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REGULATION OF GROUNDWATER WITHDRAWAL CONFLICTS

House Bill 4087 as passed by the House
Sponsor: Rep. John Moolenaar

House Bill 4097 as passed by the House
Sponsor: Rep. Ruth Johnson

Second Analysis (3-11-03)
Committee: Land Use and Environment

THE APPARENT PROBLEM:

According to committee testimony offered by the director of public health for Saginaw County, over the past eight years there have been 235 complaints from residents when their water wells have run dry during the summer months. The *Saginaw News* (1-28-03 and 3-8-02) has reported the residents believe they lose their water because of the irrigation practices of two corporate farms, one owned by Clio-based Walther & Sons, Incorporated, and the other by the Church of Jesus Christ of Latter Day Saints. The residents blame the farms' irrigation practices and their use of 10 irrigation wells, because after the growing season ends, the residential water supply returns to normal. The farms have denied a connection between their irrigation practices and the residents' water problems, blaming old, shallow residential wells as the cause of the problem.

Residents also have reported seasonal water shortages from their wells during the growing season in Gratiot County, and a county commissioner from Gratiot County reported that all residents who experience water loss are located near farms with irrigation systems.

Further, a spokesman for the Michigan Townships Association reported that de-watering is a serious problem in Monroe County, although in that county the water shortages are caused by sand- and gravel-mining operations.

The regulation of Michigan's water resources falls within the purview of the Department of Environmental Quality (DEQ), and surface groundwater withdrawals are governed by the Great Lakes Charter, a compact signed by the governors and premiers of the Great Lakes States and Provinces. See *BACKGROUND INFORMATION* below. All water resources within the basin are recognized and treated as a single hydrologic system,

and according to the charter, the management of the waters and the ecosystem are considered as a unified whole.

The subsurface water resources also are a part of the water system in the Great Lakes Basin, and their stewardship also falls to the DEQ. When residents lose their subsurface supply of water they have little recourse, since there is no dispute resolution system in Michigan that addresses concerns about groundwater withdrawals. According to reports, a dispute resolution system does operate effectively in the state of Indiana, and legislation to establish a similar conflict resolution program at the DEQ has recently been introduced.

THE CONTENT OF THE BILLS:

The bills would allow the director of the Department of Environmental Quality (DEQ) to regulate conflicts about groundwater withdrawals. The bills are tied to each other so that neither could become law unless the other also were enacted.

House Bill 4087 would add Part 317, entitled "Aquifer Protection and Conflict Resolution," to the Natural Resources and Environmental Protection Act (MCL 324.31701 et al.) in order to establish a process that would be followed by the director of the DEQ to receive groundwater withdrawal complaints, as well as to investigate and resolve those complaints. Under the bill, the conflict resolution orders that would be issued by the director would allow for the temporary provision of potable water, quantity restrictions on high capacity wells, and compensation for small quantity well owners. In addition, the bill would allow high capacity well owners to appeal the terms of an order directly to circuit court, set penalties for violation of an order, and enable the director to promulgate rules that might be necessary to

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implement the complaint resolution process. A more detailed explanation of the bill follows.

Definitions. The bill provides definitions for fifteen terms, including the following. “High capacity well” is defined to mean one or more water wells associated with an industrial or processing facility, an irrigation facility, or a public water supply system that, in the aggregate from all sources and by all methods, have the capability of withdrawing 100,000 or more gallons of groundwater in one day. “High capacity well” would not include a water well associated with a public water supply system that is owned or operated by a local unit of government if the recharge area of the water well is protected by a wellhead protection program approved by the department under the state’s wellhead protection program. “Small quantity well” is defined to mean one or more water wells of a person at the same location that, in the aggregate from all sources and by all methods, have the capability of withdrawing less than 100,000 gallons of groundwater in one day. “Irrigation facility” is defined to mean all wells, pumps, intakes, gates, tanks, pipes, or other equipment under common ownership or control and located either on the same site or on separate sites, which are used to withdraw, convey, or distribute water for the purposes of irrigating farmland, golf courses, parks, recreational areas, or other grounds. “Groundwater” is defined to mean subsurface water.

