

"EARTH CHANGE" PERMIT EXEMPTIONS

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House Bill 4604 as enacted

Public Act 2 of 2016

Sponsor: Rep. Brett Roberts

House Committee: Agriculture

Senate Committee: Natural Resources

Complete to 7-12-16

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4604 amended Section 9115a of the Natural Resources and Environmental Protection Act (NREPA) to exempt certain persons from having to obtain a permit from a county or municipal enforcing agency for "earth changes" associated with specified agricultural practices.

The bill also would add language stating that the exemptions contained within Section 9115a are "notwithstanding any other provisions of [Part 91]." House Bill 4604 took effect February 25, 2016.

The section being amended—MCL 324.9115a—is in Part 91 of NREPA, which addresses soil erosion and sedimentation control.

Under the bill, notwithstanding any other provision of Part 91, a permit is not required for earth changes associated with the following agricultural practices, if the activities do not result in, or contribute to, soil erosion or sedimentation of the waters of the state, or a discharge of sediment off-site:

- The construction, maintenance, or removal of fences and fence lines.
- The removal of tree or shrub stumps or roots.
- The installation of drainage tile, irrigation, or electrical lines.
- The construction or maintenance of one or more ponds that meet all of the following:
 - The associated earth change is less than five acres.
 - The earth change does not result in a discharge of storm water into the waters of the state.
 - The earth change associated with the construction or maintenance is not part of a larger plan of development. "Larger plan of development" would mean "a contiguous area where multiple separate and distinct construction activities are occurring under a single plan as identified in documentation or physical demarcation indicating where construction activities may occur."

The act currently defines "earth change" as a human-made change in the natural cover or topography of land, including cut and fill activities, which may result in or contribute to

soil erosion or sedimentation of the waters of the state. "Earth change" does not include the practice of plowing and tilling soil for the purpose of crop production.

"Sediment" is presently defined as solid particulate matter, including both mineral and organic matter that is in suspension in water, is being transported, or has been removed from its site of origin by the actions of wind, water, or gravity and has been deposited elsewhere.

HB 4604 retains provision in Section 9115a that states the exemptions provided in that section shall not be construed as exemptions from enforcement procedures under Part 91, or the rules promulgated under Part 91, if the exempted activities cause or result in a violation of either Part 91 or the rules promulgated under Part 91.

FISCAL IMPACT:

House Bill 4604 would have no fiscal impact on the State of Michigan. It could result in a loss of permit revenue for the local units of government that were previously issuing permits for the type of earth changes specified in the bill. The extent of this potential loss of revenue would vary by jurisdiction, depending on the number of permit applications affected. Consequently the full fiscal impact of HB 4604 on local units of government is unknown at this time.

BACKGROUND INFORMATION:

Enforcement of Earth Changes under Part 91 (Soil Erosion and Sedimentation Control)

A landowner or designated agent who contracts for, allows, or engages in an earth change in Michigan is required to obtain a permit from the appropriate enforcing agency before commencing an earth change which disturbs one or more acres of land or is within 500 feet of the water's edge of a lake or stream. A municipality can pass an ordinance regarding soil erosion and sedimentation control on public and private earth changes that is more restrictive than Part 91 or the rules promulgated under Part 91.

Section 9108 allows a county enforcing agency or municipal enforcing agency to require the applicant to deposit cash, a certified check, or an irrevocable bank letter of credit, or a surety bond, in an amount "sufficient to assure the installation and completion of such protective or corrective measures as may be required by the county enforcing agency or municipal enforcing agency."

If the county or municipal enforcing agency determines that soil erosion or sedimentation of adjacent properties or waters has occurred, or is reasonably expected to occur, in violation of Part 91, the administrative rules, or an applicable local ordinance, then that enforcing agency may seek to enforce a violation by notifying the person who owns the land of its determination, by mail, with return receipt requested. The notice must contain a description of the violation and what must be done to remedy it, and must specify a time to comply. Within five days of such a notice being issued, the landowner must implement and maintain appropriate soil erosion and sedimentation control measures.

Exemptions Existing Prior to Passage of HB 4604

However, there already were several instance in which a landowner was exempt from the permit requirement.

****Section 9109 of NREPA exempts a person engaged in agricultural practices that enters into an agreement with the appropriate conservation district to pursue agricultural practices that are in accordance with Part 91 and its promulgated rules, as well as any applicable local ordinance. If a person enters into such an agreement, the conservation district must notify the county enforcing agency, the municipal enforcing agency, or the Department of Environmental Quality (DEQ) of the agreement in writing. Upon entering into the agreement, a person is not subject to permits required under Part 91, but is required to develop project-specific soil erosion and sedimentation control plans, and is subject to the remedies provided for violations of Part 91.**

****Section 9114 of NREPA authorizes the DEQ and the Department of Agriculture and Rural Development (MDARD) to promulgate additional rules necessary to carry out their functions as prescribed in Part 91. Rule 1704 (R 323.1704) addresses permit requirements. Rule 1705 (R 323.1705) lists the following as exempt from permit requirements:**

- A beach nourishment project permitted under Part 325 (Great Lakes Submerged Lands) of NREPA.
- Normal road and driveway maintenance, such as grading or leveling, that does not increase the width or length of the road or driveway and that will not contribute sediment to lakes or streams.
- An earth change of a minor nature that is stabilized within 24 hours of the initial earth disturbance and that will not contribute sediment to lakes or streams.
- Installation of oil, gas, and mineral wells under permit from the supervisor of wells if the owner-operator is found by the supervisor of wells to be in compliance with the conditions of Part 91.

****Further, a county or local enforcing agency may grant a permit waiver for an earth change after receiving a signed affidavit from the landowner stating that the earth change will disturb less than 225 square feet and that the earth change will not contribute sediment to lakes or streams.**

While these are exemptions from the permit requirement, Rule 1705 also states that they "shall not be construed as exemptions from Part 91 enforcement procedures if the activities cause or result in a violation of Part 91 or these rules."

Section 9121 of NREPA contains the penalties for a violation of Part 91. If the action is brought by a county enforcing agency or a municipal enforcing agency of a local unit of government that has enacted an ordinance that provides a penalty for violations, the person is responsible for a municipal civil infraction and may be ordered to pay a civil fine of not more than \$2,500.

If the action is brought by the state or a county enforcing agency of a county that has not enacted an ordinance, the person is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than \$2,500.

A person who knowingly violates Part 91 or who knowingly makes a false statement in an application for a permit or in a soil erosion and sedimentation control plan is responsible for the payment of a civil fine of not more than \$10,000 for each day of violation. A person who knowingly violates Part 91 after receiving a notice of determination is responsible for the payment of a civil fine of not less than \$2,500 or more than \$25,000 for each day of violation.

DISCUSSION:

Supporters said the exemptions added by the bill generally apply to minor soil disturbances no greater than other, currently exempted, agricultural activities such as plowing. By eliminating the need for permits, the requirements and fees for which can vary from county to county, individuals engaging in these activities in different counties will have the same standards they must follow.

Opponents of the bill were particularly concerned about the inclusion of tiling as an exempted activity, saying that this activity generates much more earth change than the other activities listed.

POSITIONS:

The following indicated support for HB 4604:

Michigan Forest Products Council (9-9-15)
Michigan Farm Bureau (9-9-15)
Michigan Potato Growers (9-9-15)
Michigan Bankers Association (9-9-15)

The following indicated opposition to HB 4604:

Tip of the Mitt Watershed Council (9-9-15)
Michigan Environmental Council (9-9-15)
Michigan League of Conservation Voters (9-9-15)

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Fiscal Analyst: Austin Scott

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