department of Human Resources, EEO Roundtable.
25	8/22/08	Los Angeles	Presentation to all Southern California fair housing groups on the mission of the DFEH, its three-year plan, and collaboration for the 50th anniversary of California's Fair Employment and Housing Act in 2009.
26	9/9/08	Los Angeles	Testimony on California's achievements on fair housing and lending before the National Fair Housing Commission, a newly formed co-chaired by former U.S. Department of Housing and Urban Development Secretaries Jack Kemp and Henry Cisneros, which held hearings across the nation on the state of U.S. housing post-Katrina. The commission was hosted by the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil Rights Education Fund, the NAACP Legal Defense Fund and the National Fair Housing Alliance.
27	9/16/08	San Francisco	Presentation at a meeting of the Fair Employment & Housing Commission.



**Appendix A: Director Phyllis Cheng's Speaking Engagements ~ 2008**

28	9/16/08	San Francisco	Presentation as honoree at a California Minority Counsel Program (CMCP) Reception at the GAP Headquarters.
29	9/17/08	Walnut Creek	Keynote address at the Contra Costa County Bar Association Employment Law Section meeting.
30	9/18/08	Sacramento	Keynote presentation at the Sacramento County Bar Association Constitutional Law and Civil Rights Section meeting.
31	10/1/08	Sacramento	Opening remarks at "Focus on Abilities II: America's People...America's Talent...America's Strength: 2008 National Disability Employment Awareness Month Symposium."
32	10/2/08	Beverly Hills	Presentation at the Corporate Counsel Women of Color (CCWC) Conference, Beverly Hilton.
33	10/3/08	Pasadena	Keynote address on diversity at the California Employment Lawyers Association Annual Conference, Pasadena Hilton & Towers.
34	10/6/08	Los Angeles	Remarks at press conference of I.A.M.PWD, a campaign founded by the Screen Actors Guild, American Federation of Television and Radio Artists, Actors Equity Association, and Tri-Union Performers with Disabilities Committee to seek equal employment opportunities for artists and professionals with disabilities throughout the entertainment and news media.
35	10/15/08	Los Angeles	Keynote presentation at the Disability Mentoring Day, Disability Rights Legal Center, Loyola Law School.
36	10/21/08	Long Beach	Attend Governor's and First Lady's Women's Conference "Night at the Village."
37	10/22/08	La Jolla	Keynote presentation at the Wilson Petty Kosmo & Turner LLP Annual law Seminar, Torrey Pines Lodge.

## Appendix A: Director Phyllis Cheng's Speaking Engagements ~ 2008

38	11/1/08	San Diego	Presentation on the "Visionaries" panel of the State Bar Labor & Employment Law Section's Annual Meeting, "The Shape of Things to Come," San Diego Mission Bay Hyatt Regency Marina and Spa.
39	11/10/08	Newport Beach	Keynote address at the Orange County Bar Association Labor & Employment Law Association, Radisson Hotel.
40	11/13/08	Los Angeles	Welcoming remarks and presentation at the Employment Round Table of Southern California's (ERTSC) Fall Conference, USC Radisson Hotel.
41	11/15/08	San Francisco	Presentation to the Employers Group' Legal Subcommittee, at Orrick, Herrington & Sutcliffe.
42	11/25/08	Los Angeles	Guest speaker on a Webinar, "HR That Works," with Don Phin, President of the Employer Advisors Network, Inc., subscribed by 1,500 California employers.
43	12/3/08	San Francisco	Convene the inaugural meeting of the new Fair Housing/Public Accommodations Subsection of the State Bar Real Property Law Section, State Bar of California, to develop the fair housing/public accommodations practice.
44	12/5/08	Pasadena	Presentation at the annual meeting of the Employment Round Table Southern California (ERTSC).