Groundwater withdrawal complaints and investigations. The bill would allow the owner of a small quantity well to submit a complaint alleging a potential groundwater conflict if his or her well had failed to furnish the normal supply of water, or had failed to furnish potable water, and the owner believed the well’s problems had been caused by a high capacity well. A complaint would be submitted to the DEQ by calling a toll-free telephone number, or by writing to the DEQ or to the Department of Agriculture, if the complaint involved an agricultural well. In either instance, the department would be required to conduct an on-site investigation within two working days after the complaint was taken. However, the either director could refuse to accept an unreasonable complaint. An investigation by the agriculture department would be conducted under the Michigan Right to Farm Act. If an investigation were conducted, the director would be required to consider whether the owner of the high capacity well was using industry recognized water conservation management practices. After conducting an on-site investigation, the director of the DEQ or the Department of Agriculture, as appropriate, would be required to make a diligent effort to resolve the

complaint, and could propose an equitable remedy. However, the bill specifies that if the Department of Agriculture was unable to resolve a complaint within a reasonable amount of time, then the complaint and all relevant information would be referred to the director of the DEQ for resolution. The bill would require the two departments to enter into a memorandum of understanding that describes their complaint resolution process.

The bill also specifies that a complainant who submitted more than three unverified complaints within one year could be ordered by the director to pay for the full costs of investigation of any fourth or subsequent unverified complaint. (As used in this subsection, “unverified complaint” means a complaint in response to which the director determined that there was no reasonable evidence to declare a groundwater conflict.)

Groundwater conflict declarations. Under the bill, the director of the DEQ would be required to declare a groundwater conflict if an investigation of a complaint disclosed all of the following, based upon scientifically-based evidence: a) a small quantity well had failed to furnish the well’s normal supply of water or failed to furnish potable water; b) the small quantity well and the well’s equipment were functioning properly at the time of the failure (a determination that the DEQ director would make by obtaining an assessment from a well drilling contractor registered under the Public Health Code); c) the failure of the small quantity well was caused by the lowering of the groundwater level in the area; d) the lowering of the groundwater level exceeded normal seasonal water level fluctuations, and substantially impaired continued use of the groundwater resources in the area; e) the lowering of the groundwater level was caused by at least one high capacity well; and, f) the owner of the small quantity well did not unreasonably reject a remedy proposed by the director of the DEQ or the director of the Department of Agriculture.

In addition, the bill would grant the director authority to declare, by order, a groundwater conflict, if he or she had clear and convincing scientifically-based evidence that indicated that continued groundwater withdrawals from a high capacity well would exceed the recharge capability of the groundwater resource of the area.

Groundwater conflict orders. An order declaring a groundwater conflict order would be effective when a copy was served upon the owner of a high capacity well that was reasonably believed to have caused the

failure of the complainant's small quantity well. The bill specifies that if a groundwater conflict required action before the order had been served, oral notification (for not more than 96 hours) in person by the director of the DEQ would be sufficient until service could be completed. As soon as possible after an order had been issued, the director would be required to provide copies to the local units of government in which the high capacity well and the small quantity well were located, and also to the local health departments with jurisdiction over the wells.

Temporary supply of potable water. Under the bill, upon the declaration of a groundwater conflict, the director of the DEQ would be required, by order, to arrange for the immediate temporary provision, at the point of use, of an adequate supply of potable water.

Quantity restrictions. If the director issued an order declaring a groundwater conflict, he or she could, by order, restrict the quantity of groundwater that could be extracted from a high capacity well, under either of the following conditions: a) if the high capacity well was reasonably believed to have caused the failure of the complainant's small quantity well, and an immediate temporary provision of an adequate supply of potable water had not been provided; or, b) there was clear and convincing scientifically based evidence that continued groundwater withdrawals from the high capacity well would exceed the recharge capability of the groundwater resource of the area.

The bill would require that, when issuing an order, the director consider the impact the order would have on the viability of a business associated with the high capacity well, or other use of the high capacity well. Further, the director could not issue an order that diminished the normal supply of drinking water or the capability for fire suppression of a public water supply system owned or operated by a local unit of government.

Compensation for small quantity well owners; DEQ reimbursement. Under the bill, if a groundwater conflict had been declared by order, then the owner of a high capacity well would be required to provide timely and reasonable compensation to those who owned a small quantity well, if there were a failure or substantial impairment of those wells, and the following conditions existed: a) the failure or impairment had been caused by the groundwater withdrawals of the high capacity well; and, b) if the small quantity well had been constructed prior to February 14, 1967, or if the small quantity well had

been constructed on or after February 14, 1967, in compliance with the Public Health Code.

In addition the bill specifies that the owner of a high capacity well would be required to reimburse the director an amount equal to the actual and reasonable costs incurred by the DEQ in investigating and resolving the groundwater conflict, not to exceed \$75,000.

