

CRITICAL DUNE AREAS AMENDMENTS

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Senate Bill 1130 (Substitute H-1)

Sponsor: Sen. Arlan Meekhof

House Committee: Natural Resources, Tourism, and Outdoor Recreation

Senate Committee: Natural Resources, Environment, and Great Lakes

Complete to 6-13-12

A REVISED SUMMARY OF SENATE BILL 1130 (H-1) AS REPORTED FROM COMMITTEE 6-12-12

The bill would amend Part 353 (Sand Dunes Protection and Management) of the Natural Resources and Environmental Protection Act to exempt certain types of activities in critical dune areas that currently need a permit from needing one in the future. Among other things, the bill would:

- Require the DEQ to approve a permit unless a local unit of government or the DEQ determines it is more likely than not that the actual harm to the environment resulting from the use will significantly damage the public interest in the land by depletion or degradation of the diversity, quality, or function of the critical dune areas.
- Require local units of government and the DEQ to provide written decisions regarding permits that are based on evidence that satisfies requirements under the Administrative Procedures Act. A permit denial must document and any review upholding the decision must determine all of the following:
 - The local unit or the DEQ has met their burden of proof.
 - The decision is based on sufficient facts.
 - The decision is the product of reliable scientific principles and methods.
 - The decision has applied the principles and methods reliably to the facts.
 - The facts are recorded in the file.
- Prohibit a permit authorizing construction of a dwelling or other permanent building on the first lakeward-facing slope of a critical dune area except on a lot of record that was recorded prior to July 5, 1989, that does not have sufficient buildable area landward of the crest to construct the structure. The construction, to the greatest extent possible, would have to be placed landward of the crest and the portion that is lakeward must be placed in a location that has the least impact on the dune.
- Require permits to provide that a use that is a structure must be constructed behind the crest of the first landward ridge of a critical dune area. If construction occurs within 100 feet landward from the crest, the use must meet the following:

- Structure and access must be in accordance with a site plan prepared by a registered professional architect or engineer and must provide for the disposal of storm waters without serious soil erosion.
 - Access must be from the landward side of the dune.
 - The dune must be re-stabilized with indigenous vegetation.
 - The crest of the dune cannot be reduced in elevation.
- Require the DEQ to provide a determination on whether a local ordinance is in compliance within 180 days of it being submitted, otherwise the ordinance would be considered approved. (Automatic approval currently happens after 90 days.)
 - Exempt uses that are needed to maintain, repair, or replace existing utility lines, pipelines and other utility facilities within a critical dune area that existed on July 5, 1989, from needing a permit, provided the work is done in compliance with the following:
 - Vehicles cannot be driven on slopes greater than 1-foot vertical rise in a 3-foot horizontal plane.
 - All disturbed areas are immediately stabilized and re-vegetated with native vegetation once the work is complete.
 - Removal of woody vegetation is done to assure that any adverse effect will be minimized and will not significantly alter the characteristics or stability of the dune.
 - When replacing a utility pole, the new pole is placed adjacent to the existing pole and the existing pole is cut at ground level.
 - There is minimal excavation when replacing underground wires.
 - Directional boring is used when replacing or repairing an underground pipeline and excavation area is on slopes 1-foot vertical in a 4-foot horizontal plane or less.
 - Provide for the appointment by the DEQ of a team of qualified ecologists to review the "Atlas of Critical Dune Areas" beginning when the bill takes effect and every 10 years after. (The House bill says the department "shall" appoint a team; the Senate bill, as substituted, says the department "may" appoint a team.)
 - Allow the construction, improvement, and maintenance of a driveway for any dwelling or permanent building allowed in a critical dune area, subject to applicable permit requirements and the following:
 - Permit a driveway to the principal building or an accessory building. Additional driveways must meet applicable requirements for any other use. The plan development for a driveway should include consideration of the use of retaining walls, bridges, or similar measures.
 - Require driveways on slopes steeper than 1-foot vertical rise in a 4-foot horizontal plane, but not steeper than 1-foot rise in a 4-foot horizontal plane, to be in accordance with a site plan prepared by an engineer or architect that is submitted along with a permit application. It must provide for storm water drainage and re-stabilization.