Appendix B: DFEH Staff Speaking Engagements & Outreach Events ~ 2008

Number	Date of Event	Location of Event:	DFEH Summary of Events:
1	2/2/08	San Jose	Ann Lueckeman, Consultant III, attended the San Jose Public Library's Martin Luther King Jr., celebration and resource faire. This informational event promoted community awareness of agencies at work in the areas of anti-discrimination.
2	2/8/08	Delano	Beth Rosen-Prinz, Regional Administrator, Housing, participated in a fair housing workshop sponsored by CA Rural Legal Assistance. The topics include fair housing law and enforcement procedures.
3	2/14/08	San Diego	Beth Rosen-Prinz, Regional Administrator, Housing, participated in the 15 <sup>th</sup> Annual Fair Housing Laws and Litigation conference sponsored by the Fair Housing council of San Diego. The topics included fair housing law and enforcement procedures.
4	2/29/08	Coachella	Beth Rosen-Prinz, Regional Administrator, Housing, participated in a fair housing workshop sponsored by CA Rural Legal Assistance. The topics included fair housing law and enforcement procedures.
5	2/29/08	Sacramento	Jennifer Harlan, Regional Administrator, gave a presentation to the Call Center at the Department of Consumer Affairs regarding an overview of DFEH's intake process and the new Online Appointment System.
6	3/13/08	San Francisco	Herbert Yarbrough, District Administrator of the San Francisco District Office, and EEOC participated in a joint presentation for the Human Resources Managers of the City and County of San Francisco. The topics included an overview of the complaint process and coordinating complaint processing between state and federal agencies.
7	4/4/08	Mountain View	Susan Saylor, Senior Staff Counsel, participated in the 3 <sup>rd</sup> annual Fair Housing Symposium, sponsored by Project Sentinel commemorating the 40 <sup>th</sup> anniversary of the signing of the Fair Housing Act. Ms. Saylor was a panelist in a workshop focusing on fair housing issues faced by families with children.
8	4/4/08	Mountain View	Susan Sheftel, District Administrator, was a speaker at the 3 <sup>rd</sup> annual Fair Housing Symposium, sponsored by Project Sentinel commemorating the 40 <sup>th</sup> anniversary of the signing of the Fair Housing Act. Ms. Sheftel's discussed issues in fair housing laws. The event was held in Mountain View.



## Appendix B: DFEH Staff Speaking Engagements &amp; Outreach Events ~ 2008

9	4/16/08	Los Angeles, Berkeley and Elk Grove	Belinda Brown, Susan Sheffel, and Anita Joseph, Housing District Administrators, participated in HUD's Fair Housing Education Day program by conducting a fair housing presentation at local elementary schools.
10	4/21/08	Oakland	Beth Rosen-Prinz, Deputy Director, Housing, presented a proclamation to Housing Rights, Inc. at the opening of a fair housing photography exhibit at the Oakland State Building.
11	4/23/08	Los Angeles	Beth Rosen-Prinz, Deputy Director, Housing, presented a proclamation at the Housing Rights Center's 9th Annual Housing Summit, a celebration of the 40th anniversary of the Fair Housing Act, Los Angeles Times.
12	4/23/08	San Francisco	Selena Wong, Regional Administrator, attended EEOC's briefing to federal and state congressional staff. Ms. Wong compared federal and state laws in employment discrimination.
13	4/20/08	Santa Monica	Beth Rosen-Prinz, Deputy Director of Housing, presented a proclamation to the Santa Monica City Attorney's Office, and spoke at the event regarding fair housing law and enforcement procedures.
14	4/28/08	Susan Sheffel	Susan Sheffel, Oakland Housing District Administrator, presented a proclamation to ECHO Housing/Midpeninsula Citizens for Fair Housing.
15	4/30/08	Santa Monica	Beth Rosen-Prinz, Deputy Director of Housing, presented a proclamation to the Santa Monica City Attorney's office at a fair housing event in Santa Monica and participating in the fair housing event. The topics included fair housing law and enforcement procedures.
16	4/30/08	Los Angeles	Belinda Brown (District Administrator, Los Angeles Housing) presented a proclamation to Inland Fair Housing/Mediation Board.
17	5/6/08	San Jose	Marlene Massetti, District Administrator, represented DFEH at an informational booth at the Unity in Diversity Day.
18	5/13/08	Los Angeles	Beth Rosen-Prinz, Deputy Director of Housing, participated in a fair housing workshop in Los Angeles, sponsored by the City of Los Angeles, Housing Department. Topics included fair housing laws and enforcement procedures, and issues pertaining to senior housing.

