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## BILL ANALYSIS



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Senate Bill 431 (as introduced 8-20-19)  
Senate Bill 849 (as introduced 3-17-20)  
Sponsor: Senator Adam Hollier  
Committee: Transportation and Infrastructure

Date Completed: 6-24-20

**CONTENT**

**Senate Bill 431 would amend the Michigan Zoning Enabling Act to do the following:**

- Prohibit a local unit of government from preventing, prohibiting, or denying a permit, approval, or other authorization for the mining of natural resources if the natural resources were valuable and very serious consequences would not result from the extraction of the natural resources.
- Provide that a person who sought to extract natural resources by mining could meet the requirements above by submitting to a local unit of government a plan for the proposed extraction that met certain requirements.
- Provide that, if an applicant had made a prima facie case that the requirements were met, the burden of proof would shift to the party challenging or opposing the proposed mining activity.
- Describe certain limitations on a local unit of government's regulation of a mining operation.
- Specify that a permit or other authorization issued by a local unit of government to extract natural resources by mining would be valid until mining operations, including reclamation, were completed.

**Senate Bill 849 would amend the Natural Resources and Environmental Protection Act (NREPA) to do the following:**

- Require a person who proposed to use a water withdrawal for the extraction of aggregates by mining to obtain a water withdrawal permit before making the withdrawal.
- Specify that the extraction of aggregates by mining could not pollute, impair, or destroy natural resources.
- Specify that the above prohibition would be subject to enforcement under Part 17 (Michigan Environmental Protection Act) of NREPA.
- Specify that the excavation and removal of aggregates and of associated overburden would not, of itself, constitute pollution, impairment, or destruction of those natural resources.

Senate Bill 849 is tie-barred to Senate Bill 431. Senate Bill 431 would take effect 90 days after its enactment.

## **Senate Bill 431**

### Mining Zoning Ordinance Preemption

Under the Michigan Zoning Enabling Act, an ordinance may not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those resources.

Instead, the bill would prohibit a local unit of government, by ordinance or otherwise, from preventing, prohibiting, or denying a permit, approval, or authorization for the extraction by mining of natural resources from any property by a person with property, possessory, or contractual rights to do so if the following applied:

- The natural resources were valuable; natural resources are considered valuable for the purpose of the Act if a person, by extracting them, can receive revenue and reasonably expect to operate at a profit.
- Very serious consequences would not result from the extraction of the natural resources.

The bill states that the State has a paramount public interest in the conservation and development of the State's valuable natural resources. Whether any serious consequences would result from the extraction, by mining, of natural resources would have to be considered in light of this paramount State interest. For purposes of the Act, a consequences would be very serious if it substantially exceeded the ordinary impacts of customary mining operations and posed an actual and unnecessary risk to public health, safety, or welfare that could not be avoided or ameliorated through the imposition of reasonable controls or conditions on the mining operations.

The Act specifies that a person challenging a zoning decision has the initial burden of showing that there are valuable natural resources located on the relevant property, that there is a need for the natural resources by the person or in the market served by the person, and that no very serious consequences would result from the extraction, by mining, of the natural resources. In determining whether very serious consequences would result from the extraction, by mining, of natural resources, the standards set forth in *Silva v. Ada Township*, 416 Mich 153 (1982), must be applied and all of the following factors may be considered, if applicable:

- The relationship of extraction and associated activities with existing land uses.
- The impact on existing land uses in the vicinity of the property.
- The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence.
- The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property.
- The impact on other identifiable health, safety, and welfare interests in the local unit of government.
- The overall public interest in the extraction of the specific natural resources on the property.

The bill would delete these provisions.

### Plan for Proposed Extraction

Under the bill, notwithstanding anything to the contrary in the Act or any other statute or ordinance, the requirements above would be met if the person seeking to extract natural

resources by mining submitted to a local unit of government a plan for the proposed extraction that included all of the following:

- A demonstration that the person could, by extracting the natural resources, receive revenue and reasonably expect to operate at a profit.
- A general description of materials, methods, and techniques that would be used for mining operations.
- A description of the proposed haul routes to be used to transport natural resources from the mining area to a primary road, other than for local deliveries.
- Signs to be maintained on the boundaries of the mining area, facing outward, spaced every 200 feet or closer, and stating "No Trespassing -- Mining Area".
- Stockpiles, other than screening berms, not exceeding the higher of 70 feet above ground surface at the location of the stockpile or 40 feet higher than the elevation of the adjoining property at the nearest property line.
- Berming or other screening of the active mining area from an occupied residence on an adjoining property to the extent reasonably practicable, which could be accomplished using overburden to the extent available to construct berms of up to six feet in height along adjoining property lines or by other means requested by the applicant.
- A description of processing activities that could include washing, screening, crushing, and blending of stone, sand, gravel, and other materials, including recycled materials and other materials obtained from off site.
- A general description of the natural resources deposit.
- The sequence of mining, including proposed phasing, if applicable.
- Surface overburden removal plans.
- A description of the depth from the grade level from which the natural resources would be removed.