Under the bill, timely and reasonable compensation would consist of (and be limited to) either or both of the following:

a) the reimbursement of expenses incurred by the complainant beginning 30 days prior to the date on which a complaint had been made, in doing the following: i) paying for the cost of obtaining an immediate temporary provision at the prior point of use of an adequate supply of potable water; ii) obtaining one of the following: A) the restoration of the affected small quantity well to the well's former capability; B) the permanent provision at the point of use of an alternative potable supply of equal quantity; and/or,

b) if an adequate remedy was not available under a (above), the restriction or scheduling of the groundwater withdrawals of the high capacity well so that the affected small quantity well could continue to produce either of the following: i) the well's normal supply of water, or ii) the normal supply of potable water if the well normally furnished potable water.

The bill specifies that the refusal of an owner of an affected small quantity well to accept timely and reasonable compensation would be sufficient grounds for the director to terminate an order imposed on a responsible high capacity well. Further, an owner of a high capacity well subject to an order issued by the director could appeal that order directly to the circuit court, if the owner did not believe compensation was timely or reasonable.

Exemptions. The bill would not apply to a potential groundwater conflict involving a high capacity well owned or operated by a local unit of government if the local unit agreed to make the aggrieved property owner whole, by connecting the owner's property to the local unit's public water supply system, or by drilling the owner a new well, with the costs paid by the local government.

Penalties. A person who violated an order would be responsible for a civil fine of not more than \$1,000 for each day of violation, but not exceeding a total of

\$50,000. A default in the payment of a civil fine or costs or an installment of the fine or costs could be remedied by any means authorized under the Revised Judicature Act. All civil fines recovered would be forwarded to the state treasurer for deposit into the general fund. Finally, the bill specifies that the director of the DEQ could bring an action in a court of competent jurisdiction to enforce an order, including injunctive or other equitable relief.

House Bill 4097 would amend the Natural Resources and Environmental Protection Act (MCL 324.32714) to authorize the department to expend money from the Water Use Protection Fund (created within the state treasury), upon appropriation, for the implementation and administration of the groundwater conflict resolution process. The bill also would delete an outdated portion of the law that required the department, by December 31, 1999, to conduct an assessment of the fund for the legislature, in order to determine if the amount of the annual water use reporting fees could be lowered.

BACKGROUND INFORMATION:

The Council of the Great Lakes Governors comprises governors of eight Great Lakes States (Michigan, Indiana, Illinois, Wisconsin, Ohio, Pennsylvania, and New York), who work closely with the leaders of the Canadian provinces of Ontario and Quebec. Together, they work to protect the environment and economy of the Great Lakes region, and have adopted the Great Lakes Charter, which specifies "Principles for the Management of Great Lakes Water Resources", which they, as the lakes' trustees, are pledged to follow.

The purposes of the charter are to conserve the levels and flows of the Great Lakes and their tributary and connecting waters; to protect and conserve the environmental balance of the Great Lakes Basin ecosystem; to provide for cooperative programs and management of the water resources of the Great Lakes Basin by the signatory states and provinces; to make secure and protect present developments within the region; and to provide a secure foundation for future investment and development within the region.

The "Principles for the Management of Great Lakes Water Resources" are as follows: I. Integrity of the Great Lakes Basin, II. Cooperation among Jurisdictions; III. Protection of the Water Resources of the Great Lakes, IV Prior Notice and Consultation; and V. Cooperative Programs and Practices.

According to the charter, the "Implementation of Principles" relies upon a common base of data. To that end, those who signed the charter have committed their agencies to "pursue the development and maintenance of a common base of data and information regarding the use and management of basin water resources and the establishment of systematic arrangements for the exchange of water data and information." The common base of data includes the following: 1) Each state and province will collect and maintain, in comparable form, data regarding the location, type, and qualities of water use, diversion, and consumptive uses, and information regarding projections of current and future needs; 2) In order to provide accurate information as a basis for future water resources planning and management, each state and province will establish and maintain a system for the collection of data on major water uses, diversions, and consumptive uses in the basin. The states and provinces, in cooperation with the federal governments of Canada and the United States and the International Joint Commission, will seek appropriate vehicles and institutions to assure responsibility for coordinated collation, analysis, and dissemination of data and information; and, 3) The Great Lakes states and provinces will exchange on a regular basis plans, data, and other information on water use, conservation, and development, and will consult with each other in the development of programs and plans to carry out these provisions.

The charter also names the water resources management committee, sets forth consultation procedures, describes a basin water resource management program, encourages a coordinated and concerted research program, and specifies five steps that must be accomplished to ensure progress toward implementation.