**Appendix B: DFEH Staff Speaking Engagements & Outreach Events ~ 2008**

19	5/21/08	Sacramento	Beth Rosen-Prinz, Deputy Director of Housing, participated in a conference in Sacramento, sponsored by the California Department of Aging. The workshop addressed fair housing laws, enforcement procedures, and issues pertaining to sexual orientation and disability/reasonable accommodation.
20	6/13/08	San Jose	Selena Wong, North - Regional Administrator, gave a presentation at one of the workshops at the EEOC TAPS Seminar.
21	6/18/08	Los Angeles	Beth Rosen-Prinz, Deputy Director of Housing, conducted a fair housing workshop for the City of Los Angeles (staff of the Housing and Planning Departments). Topics included an overview of federal and state fair housing law and issues pertaining to senior housing.
22	6/18/08	Sacramento	Jennifer Harlan, Acting Deputy Director of Employment, Lyn Vice, Deputy Director of Administration and Jennifer Morris, Budget Officer, represent the Department at the SCSA Disaster Exercise two-hour kick-off meeting.
23	6/19/08	Fresno	Jennifer Harlan, Deputy Director of Employment, presented a two-hour workshop on compliance with the ADA at the Central California Small Business Development Center in Fresno. Topics included what DFEH investigators look for to determine reasonable accommodation, undue hardship on a business owner, whether the requirements for an interactive process have been met, and the rights of both employees and employers.
24	6/23/08	Los Angeles	Sybil Villanueva, Senior Staff Counsel, Los Angeles Legal Office, attended the California Association of Equal Rights Professionals (CAERP) Seminar and participated in a joint presentation on "Identifying & Combating Hate Issues in the Workplace" with EEOCs Los Angeles Regional Attorney, Anna Park.
25	7/22/08	Santa Clara	Selena Wong, District Administrator, Special Investigations Unit, gave a presentation in conjunction with the EEOC to the Council on American Islamic Relations (CAIR) on the role of the DFEH, the differences between the State and federal agencies, and the process for referring complaints.
26	7/25/08	Los Angeles	Beth Rosen-Prinz, Deputy Director, Housing, gave a presentation to Target Media for their staff statewide. Topics covered included an overview of state and federal fair housing laws and fair housing advertising issues.
27	8/16/08	Los Angeles	Los Angeles Housing Consultant Graciela Marshall attended a community resource fair in Los Angeles, sponsored by Congresswoman Hilda Solis. She provided DFEH materials at a booth and answered questions from the public.



**Appendix B: DFEH Staff Speaking Engagements & Outreach Events ~ 2008**

28	9/3/08	Manhattan Beach	Lillianta Brumfield, DFEH Housing Consultant (Los Angeles), attended the 2008 Refugee Summit sponsored by the CA Department of Social Services (DSS). She will be provided DFEH materials at a booth and answered questions from the public.
29	9/4/08	Napa	Susan Sheffel, DFEH District Administrator (Oakland), participated in a workshop in Napa, sponsored by the CA Department of Housing & Community Development (HCD). Topics addressed included fair housing law and enforcement procedures. The attendees were representatives of local governments that receive federal block grant funds distributed by HCD.
30	9/16/08	San Francisco	Tim Muscat, Chief Counsel, made a presentation on Harassment Investigations in the Workplace at the San Francisco Bar Association.
31	9/26/08	Santa Maria	Beth Rosen-Prinz, Deputy Director of Housing, conducted a fair housing workshop. The workshop was sponsored by California Rural Legal Assistance (CRLA) and will focus on fair housing law and enforcement procedures.
32	10/9/08	Fresno	Geraldine Reyes, District Administrator, Fresno, made a presentation at the Central Valley Human Resource and Safety Seminar (HRACC).
33	10/10/08	Los Angeles	Mary Bonilla, District Administrator, and Los Angeles Consultants Rene Tellez and Claudia Quintanilla represented the DFEH as exhibitors at the "Accessible City Expo" community resources and employment fair sponsored by the City of Los Angeles Department on Disability and will be held at the Los Angeles Convention Center.
34	10/14/08	Rancho Murrieta	Windie Scott, Chief Deputy Director, gave a presentation at Rancho Murrieta Rotary Club to discuss how small businesses can avoid inadvertently violating the FEHA.
35	10/17/08	Santa Ana	Beth Rosen-Prinz, Deputy Director, Employment, gave a presentation at a conference sponsored by the California Senate Manufactured and Mobile Home Committee. The topics included fair housing law and enforcement procedures.
36	10/23/08	Santa Ana	Steve White, District Administrator, Santa Ana, gave a presentation at the Southern California Public Labor Relations Council. He discussed "The Ten Common Misconceptions about California FEHA."



Appendix B: DFEH Staff Speaking Engagements & Outreach Events ~ 2008

37	10/24/08	Sacramento	Beth Rosen-Prinz, Deputy Director, Employment, conducted a workshop for staff of the California Department of Housing & Community Development. The topics included fair housing law and issues pertaining to senior housing.
38	10/25/08	El Monte	Graciela Marshall, Los Angeles Housing Consultant, participated in the Annual Veterans' and Military Families' Resource Fair in El Monte. This public outreach event was sponsored by Congresswoman Hilda Solis. Graciela provided DFEH materials and answered questions from the public.
39	11/13/08	Sacramento	Windie Scott, Chief Deputy Director, participated in the Executive Fellowship Program Placement Fair to recruit fellows for mentorship opportunities with the DFEH, Governor's Office.
40	11/13/08	Los Angeles	Sybil Villanueva, DFEH Senior Staff Counsel, Los Angeles Legal Office, gave a panel presentation at the Employment Round Table of Southern California's fall conference. The topic was about "ADA & FEHA in Practice: New EEOC Guidance on Applying Performance and Conduct Standards to Employees with Disabilities –The Neiman Marcus Case – (FEHA): What it Tells Us About the Interactive Process," Radisson USC Hotel.