The plan also would have to include proof of financial assurance for reclamation of the mining area that met the following requirements:

- Financial assurance would have to be maintained during mining operations and until reclamation had been substantially completed.
- The amount of financial assurance would have to be \$1,500 per acre disturbed by mining operations but not yet reclaimed, excluding roadways, plant sites, and open water areas that would remain after completion of reclamation, and the amount of financial assurance would have to be adjusted annually as necessary because of changes in the number of acres.
- The required financial assurance would have to be adjusted annually as necessary to ensure that it was sufficient to satisfy the reclamation requirements.
- Financial assurance would have to consist, at the sole option of the applicant, of a performance bond, surety, escrow, cash certificate of deposit, or other equivalent security or combination thereof; alternatively, the applicant could demonstrate that it had sufficient financial resources to satisfy the reclamation requirements of the bill.

A plan would also have to include a site plan showing the location of buildings, equipment, stockpiles, roads, berms, or other features necessary to the mining operations and demonstrating all of the following:

- A setback of the mining area from the nearest public roadway or adjoining property line of not less than 50 feet.
- A setback of equipment used for screening and crushing of not less than 200 feet from the nearest public roadway or adjoining property line, or not less than 300 feet from the nearest residential dwelling occupied on adjacent property as of the date of submittal of the plan for extraction.

The plan would have to include plans for reclamation of the mining area following cessation of mining operations that included all of the following:

- Grading, revegetating, and stabilization that would minimize, to the extent practicable, soil erosion, sedimentation, noise, off-site migration of dust, and public safety concerns consistent with regulations described below.
- Reclaiming slopes of the banks of the excavation not exceeding three feet horizontal to one foot vertical measured from the nearest setback line into any area disturbed by mining operations.
- Where open water with a maximum depth in excess of five feet would result from mining operations, reclaiming slopes into the water not exceeding one foot vertical to five feet horizontal maintained and extended into the water to a depth of five feet.

An application to extract natural resources by mining would have to be considered to be administratively complete effective 30 days after it was received by the local unit of government unless the local unit of government notified the applicant in writing that the application was not administratively complete before the 30-day period expired. The notification would have to specify the information necessary to make the application administratively complete. If the local unit of government notified the applicant, the 30-day period would be tolled until the applicant submitted to the local unit of government the specified information.

An application to extract natural resources by mining that contains the information required by the bill would be considered approved if the local unit of government did not make a final decision regarding the application within 180 days after receiving it; however, the applicant could agree in writing to extend the 180-day period.

#### Alternative to Plan for Proposed Extraction

As an alternative to submitting a plan for the proposed extraction, and notwithstanding anything to the contrary in the Act or any other statute or ordinance, the conditions above could be met if the person who sought to extract natural resources by mining demonstrated that the person could, by extracting the natural resources, receive revenue and reasonably expect to operate at a profit. The person would also have to demonstrate that very serious consequences would not result from the extraction of the natural resources by mining, considering the following factors, as applicable:

- The relationship of extraction and associated activities with existing land uses.
- The impact on existing land uses in the vicinity of the property.
- The impact on property values in the vicinity of the property and along the proposed hauling route serving the property, based on credible evidence.
- The impact on pedestrian and traffic safety in the vicinity of the property and along the proposed hauling route serving the property.
- The impact on other identifiable health, safety, and welfare interests in the local unit of government.

If the applicant had made a prima facie case that the requirements of a plan for proposed extraction or an alternative to a plan were met, the burden of proof would shift to the party challenging or opposing the proposed mining activity in an administrative or judicial action challenging that ordinance or action.

If a person challenged in court a zoning decision or ordinance that prevented, prohibited, or denied an applicant a permit or other authorization to extract natural resources by mining,

the judicial proceedings and the review of the zoning decision or ordinance would have to be de novo.

#### Regulations Not Preempted; Limitations

Currently, the Act does not limit a local unit of government's reasonable regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic, not preempted by Part 632 (Nonferrous Metallic Mineral Mining) of the Natural Resources and Environmental Protection Act. However, these regulations must be reasonable in accommodating customary mining operations.

Under the bill, the regulations could not be more restrictive than the following standards.

For dust control, dust could not exceed the standards required pursuant to any applicable general or individual air permit issued pursuant to Part 55 (Air Resources Protection) of the Natural Resources and Environmental Protection Act or Federal law.

