

with this? This looks like this is a very public process, this draft copies and working copies of rules and regulations shall include in addition when all this goes out. We're asking the department that's ultimately going to be sued in court to defend their rule and regulation to provide for the public an analysis of their proposed rule and regulation stating how what they're doing might be a takings, where then they're going to have to turn it around and defend that in court. Is there a problem with that, or is that...

SENATOR LINDSAY: There might be, depending on, I think, on your interpretation of the amendment. If the amendment...if the language in line 23, referring to an analysis includes arriving at a conclusion, then I think you do have the same problem. If that analysis is more setting forth what potential arguments for and against are, without having to come down and have a conclusion that we are doing a taking. If the agency says, we think we're doing a taking, I think then you've got an admission that may cause a problem in litigation.

SPEAKER WITHEM: Yeah, I would think this process would have the same. I think it really puts the department in an awkward position. Somewhat a separation of powers argument. The Legislature sets the policy, we then will go to...

SENATOR CROSBY: One minute.

SPEAKER WITHEM: ...the department then has the obligation to write the rules and regulations, not necessarily something they want to do. In some cases they may prefer not to do it. But the Legislature has passed a bill. We're telling them to write those rules and regulations, and then telling them, through this process, to publicly second guess what they're doing, to publicly state, we're proposing these rules and regulations, but they might be inadequate because of this takings issue. I think if there is to be a takings issue, it probably ought to be one that is decided by the courts and not have the department involved within it. Back to the original Lindsay amendment though again, I think there's a fair amount of consensus that that is an improvement. It basically, as I understand it, Senator Lindsay, takes all portions of the green copy and makes those irrelevant as far as this discussion, and then we'd just be working with the AM1246. Is that correct?

SENATOR LINDSAY: That's correct.