SENATE RULES COMMITTEE  
CONFIRMATION QUESTIONS  
CYNTHIA D. FLORES  
SUBMITTED JANUARY 6, 2009

Senate Rules Committee

JAN 06 2009

Appointments

**Statement of Goals**

1. ***What are your goals as a member of the Lottery Commission? What do you hope to accomplish during your term? How will you measure your success?***

My goal is simple - to assist the Lottery in increasing revenues so that California's education system can benefit from an increase in much needed funds. This increase in funding stream to education will also serve as a means to measure my success as a Commission member. To accomplish this, I will continue to both substantively review and benchmark the Lottery's activities against the foundation that was laid out in the strategic Business Plan. As the Lottery moves forward, only through the Commission's diligent oversight and review can the Lottery hope to achieve continued success in long term planning, maintaining customer satisfaction and confidence, improvement of brand image, increasing prize payouts, and modernizing operations.

2. ***What have been your most significant accomplishments as a member of the Lottery Commission?***

One of my most significant accomplishments as a member of the Lottery Commission has been the recent establishment of an Audit Committee. The Audit Committee will play a critical role in maintaining an ethical environment at the Lottery, as well as assisting in maintaining compliance with laws and regulations. In addition, an Audit Committee can assist the Commission in fulfilling its oversight responsibilities for (1) the integrity of the Commission's financial statements, (2) the company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the company's internal audit function and independent auditors.

Another accomplishment is that on January 17, 2009, we are airing our new game show, "Make Me A Millionaire." This tremendous achievement required many hours and a huge group effort from nearly every corner of the Lottery. The show is a highly polished and first-rate.

Over the last year, the Lottery grew our network to more than 20,500 stores through vigorous recruitment of more retailers and faster processing of their applications. Further, we successfully completed our test project with CVS and we reached agreement to begin service with their network of over 350 pharmacies in Southern California.



At the Lottery, I am proud to say we have instilled a belief that it is not simply talk when we say there is nothing more important to our success than integrity and maintaining consumer confidence. To this end, the Commission adopted our first-ever Consumer Protection Strategic Plan, and authorized the first undercover sting operation in North America. The sting focuses on the criminal theft of lottery tickets from customers. The 500 operations that have been conducted to date have been extremely successful, and have resulted in multiple criminal prosecutions. So much so, that our operations have been chronicled by Dateline NBC for a story to be aired in the coming year.

Finally, the Lottery made more progress than ever before toward amending the Lottery Act to allow us to increase prize payouts. Through much hard work, the Lottery assisted the passage of Assembly Bill (AB) 1654. This was the result of many staff working together providing data and analysis to policymakers. Although AB 1654 puts prize payouts on the ballot for the next statewide election, this is a major step in the right direction for both the Lottery and California.

### **Securitization of the Lottery**

The 2008 budget package includes legislation that, if approved by the voters, would authorize the California State Lottery to "securitize" future profits. Under the securitization plan, the state would issue bonds backed by lottery proceeds. It is estimated that bond sales would raise \$5 billion in 2009–10 and \$5 billion in 2010–11. The proposal would also establish a Debt Retirement Fund (DRF) into which bond proceeds would be deposited. DRF monies could be used by the Legislature for any General Fund budgetary obligation.

- 3. Under the ballot proposal, there are technically no limits on the amounts that can be borrowed against lottery proceeds. What steps is the commission prepared to take to increase revenues if the plan is approved by voters and additional revenue is necessary?***

Allowing the Lottery to increase prize payouts is the most significant revenue generator in Assembly Bill (AB) 1654. If approved by the voters, AB 1654 will allow the Lottery to increase prize payouts by increasing the percentage of revenue allocated to prizes, allowing the Lottery to reinvest interest income and unclaimed prizes into prize increases.

Our research of states that have increased prize payouts shows that maximizing profits over the long term requires a gradual increase in prize payouts rather than a dramatic one-time infusion. Other states' experiences also indicate that we need to

carefully monitor prize payout levels to ensure the state is receiving the maximum return from this strategy. For example, it is possible to increase prize payout levels to a point where profits are not maximized, i.e. too much revenue is allocated to prizes to the detriment of bottom line profits.

At our December 3, 2008, Commission meeting, the Commission approved alternative prize structures for Scratchers games in anticipation of voter approval of changes to the Lottery Act. These prize structures are modeled after other state lotteries that have successfully increased prize payouts in a responsible and sustainable manner. This action will allow us to begin implementation as soon as possible after voter approval.

Other states' experience shows that profits can double and, in certain circumstances, even triple using this strategy for responsible, sustainable growth.

