June 12, 2012

Michigan House Natural Resources, Tourism and Outdoor Recreation
Lansing, Michigan

Re: SB 1130, Revisions to Michigan Critical Dunes Protection Act

Dear Senators,

The Michigan Environmental Council (MEC) is a coalition of more than 60 environmental, public health and faith-based groups dedicated to protecting and enhancing the resources and assets of the great state of Michigan, for this and future generations. As such, we are deeply troubled by a new legislative proposal that would dramatically and unnecessarily alter Part 353, Sand Dune Protection and Management (Critical Dunes Act).

Notably, good-faith discussions and stakeholder negotiations have already resulted in significant changes to the implementation of the critical dunes program—all at the request of the Michigan Homebuilders and Michigan Realtors®—that include pre-application meetings with proposed developers[1]; articulation of a previous 10-point "de minimis" list of activities that the department would not consider to be "uses" requiring a permit[2], and expedited or "desktop" level reviews of some minor permit applications for small-scale projects. These changes provide greater consistency of interpretation and support better coordination between the program staff and the regulated community and development consultants.

If any additional changes to the dunes law are necessary to alleviate concern about a supposed elevated risk of "takings cases" being brought against the state, it would only involve a narrow and identifiable set of parcels where the entire parcel was a) platted prior to the law's creation and b) located entirely or nearly entirely on the lakeward-facing side of the crest of the dune closest to the lake.

This is a small set of parcels, and any concern about takings claims related to these parcels could be entirely resolved with a very minor tweak to the wording in section Sec. 35317 (3) to allow variances for these types of pre-1989, lake-ward-of-the-crest parcels. This minimal legislative change would remove the threat of takings on these

---

[1] Online at DEQ website: Critical Dune Area Pre-Application Meeting Request, dated July 31, 2009. http://www.michigan.gov/documents/deq/lwm-353-09-02_304416_7.pdf

[2] Online at DEQ website: LWMD Policy Guidance Document 353-09-02, Activities Not Constituting a Use Under Part 353 http://www.michigan.gov/documents/deq/lwm-353-09-02_304416_7.pdf

parcels while offering minimal impact to the program itself, and without paving the way for additional destruction of one of Michigan's most precious natural assets, threatening millions in tourism dollars, undermine our quality of life attractiveness ("Pure Michigan") and thwarting more than 30 years of previous bipartisan, legislative efforts to secure this rare and magnificent resource for future generations.

Instead, the proposed changes go far beyond this easily addressable "takings" issue and instead completely rewrite the law. As such, the proposed changes could open the state to additional legal actions as the hundreds of law-abiding dune owners who have dutifully followed the letter and intent of the law since 1989 would now see their neighbors undertaking new and harmful activities in areas of the dunes not previously allowed.

In our opinion, the suggested changes to current law would allow unrestricted development in the dunes, reduce the ability to work with experts to reduce negative impacts of development, and risk irreversible negative impacts to Michigan's rare, irreplaceable and highly sensitive dune system. Following are a few of our primary concerns with the proposed legislation:

1. Changes the bill's stated intent away from resource protection and protecting these unique resources for future generations:

    a. Existing law: "The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and the ecology of the critical dune areas for the benefit of the present and future generations is assured.
    b. Proposed law: THE PURPOSE OF THIS PART IS TO BALANCE THE BENEFITS OF PROTECTING, PRESERVING, RESTORING, AND ENHANCING THE DIVERSITY,QUALITY, FUNCTIONS, AND VALUES OF THE STATE'S CRITICAL DUNES WITH THE BENEFITS OF ECONOMIC DEVELOPMENT AND MULTIPLE HUMAN USES OF THE CRITICAL DUNES AND THE BENEFITS OF PUBLIC ACCESS TO AND ENJOYMENT OF THE CRITICAL DUNES.

2. Removes and undermines the role of local governments in protecting the dunes:

    a. Deletes provision 304g(2) which allows that "A local unit of government zoning ordinance regulating critical dune areas may be more restrictive of development and more protective of critical dune areas than the model zoning plan."
    b. Deletes section 35302(b): "Local units of government should have the opportunity to exercise the primary role in protecting and managing critical dune areas in accordance with this part."
    c. Cuts the time a local unit has to review a proposal from 60 days to 30 days.