For noise, the eight-hour time-weighted average sound pressure level in decibels (dB) measured at the common property line nearest to the active mining area on a sound level meter using the A-weighting network could not exceed 20 dB above background level and the following levels for adjacent property:

- For residentially zoned property: 75 dB(A).
- For commercially zoned property: 85 dB(A).
- For industrial and all other zoning classifications: 90 dB(A).

For ground vibration, all stationary machinery and equipment would have to be mounted and operated to prevent transmission of ground vibration exceeding a displacement of 0.1 inches measured anywhere outside of the property line. Blasting activity could not create any of the following at any residential building:

- Ground vibration in excess of that set forth in a United States Bureau of Mines report that lists safe blasting vibration criteria developed for residential structures.
- Air blast in excess of 133 decibels at any residential dwelling.

For truck loading hours, customer truck loading would have to be permitted from at least 5 AM to 7 PM local time, Monday through Saturday, or as otherwise specifically required by State or county contract. These limitations would apply only to the loading of trucks or trailers for over-the-road transportation and would not apply to the loading or unloading of railroad cars or ships, which would have to be permitted at any time.

The bill would apply to all requests for the extraction of natural resources by mining submitted on or after bill's effective date and would apply to all requests for the extraction of natural resources by mining pending on the bill's effective date or with respect to which all administrative and judicial actions had not been exhausted.

The bill also specifies that it would not apply to ferrous mineral operators regulated under Part 631 (Ferrous Mineral Mining) of the Natural Resources and Environmental Protection Act (NREPA). In addition, the bill specifies that the Michigan Zoning Enabling Act would not alter or limit the preemptive effect of Part 632 (Nonferrous Metallic Mineral Mining) of the NREPA as it related to the regulation of nonferrous metallic mining by a local unit of government. A local unit of government could not exercise zoning authority under the Michigan Zoning Enabling Act over activity governed by Part 362 of NREPA.

## **Senate Bill 849**

The Natural Resources and Environmental Protection Act requires certain entities to obtain a water withdrawal permit before making the withdrawal, except as otherwise provided under the Act. Under the bill, a person who proposed to use the water withdrawal for the extraction of aggregates by mining would have to obtain a water withdrawal permit before making the withdrawal.

The Act requires the Department of Environment, Great Lakes, and Energy (EGLE) to issue a water withdrawal permit if the following conditions are met:

- All water withdrawn, less any consumptive use, is returned, either naturally or after use, to the source watershed.
- The withdrawal will be implemented so as to ensure that the proposal will result in no individual or cumulative adverse resource impacts.
- Subject to the Act, the withdraw will be implemented to ensure that it complies with all applicable local, State, and Federal laws as well as all legally binding regional interstate and international agreements, including the Boundary Waters Treaty of 1909.
- The proposed use is reasonable under common law principles of water law in the State.
- The applicant has self-certified that he or she is in compliance with environmentally sound and economically feasible water conservation measures developed by the applicable water user's sector under the Act or that he or she is in compliance with environmentally sound and economically feasible water conservation measures developed for the water use associated with that specific withdrawal.
- The Department determines that the proposed withdrawal will not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties.

The bill would require EGLE to issue a water withdrawal permit to a person who proposed to use water withdrawal for the extraction of aggregates by mining if the conditions above were met.

Under the bill, notwithstanding any authorization or permit granted under a zoning ordinance for the extraction of aggregates by mining, the extraction of aggregates by mining could not pollute, impair, or destroy natural resources. The bill specifies that this provision would be subject to enforcement under Part 17 of the Act. The bill also specifies that the excavation and removal of aggregates and of associated overburden would not, of itself, constitute pollution, impairment, or destruction of those natural resources.

(Part 17 of NREPA allows the Attorney General to maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.)

MCL 125.3205 (S.B. 431)  
324.32723 et al. (S.B. 839)

Legislative Analyst: Tyler VanHuyse

## **FISCAL IMPACT**

### **Senate Bill 431**

The bill would have no fiscal impact on State or local government.

## **Senate Bill 849**

The bill would have an indeterminate fiscal impact on EGLE, and no fiscal impact on local units of government. The bill would require a person seeking to use a water withdrawal for the mining of aggregates to apply for a permit. This would result in an unknown increase in the number of permit applications received by EGLE, each of which would be accompanied by a \$2,000 permit application fee and an increase in administrative costs associated with processing each permit. To the extent that the permit fee exceeded the marginal cost to process each application, the bill would have a positive fiscal impact on EGLE; if costs exceeded, the revenue the opposite would be true.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.