## Lottery Performance

One of the underlying issues framing recent policy discussions about the lottery has been its low sales per capita relative to other states. In 2005–06 lottery sales per capita in California were about one-half of the national average.

The commission's 2007–10 business plan states that the lottery's history of short-term planning is holding it back, and that the organization needs significant change if it is going to survive in today's marketplace. The plan identifies marketplace options such as changing the payout level of games to maximize profits, expanding the base of retail outlets, and breaking into the multilane retailers such as Wal Mart and Sears. The plan also states that many in the lottery industry believe California has the most onerous restrictions in the nation.

4. ***Regardless of whether the lottery proposal is approved by the voters, what changes are you planning for the lottery to better compete in the marketplace?***

In 2007, the Commission adopted a long-term business plan to position the Lottery for sustainable growth given these realities and even without changes in law. The four key strategies are to focus on long term planning, improve brand image, shift the jackpot paradigm, and modernize operations.

Long term planning is essential because the Lottery needs fundamental change to survive and grow in today's environment. The Lottery previously planned one year at a time, which only served to perpetuate existing business practices.



Consumer product businesses such as the Lottery thrive on a positive brand image to grow and maintain customer loyalty. Prime examples are Starbucks and Coca Cola. The Lottery has not paid much attention to its brand image over the years. As a result, consumers constantly ask where the money goes and why no one wins the Lottery anymore. A recent brand audit conducted by the Lottery's marketing vendor confirmed this. It is important for the Lottery to focus on improving its brand image through proactive messaging and operating transparently.

Shifting the jackpot paradigm is a strategy to get players to play at lower jackpot levels rather than waiting for the \$200 million jackpots. Achieving this will increase sales and provide sales that are more consistent. Recently, the Lottery implemented a successful campaign that asked, "Isn't any jackpot worth playing for?" This campaign increased sales at lower jackpot levels by as much as 7%. The Lottery will continue exploring different ways to garner more sales at lower jackpot levels.

Modernizing operations is a broad category that involves everything from technology to business models. Our accounting systems are outdated and require manual processing and redundancy. Our business models served us well over the last two decades but do not reflect current retail needs or consumer shopping trends. Our gaming system requires months of advanced planning for any changes. To take efficient and effective advantage of business opportunities as they arise, these areas require updating.

In alignment with these strategies, the Lottery launched a new TV game show that replaces the Big Spin in January and recently signed an agreement with CVS Pharmacy to implement an innovative business model in 350 of its stores.

However, without voter approval of the statutory changes proposed by Assembly Bill 1654, the impact of each of these efforts will undoubtedly be limited.

5. ***Under current law, what restrictions prevent the lottery from maximizing its revenues? Will you be proposing legislation to address any such restrictions?***

Assembly Bill (AB) 1654 addresses some of the restrictions that prevent the Lottery from maximizing its revenues, including:

- prize payout restrictions,
- inability to allocate interest income and unclaimed prizes, and
- inability to use retained earnings.



Unfortunately, AB 1654 directs these changes to be put to a vote of the people at the next statewide election before the Lottery can begin to implement them.

The Business Plan discusses four additional restrictions that, if removed, could generate additional sales. They are: prohibitions against fixed prizes, technology restrictions, ticket dispenser restrictions, and theme restrictions.

## **Problem Gambling**

The California Research Bureau estimates that problem and pathological gambling costs the state \$1 billion a year. In FY 2008–09 the lottery entered into an interagency agreement with the state Office of Problem Gambling within the Department of Alcohol and Drug Programs to coordinate problem gambling efforts

The lottery ballot proposal—if approved by voters—would provide \$1 million annually from the lottery for problem gambling. The proposal would allocate this funding to the Office of Problem Gambling and require the office to report to the commission on the effectiveness of problem gambling awareness and treatment efforts.

6. ***How is the commission currently coordinating with the Office of Problem Gambling under the interagency agreement for problem gambling efforts? How are you informed of Office of Problem Gambling activities?***

In a 2007 hearing, the Senate Governmental Organization Committee made it clear that problem-gambling efforts in the state should be centralized under the Department of Alcohol and Drug Programs (DADP) Office of Problem Gambling (OPG). To that end, for FY2008-09, the Lottery committed \$250,000 to OPG to cover the cost of help-line consolidation and provide funding for local assistance programs. The Lottery has committed to providing OPG with an additional \$60,000 annually for ongoing maintenance of effort. This collaborative funding model allows the professionally trained staff at OPG to more broadly administer the programs and services they understand to benefit Californians.

The Deputy Director responsible for the Office of Problem Gambling (OPG) provides regular updates to the Lottery Commission on OPG activities, including updates of activities planned for Problem Gambling Awareness Week, which is traditionally in March of each year.