3. Paves the way for unregulated new impervious surfaces extending throughout the dunes in the form of massive driveways, turnarounds and other access drives without review regarding environmental considerations:

a. Adds Section 35311A: THE CONSTRUCTION, IMPROVEMENT, AND MAINTENANCE OF A DRIVEWAY **SHALL BE PERMITTED FOR ANY DWELLING OR OTHER PERMANENT BUILDING…**

4. Removes critical sections of the original bill which were intended to minimize the both the geographic and environmental impacts of development and preserve as much of the dune's natural character as possible:

   a. DELETES 35316(f): a provision allowing department to regulate development that is deemed "more extensive than required to implement a use" for which a permit is requested.
   b. DELETES 35316 (g) a KEY provision allowing the department to review whether proposed project might be a "use that is not in the public interest," including provisions for reviewing "**the availability of feasible and prudent alternative locations or methods, or both, to accomplish the benefits expected from the use" and the "the impact that is expected to occur to the critical dune area, and the extent to which the impact may be minimized.**"
   c. Changes Sec. 35323 to allow a replacement structure to be a different use than the original use, i.e., a garage could be replaced by an additional house, etc.

5. Adds vague and misleading language to make resource protection standards meaningless and unusable. These phrases appear to be intentionally vague, confusing and difficult to interpret and/or implement successfully.

   a. Adds vague phrases such as "**more likely than not** that the actual harm to the environment resulting from the use will **significantly damage** the public interest" and "**Significant and unreasonable depletion or degradation**"
   b. Creates subjective decision criteria without clear standards:
      i. THE DECISION SHALL DETERMINE "THAT THE DECISION IS BASED UPON **SUFFICIENT** FACTS OR DATA." THAT THE "DECISION IS THE PRODUCT OF **RELIABLE** SCIENTIFIC PRINCIPLES AND METHODS," and THAT THE "DECISION HAS APPLIED THE PRINCIPLES AND METHODS **RELIABLY** TO THE FACTS."

6. Creates new and unwarranted obstacles to public engagement in dune protection:

   a. Rather than the current standard of two residents within the local jurisdiction requesting a public hearing on a proposed project, the new law would require **five people within <u>one mile</u> of the proposed project to seek a public hearing,** or else the project can be approved without public hearing.
   b. Adds the option of local jurisdictions charging people a fee in order to be notified of applications for development within the critical dune area.
   c. Removes the requirement that local governments to publish notice of pending decisions in other publications, where appropriate, in order to "give notice to

persons likely to be affected by the proposed use," and allows the notice to simply be published in a single newspaper.

7. Expressly limits the use of environmental site assessment or impact statements.

8. Removes existing role for local conservation districts in reviewing proposals and improving project outcomes.

Conclusion

Michigan's freshwater lakeshore dunes are incredibly rare, even on a global scale, and represent a valuable asset to our state's collective future. They are fundamental to our state's environmental and economic identity. They are Pure Michigan at its most Pure, and are the reason Michigan's majestic Sleeping Bear Dunes were named the Most Beautiful Place in America, in 2001, and why Traverse City was named one of the Best Summer Trips for 2012 by National Geographic Magazine.

Previous legislative bodies decreed that the critical dune areas of this state "are a unique, irreplaceable, and fragile resource that provides significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource."

The existing laws and regulations intended to protect the dune resources are not onerous. They are appropriate for a resource this rare and so foundational to Michigan's identity. Also, it should be noted that less than 30% of Michigan's magnificent sand dunes are protected by the Critical Dune law—about 70,000 acres out of the 250,000 acres of sand dunes in Michigan—meaning that most of the remaining dunes are not regulated under this program. The dunes enrolled within the program are the best, most iconic and most precious to the state, and thus deserving of additional oversight and protection.

It is critical to protect the legacy of the dunes, to preserve existing law, and encourage residents and developers of property in the dunes to recognize their unique responsibility to work in partnership with the DEQ to limit the negative impacts of development.

The Michigan Legislature now has the opportunity to continue in this tradition by supporting these amazing assets and provide Michigan with a permanent strong foundation for tourism and a strong quality of life, by opposing Senate Bill 1130.

The proposed law, if approved, would undoubtedly lead to greater dune destabilization, system fragmentation and disruption of natural dune ecology and evolution.

Sincerely,

James Clift, Policy Director

Michigan Environmental Council, 119 Pere Marquette, Ste. 2A, Lansing, MI 48912