

Michael Kakuk Bill Analysis for HB 394

Identified Problem 1: Definition of “environmental review” includes environmental assessments. No change proposed. Including environmental assessments in the definition of environmental review is critical because mitigated environmental assessments (EA)—not just environmental impact statements (EIS)—use the “significance” threshold for identified impacts. A mitigated EA can mitigate a significant impact *below* the threshold of significant—thus avoiding the need to do an EIS.

Identified Problem 2: Definition of mitigate includes “not taking an action.” Amendment 1 clarifies that mitigation does not mean “not taking an action.”

Identified Problem 3: Definition of “wildlife” is too broad. Under Amendment 2 and 3, the definition of wildlife was tightened to include vertebrates, which are good indicator species. Additionally, the word “any” was removed because it seemed to be interpreted by some opponents to mean that each and every individual animal would somehow be protected.

Identified Problem 4: “Unlawful delegation of legislative authority.” The legislature routinely gives agencies directions on how to run programs and make decisions. This practice is necessary because the legislature can’t fill in every detail on every possible decision that may come before an agency. If there are significant guidelines and standards in place for agencies to make decisions, there is not an “unlawful delegation of legislative authority.” MEPA’s environmental reviews have a specific purpose and occur during defined situations. In the past—before the 2001 changes—agencies were able to modify permits based on information discovered through the MEPA process, and did so in very limited circumstances. Agencies routinely make decisions based on MEPA and based on their expertise—showing that MEPA is not an unconstitutional delegation of legislative authority.

Identified Problem 5: How do the agencies make the determination that a project “may” result in significant impacts to the resource? What is the burden of proof and who has such burden? Amendment 9 makes it clear that the current MEPA process is being used to determine if a project has “significant” impacts to the resource. The “burden of proof” for a significance determination in MEPA is that all MEPA decisions are required to be based on science, and that the director of each agency must “endorse in writing any determination of significance” (75-1-201(7)).

Identified Problem 6: Who within the agency will be making these decisions? Does each agency have fish and wildlife specialists able to make these decisions or will Fish, Wildlife & Parks act as a clearinghouse? Agencies routinely consult with agencies with specific expertise or contract with experts to do their MEPA compliance. Since HB 394 is using the current process, no change will be required in identifying impacts to fish or wildlife.

Identified Problem 7: How is the project sponsor involved in these mitigation decisions?

Amendment 9 (Subsection (2)) clarifies that the MEPA process is being followed—so that no new process is being created. Additionally, Amendment 9 address project sponsor involvement in two places:

- (3)(b) specifically requires that the project sponsor be consulted throughout the MEPA process; and
- (3)(c) specifically references the appeal process available to the project sponsor if they do not agree with a mitigation requirement.

Identified Problem 8: How are other members of the public involved in the HB 394 mitigation process?

The “fullest extent possible” language could keep a cadre of attorney busy for years on every issued, or unissued permit. Amendment 9 (Subsection (2)) specifically ensures that the MEPA process is being followed, which require that members of the public have the opportunity to be involved in the environmental review process. The “fullest extent possible” language is addressed below (Identified Problem 11).

Identified Problem 9: How does the project sponsor appeal or otherwise contest an agency mitigation decision under HB 394? Amendment 9 (3) (c) specifically references the appeal process available to the project sponsor if they do not agree with a mitigation requirement.

Identified Problem 10: Do the criminal misdemeanor provisions of Title 87, chapter 5 apply to these mitigation decisions? This issue did not make any sense to 3 attorneys that looked at this issue for Representative Clark.

Identified Problem 11: To what level of adverse impact must they mitigate? What does “fullest extent possible” really mean? Amendment 7 removes the phrase “to the fullest extent possible,” removing this concern with the bill.

Identified Problem 12: What should the agencies consider when imposing mitigation?

Amendment 9 (Subsection (2)) clarifies that the MEPA process is the process being used, which is required to be based in science. Amendment 9 spells out mitigation must be reasonable, achievable under current technology, and economically feasible.

Identified Problem 13: May the agencies consider adverse economic impacts to the project sponsor resulting from their mitigation? YES! Amendment 9 (Subsection (2)) clarifies that the MEPA process is the process being used under HB 394. As part of MEPA, agencies must identify “the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal” (75-1-201(1)(b)(iv)(E)).

Identified Problem 14: May they consider the loss of jobs to the local area, region, or even state resulting from their mitigation? YES! Amendment 9 (Subsection (2)) clarifies that the MEPA process is the process being used under HB 394. As part of MEPA, agencies must identify “the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal.” (75-1-201(1)(b)(iv)(E))

Identified Problem 15: How should the agencies define “habitat”? Habitat was not defined in the amendments. In the past—before the 2001 changes—agencies were able to modify permits based on information discovered through the MEPA process, including impacts to wildlife habitat, and did not have problems interpreting this word.

Identified Problem 16: “Total rejection of the proposal” appears to be a new standard in environmental permitting and regulation. How is “total rejection” defined? Amendment 8 removes the word “total” from HB 394, so that “the imposed conditions may not result in a rejection of the proposed action.” This removes this problem.

Identified Problem 17: The somewhat less than comforting private property language in Section 7 notwithstanding, do agencies have to consider the potential devaluation of their mitigation on the sponsor’s private property rights? Amendment 9 (Subsection (2)) clarifies that the MEPA process is the process being used under HB 394. MEPA requires impacts on private property to be analyzed: “any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed” (75-1-201(1)(b)(iv)(D)).