Additionally, the Lottery receives information relative to OPG activities on an ongoing basis as a representative on the OPG Advisory Board. OPG maintains the Advisory Group for essential input as the Office develops services and updates the

statewide plan, which was first drafted in 2006. The Advisory Group meets three to four times annually.

7. ***What level of oversight do you believe the commission should have over the Office of Problem Gambling's expenditure of the \$1 million if the ballot proposal is approved? For example, will the commission adopt any criteria that it will apply in reviewing the report from the Office of Problem Gambling to ensure effective use of the \$1 million? If so, what criteria?***

Following guidance provided by the Senate Governmental Organization Committee, the Lottery began the process of consolidating problem gambling efforts in the state, specifically by consolidating the existing help-lines to the current 1-800-GAMBLER. The Lottery subsequently began widespread publication of this number on our various products, signs, terminals, and brochures, and was completed in the Summer of 2008. In FY2008-09, the Lottery committed \$250,000 to OPG to cover the cost of the consolidation of the help-lines, as well as to provide funding for other prevention efforts statewide. The Lottery has committed to providing OPG with an additional \$60,000 annually for ongoing maintenance of effort.

The \$1 million detailed in Assembly Bill 1654, should it be approved by voters, should be monitored and maintained in much the same fashion as the existing monies – through an interagency agreement (IA) between the Lottery and OPG. The current IA requires that the Lottery be provided with monthly reports and comprehensive outcomes studies comprised of statistical data collected from calls fielded on the help-line. The data includes but is not limited to help-line usage, broken out by Lottery and non-Lottery callers, referral source, and demographic information.

As more information, treatment options, and monies (tribal and card room) become available in California, the Lottery is committed to continue to collaborate with OPG to address opportunities to increase awareness of the issues surrounding problem and pathological gambling, and to provide essential treatment options. OPG received \$5 million and two PY's in FY2008-09 from the State General Fund to address needed problem gambling treatment issues in the state.

Additionally, as previously stated, the Lottery provides oversight and guidance to the Office of Problem Gambling's (OPG) as a member of the OPG Advisory Board since its inception in late 2005. In addition, the Department of Alcohol and Drug Programs Deputy Director responsible for OPG has provided regular updates to the Commission on OPG activities; the activities of which are mandated by the Welfare and Institutions Code.

This guidance and participation has ensured effective and efficient collaboration between the Legislature, Lottery, and OPG, keeping each of the agencies efforts in concert with one another, as well as the other stakeholders statewide.

### **Employee Incentives**

AB 1654 (Committee on Budget, Chapter 764, Statutes of 2008) provides express authority for the Lottery Commission to, among other things; approve lottery-related expenditures, including "employee incentives." A \$50,000 California Lottery employee-recognition party was the focus of a state Senate hearing and State Controller's audit in 2008.

8. ***How do you interpret the Commission's authorization regarding "employee incentives"? What actions have been taken to increase scrutiny of such expenditures?***

The Commission took action at our May 20, 2008 commission meeting to address employee incentives for non-sales staff. At this meeting, the Commission restricted employee recognition to the types of recognition offered by other state agencies consistent with Department of Personnel Administration rules and guidelines. These are the rules and guidelines I intend to enforce.

**Submitted to:**

Nettie Sabelhaus  
Appointments Director  
Senate Rules Committee  
State Capitol, Room 420  
Sacramento, CA 95814



The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be supported by a valid receipt or invoice. This ensures transparency and allows for easy verification of the data. The second part of the document provides a detailed breakdown of the financial data for the quarter. It includes a table showing the revenue generated from various sources, as well as the associated costs and expenses. The final part of the document concludes with a summary of the overall financial performance and provides recommendations for future actions. It suggests that the company should continue to focus on improving its operational efficiency and expanding its market reach to achieve its long-term goals.

DEPARTMENT OF INDUSTRIAL RELATIONS  
WORKERS' COMPENSATION APPEALS BOARD  
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San Francisco, CA 94142-9459



January 5, 2009

Chairman Darrell Steinberg  
Senate Rules Committee  
State Capitol Room 420  
Sacramento, CA 95814-4900

Dear Chairman Steinberg:

Thank you for your letter of Dec. 17, 2008 requesting a written response to the questions which you have posed, along with an updated Form 700. Enclosed herewith please find my responses, along with the updated Form 700. Please let me know if you or the Rules Committee would like any additional information.