- Driveways on slopes steeper than 1-foot vertical rise in a 3-foot horizontal plan must be in accordance with a site plan submitted as part of a permit application prepared by an engineer. It must include storm water drainage, methods for controlling erosion, and re-stabilization.
- Allow temporary construction access for septic tanks and systems for any use allowed in a critical dune area for which a driveway is not already installed by the owner, provided the temporary access does not remove vegetation or change contours that increase erosion or decrease stability.
- Allow, at the request of the applicant, the construction, improvement, and maintenance of accessibility measures for any dwelling or permanent building approved under Part 353, subject only to applicable permit requirements and the specific slope provisions in the bill.
- Clarify that local units with one or more critical dune areas can formulate zoning ordinances in accordance with the Zoning Enabling Act.
- Provide that local zoning ordinances cannot be more restrictive than the model zoning plan or the standard of review for permits or variances contained in the model zoning plan.
- Remove from the required information that must be contained in a permit for the use of a critical dune area:
 - When cutting and removing trees, assuring the work will be performed to the instructions or plans of the soil conservation district.
 - The ability of the planning commission to consult with the soil conservation district when a site plan contains data pertaining to the physical development of a site.
 - An environmental assessment or environmental impact statement required under Sections 35319 and 35320, respectively.
- Prohibit a local unit or the DEQ from requiring an environmental site assessment or environmental impact statement as part of a permit application unless it is for a special use project.
- Remove a provision that prohibits a zoning ordinance from permitting a use that is not in the public interest and the criteria used to make that determination.
- Require a variance or special exception to an ordinance to be granted if a practical difficulty will occur as a result of the variance not being granted, unless the local unit or the DEQ determines that it is more likely than not that the actual harm to the environment resulting from the use will significantly damage the public interest of the land by significant depletion and degradation of the diversity, quality, or function of the critical dune areas.

- The decision to grant a variance or special exception must be made in writing and based on evidence that satisfies requirements under the Administrative Procedures Act. A denial must document and any review upholding the decision must determine all of the following:
 - The local unit or the DEQ has met their burden of proof.
 - The decision is based on sufficient facts.
 - The decision is the product of reliable scientific principles and methods.
 - The decision has applied the principles and methods reliably to the facts.
 - The facts are recorded in the file.
- Prohibit a local unit or the DEQ from requiring an environmental site assessment or environmental impact statement for a variance except for a special use project.
- Removes a provision preventing a variance or special exception from being granted that authorizes construction of a dwelling on the first lakeward facing slope of a critical dune area.
- Increase from 30 days to 60 days, the time a local unit has to respond to the DEQ if a determination is made that a local ordinance is not in compliance with Part 353.
- Add a provision stating a local unit would waive its opportunity to review an application if it fails to act as authorized within 60 days.
- Repeal Section 35326 (MCL 324.35326), which requires the Legislature to appropriate sufficient funds to various state departments to assure full implementation and enforcement of Part 353, and to assure adequate funding for soil conservation districts to fulfill their responsibilities.

MCL 324.35301 et al.

FISCAL IMPACT:

Senate Bill 1130 (H-1) would make changes to the Critical Dunes permitting program. These changes would have an indeterminate fiscal impact on the Department of Environmental Quality and possibly to local units of government that have critical dunes within their jurisdictions.

The bill would exempt certain types of projects that now require a permit from the DEQ from needing a permit in the future. Thus, the Department may receive less permit application fee revenue under the bill's provisions. In addition, the bill requires that the DEQ appoint a team of qualified ecologists to conduct a review of the Atlas of Critical Dunes Areas every ten years. According to the Department, however, the cost of this review is anticipated to be minimal.

Any increased costs to local governmental units would be related to potential additional staff workload from the bill's provisions that develop changes to the permitting program for local units of government.

Senate Bill 1130 also repeals section 35326 (MCL 324.35326) that requires the Legislature to appropriate funding to several state departments for the implementation and enforcement of Part 353 and requires that appropriations for soil conservation districts be adequate to fulfill their responsibilities under Part 353.

BACKGROUND INFORMATION AND DISCUSSION:

According to testimony, a provision of Part 353 that prohibits construction of a dwelling on the first lakeward-facing slope of a critical dune area has cost the DEQ \$1.8 million in a takings case, and could subject the department to more in the future. The DEQ has identified at least 55 other parcels of land in Allegan County alone. The bill addresses that issue by allowing for variances or special exceptions to be issued.

There were concerns regarding a new provision that would require the DEQ to prove that a project's actual harm to the environment resulting from the use will significantly damage the public interest in the land by depletion or degradation of the diversity, quality, or function of the critical dune areas. If the DEQ could not show that, then it would be required to issue the permit. According to testimony, the burden of proving environmental impact lies with the applicant under all other permitting programs.

The bill would only affect dunes designated by the DEQ as critical dune areas. According to testimony, approximately 70,000 out of the 250,000 acres of sand dunes in Michigan are listed as critical dunes and protected under Part 353.

POSITIONS:

Indiana-Michigan Power supports the bill. (6-12-12)

Michigan Association of Home Builders supports the bill. (6-12-12)

Michigan Association of Realtors supports the bill. (6-12-12)

National Federation of Independent Business - Michigan supports the bill. (6-12-12)

Michigan Department of Environmental Quality opposes the bill. (6-12-12)

Clean Water Action opposes the bill. (6-12-12)

Michigan Association of Conservation Districts opposes the bill. (6-12-12)

Michigan Conservation Districts Critical Dune Partnership opposes the bill. (6-12-12)

Michigan Environmental Council opposes the bill. (6-12-12)

Michigan Townships Association opposes the bill. (6-12-12)

Preserve the Dunes opposes the bill. (6-12-12)

Sierra Club opposes the bill. (6-12-12)

West Michigan Environmental Action Council opposes the bill. (6-12-12)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.