For more information about the Great Lakes Charter, visit www.cglg.org/pub/charter.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the Department of Environmental Quality would be able to recover costs of investigating and resolving groundwater conflicts. The department could expend appropriations from the Water Use Protection Fund to implement its dispute resolution program. Currently, the department collects and spends \$50,000 annually for this fund. If revenue were diverted to cover the costs of the program proposed under the bills, and the department were not able to

recover its costs, then the Ground Water Supply program services could be affected.

There would be no fiscal impact on local governmental units. (3-12-03)

ARGUMENTS:

For:

Disputes about water use in at least three of the state's 83 counties can be addressed by this bill. The legislation would allow the Department of Environmental Quality to investigate residents' complaints when they fear that farms or mining operations threaten their water supply. There have been more than 200 complaints in Saginaw County, alone, during the past eight years, and litigation has been threatened in Marion Township (within Saginaw County) because its township board imposed an irrigation well moratorium in 2000, despite the possibility that such a move exceeded the township board's legislative power since it could deny businesses their right to farm. The people of Saginaw County and elsewhere in the state who experience seasonal water shortages deserve relief. This legislation would provide a process to investigate their complaints, and make potable water available to them when the seasonal shortages occur.

Against:

Concern has been expressed that the costs of the dispute resolution system may be too great for the Department of Environmental Quality to bear, given the state's current budget crisis of nearly \$2 billion. Although the bill provides for penalties, they may not be adequate to fund the dispute resolution program that is envisioned by the legislation.

Indeed, the DEQ estimates that the resources that would be needed to implement these bills are extensive. Specifically, the DEQ estimates that it would require 5 to 7 FTEs to just analyze the data and investigate the conflicts. This does not address the issue of obtaining data that would be necessary to determine whether a conflict is occurring. It may be necessary to create groundwater computer models to determine what "normal" water levels are since the investigations would occur after the conflicts were initiated. Determining water levels in the areas of conflicts would be expensive and could range from several thousand dollars to over \$20,000 for each conflict. Just investigating 100 conflicts per year could cost over \$2 million. These costs are in addition to the approximately \$500,000 for the 5 to 7 FTEs.

Against:

An earlier version of the bill included a section to declare legislative intent. This section strengthened the bill, because it declared that the "waters of the state were valuable *public* resources." Currently, subsurface water is considered to be a private property right, and user disputes must be addressed after they occur, rather than prevented in advance. Although a dispute resolution process is needed for conflicts that arise between users, that process should be part of a larger regulatory program. A more systemic approach--for example a permitting process--could prevent user disputes while ensuring greater aquifer protection.

The legislative intent section that was removed from the bill would have situated the important dispute resolution process that the bill contains within a larger program of water protection. For example, it specified that the legislature finds and declares that a) the participation of the state in implementing this part would assist in the protection of the interrelationship between Michigan's aquifers and the Great Lakes basin, and would specifically address the paramount public concern of the health, safety, and general welfare of the citizens of the state, b) the waters of the state are valuable public natural resources, and the state has a duty as trustee to manage its water effectively for the use and enjoyment of present and future residents and for the protection of the environment, c) future inter-basin diversions and consumptive uses of waters of the Great Lakes basin could have significant adverse impacts upon the economy, environment, and welfare of the Great Lakes region and of the state; d) the continued availability of water for domestic, municipal, industrial, agricultural, recreation, hydroelectric power, navigation, energy production, and fish and wildlife habitat is vital to the future economic health of the state; and e) the state has an interest in protecting the water resources and other natural resources of the state and in providing residents of the state with tools to resolve water conflicts. These are important aspects of any water management policy, and should be included in this bill.

Response:

The Michigan legislature's bill drafting protocols seldom incorporate provisions to declare legislative intent. Removing this language was in keeping with normal drafting procedures.

POSITIONS:

The Michigan Chamber of Commerce supports the bills. (3-14-03)

The Michigan Farm Bureau supports the bills. (3-13-03)

The Michigan Agribusiness Association supports the bills. (3-12-03)

The Michigan Manufacturers Association supports the bills. (3-12-03)

The Michigan Ground Water Association supports House Bill 4087 in concept and is working with the sponsor on amendments, and has no position of House Bill 4097. (3-14-03)

The Michigan Townships Association supports the bills. (3-12-03)

The National Wildlife Federation supports the bills but would prefer a more comprehensive approach to protect Michigan's aquifers. (3-12-03)

The Michigan United Conservation Clubs (MUCC) is neutral on the bills. (3-14-03)

The Michigan Municipal League is neutral on the bills. (3-14-03)

The Department of Environmental Quality opposes the bills as written. (3-14-03)

The Michigan Environmental Council opposes the bills. (3-12-03)

Analyst: J. Hunault

■ 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.