*1. Please provide a brief statement of your goals for your term on the board. What do you expect to accomplish? How will you measure your success?*

My goals as a Workers' Compensation Appeals Board Commissioner are to:

1. Render fair and impartial decisions that uphold the Constitutional mandate to provide workers' compensation benefits to the injured workers of this state in an expeditious and cost-efficient manner;
2. Participate in en banc and significant panel decisions that will provide guidance to the workers' compensation community and that will ensure that the workers' compensation system functions in a manner consistent with the Constitutional mandate;
3. Participate in formulating regulations to implement various provisions of the Labor Code as needed; and
4. Assist the Chairperson of the Appeals Board as he/she determines or requires.

Senate Rules Committee

JAN 05 2009

APPEALS BOARD

As a judicial officer whose primary responsibility is to review decisions and orders from the district offices, I hope to serve the workers' compensation system with distinction by providing clear, well-reasoned decisions for the guidance of the community. My success will be measured by whether I achieve a reputation for excellent, impartial decisions.

2. *As a commissioner, how does your role in deciding cases and reviewing petitions for reconsideration enable you to identify key issues impacting the workers' compensation system? What are the benefits of circulating these decisions? What, if any, leadership can a commissioner provide when issues are identified?*

Issues which are important to the workers' compensation community and thus are the subject of frequent litigation, are identified by their recurrence in the petitions which we review. Such issues are also identified through information obtained by talking with one another, with workers' compensation judges and with members of the workers' compensation community, as well as by reading various publications devoted to workers' compensation issues and concerns.

Commissioners provide leadership to the workers' compensation community by issuing en banc and significant panel decisions to clarify areas of law which pose difficulties and litigation potential, and by speaking at educational seminars and conferences. In addition, the Appeals Board provides leadership by writing clear and concise regulations governing workers' compensation procedures.

3. *The board's website states that it provides "guidance and leadership" to the workers compensation community through case opinions and regulations. Should the board look for methods to enhance dissemination of its decisions to provide guidance? If so, how?*

In addition to the Appeals Board's website, which provides the full text of all en banc and significant panel decisions of the Board, there are numerous publications, both in print and online, to disseminate these and other decisions. In addition, there are a multitude of continuing education classes, conventions, seminars and articles available to the inquiring practitioner to supplement and improve his or her knowledge and expertise. Because of the ready availability of these resources, there doesn't appear to be a need for additional methods to disseminate these decisions.

4. *Based upon your experience hearing cases before the appeals board, what are the most significant issues upon which the board has issued decisions that affect injured workers?*

In the context of permanent disability, the most significant Appeals Board decision since I began at the Board is the *Boughner* 73 Cal.Comp.Cases \_\_\_\_\_ (decision, issued in June of this year, in which we upheld the validity of the 2005 Permanent Disability Rating Schedule.



Prior significant en banc decisions in the area of permanent disability have included:

*Escobedo*, (2005) 70 Cal.Comp.Cases 604, which upheld the new law on apportionment under Labor Code §4663 and 4664 and clearly articulated that apportionment to pathology and other factors, which was impermissible under the former statutes, is now allowed in the proper circumstances, and which set forth the standard of proof defendants must meet in order to establish apportionment to nonindustrial causes;

*Nabors*, (2005) 70 Cal.Comp.Cases 856, which held that the proper determination of permanent disability after apportionment is to calculate the overall percentage of permanent disability, and then to subtract the percentage of permanent disability caused by other factors under Labor Code §4663, or a prior award under Labor Code §4664, leaving the percentage of industrial disability for which indemnity is payable;

*Sanchez*, (2005) 70 Cal.Comp.Cases 1440, and *Strong*, (2005) 70 Cal.Comp.Cases 1460, which provided that a prior permanent disability award will be conclusively presumed to exist and that defendant has the burden of proof as to the award's existence and the overlap between the prior award and the disability or impairment resulting from the subsequent injury;

*Pasquotto*, (2006) 71 Cal.Comp.Cases 223, which held that an Order Approving a Compromise and Release, without more, is not a "prior award" within the meaning of Labor Code §4664(b);

*Aldi*, (2006) 71 Cal.Comp.Cases 783, *Baglione II*, (2007) 72 Cal.Comp.Cases 444, and *Pendergrass II*, (2007) 72 Cal.Comp.Cases 456 which held that the new 2005 Permanent Disability Rating Schedule applies to injuries occurring before Jan. 1, 2005 unless one of the exceptions outlined in Labor Code §4660(d) is present. Those exceptions include a pre-2005 comprehensive medical-legal report, or a pre-2005 treating physician's report which indicates the existence of permanent disability, and/or where the duty to send out notice pursuant to Labor Code §4061 arises before Jan. 1, 2005;

*Costa I*, (2006) 71 Cal.Comp.Cases 1977, and *Cost II*, (2007) 72 Cal.Comp.Cases 1492, which held that the 2005 Permanent Disability Rating Schedule is rebuttable under Labor Code §4660; and

*Benson*, (2007) 72 Cal.Comp.Cases 1620, which held that the former *Wilkinson* (*Wilkinson v. WCAB* (1977) 19 Cal.3d 491) doctrine generally no longer applies to multiple injuries, and that a separate permanent disability award must be made for each injury rather than one, larger award which combines the disabilities. [This case is currently pending before the First District Court of Appeal, which heard oral arguments in late 2008.]

In areas other than permanent disability, there have been significant decisions since the passage of SB 899 that have interpreted Labor Code §4656 and the two-year limitation of temporary disability [*Hawkins*, (2007) 72 Cal.Comp.Cases 807, *Cruz*, (2007)72 Cal.Comp.Cases 1281]; the provisions of Labor Code §4600 and the Medical Provider Networks [*Knight*, (2006) 71 Cal.Comp.Cases 1423, *Babbitt*, (2007)72 Cal.Comp.Cases 70]; calculation of penalties and attorneys' fees under Labor Code §5814(a) and 5814.5; [*Ramirez* (2008) 73 CCC 1324 and *Abney* (2004) 69 CCC 1552], and utilization review procedures under Labor Code §4610 [*Simmons* (2005) 70 CCC 866]. This is not intended to be an exhaustive list, but to illustrate some of the more recent, significant decisions of the Appeals Board.

**5. Do you believe the reduction in permanent disability benefits has impacted litigation? If so, how?**

The new laws regarding permanent disability and apportionment seem to have reduced litigation for a number of reasons. It appears that the parties are now able to resolve more cases informally without the necessity for litigation before the Board. Where injuries are promptly reported and employers/carriers have an efficient adjusting system, injured workers are usually receiving the treatment they need to minimize the effects of the injury and to return to work, with modifications if necessary, as quickly as possible, with resolution of the permanent disability in a timely and satisfactory matter.

The addition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition* as the basis for the determination of permanent disability, along with the new 2005 Permanent Disability Rating Schedule, has resulted in additional litigation in some areas. The *Guides* are sometimes difficult for physicians to use and for parties to understand, and this creates a need for doctors' depositions and/or requests for supplemental reports in some cases. In addition, there have been challenges to the use of the *Guides*, and to the application of the diminished future earning capacity factors contained in the 2005 Permanent Disability Rating Schedule. As these issues are pending before the Appeals Board at this time, I cannot make further comment here.

**6. What impact do you believe the reduction in permanent disability benefits has had on injured workers?**

Many injured workers are experiencing a reduction in permanent disability as compared to the permanent disability rating schedule in effect before SB 899. While some injured workers have experienced financial hardship because of lower permanent disability benefits, many have benefitted from receiving prompt medical treatment, early return to work, and a prompt resolution of their permanent disability and future medical entitlements.

7. *Please give us your interpretation of Labor Code Section 3202 which states "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."*

Labor Code §3202 requires that the law in workers' compensation cases should be viewed and interpreted in the light most favorable to the applicant. Thus, where a given statute is capable of two equally-plausible interpretations, the interpretation which extends the most benefits and/or rights to the injured worker should be implemented, consistent with legislative intent.

Labor Code §3202 must be construed with Labor Code §3202.5, which requires that *all* parties prove the necessary elements for the relief they seek by a preponderance of the evidence.

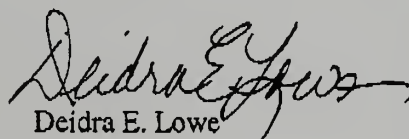
8. *Are there steps that could be taken to make WCAB work more efficiently? Is the current staffing of WCAB adequate, and how are workload fluctuations managed?*

The seven-member Appeals Board, which exercises all judicial powers vested in it by the Labor Code, is functioning well based on my experience for the past 11 months. The number of cases reviewed by the Board depends entirely on the number of trials held at the district level and on whether one of the parties wishes to challenge the Workers' Compensation Judge's determination by filing the appropriate petition. Petitions are assigned by the Chairman, on a rotating and random basis, to panels of three commissioners for decision. The Appeals Board is able to review the cases which come before it and to issue decisions in a timely fashion.

The efficient functioning of the workers compensation system as a whole, including the management of the workload, staffing and other administrative concerns, is the responsibility of the Director of the Department of Industrial Relations and his or her staff, including the Administrative Director of the Division of Workers' Compensation and the Court Administrator. The seven-member Appeals Board is not involved in these administrative functions.

I trust that these answers will be of help to the Rules Committee in considering my appointment to the Appeals Board. Please let me know if I can provide any additional information. I look forward to meeting with you at the confirmation hearing scheduled for Wednesday, January 28, 2009 at 1:30PM.

Very truly yours,

  
Deidra E. Lowe



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