

PART 317: GROUNDWATER DISPUTE RESOLUTION

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House Bill 4678 (reported from committee as Substitute H-1)

Sponsor: Rep. Kevin Daley

Committee: Agriculture

Revised First Analysis (6-5-13)

BRIEF SUMMARY: The bill would make participation in the Part 317 aquifer dispute resolution program mandatory for agricultural well owners, and allow agricultural well owners to contest groundwater dispute orders by filing an appeal with the Agriculture Commission. The bill would also provide the director of the Department of Agriculture and Rural Development (MDARD) with the same authority currently given to the director of the Department of Environmental Quality (DEQ) in disputes involving agricultural wells.

FISCAL IMPACT: House Bill 4678 will increase costs for the Michigan Department of Agriculture and Rural Development (MDARD) to carry out responsibilities related to this program. Current costs are estimated at \$40,000 and 0.25 FTEs by MDARD, but would likely be higher with enactment of this bill. Under Act 602 of 2012, actual costs for this program are reimbursed to MDARD from the Aquifer Protection Revolving Fund. The Fund is currently appropriated in the DEQ budget with total program costs estimated at \$200,000 annually.

House Bill 4678 would have a minimal fiscal impact on the Department of Environmental Quality. Any fiscal impact would be related to additional administrative costs from the bill's provisions that the director of DEQ (or the director of the MDARD) provide actual notice of the complaint to the owner of each high-capacity well identified in the complaint within two business days after receiving any complaint.

THE APPARENT PROBLEM:

The aquifer dispute resolution program contained within Part 317 of the Natural Resources and Environmental Protection Act was re-established through Public Act 602 of 2012, with the intention of providing a dispute resolution process within the Department of Environmental Quality for small-quantity well owners whose wells are thought to have been adversely affected by high-capacity wells.

The program had originally been enacted as Public Act 177 of 2003. The program existed within the DEQ until 2009, when it was repealed [through Public Act 176] because of budget constraints and the belief that existing legal remedies were available to protect small-quantity well owners from large scale water withdrawals.

According to the Department of Environmental Quality, during the program's years in operation (2003-2009), 107 complaints were received, 53 were successfully resolved, and none were declared a conflict by the director.

Under the current program, small quantity well owners can submit complaints to the DEQ alleging a potential groundwater dispute (1) if the well has failed to produce at normal capacity or (2) the well has failed and there exists a credible reason to believe the failure is the result of a high-capacity well. Upon receiving a complaint, the DEQ or Agriculture director, respectively, would have to begin an investigation, although high-capacity well owners have the ability to opt out of the process at any time. If the opt-out occurs, the investigation of the complaint is suspended and the dispute resolved as otherwise provided by law.

Upon completion of an investigation, the director(s) must make a diligent effort to resolve the complaint and can propose remedies believed to provide resolution. A groundwater dispute is declared by order if an investigation discloses all of the following, based on reasonable scientifically based evidence, and if within a reasonable amount of time a complaint cannot be resolved:

- The small-quantity well has failed to furnish the well's normal supply or failed to furnish potable water.
- The well and its equipment were functioning properly at the time of the failure. (The determination must be made based on an assessment from a well drilling contractor provided by the small-quantity well owner.)
- The failure of the well was caused by the lowering of the groundwater level in the area.
- The lowering of the groundwater level exceeds normal seasonal water level fluctuations and substantially impairs the continued use of the groundwater.
- The lowering of the groundwater level was caused by at least one high-capacity well.
- The owner of the well did not unreasonably reject a remedy proposed by the DEQ MDARD or MDARD director.

In addition to the authority to declare a groundwater dispute discussed above, the DEQ director has the authority to declare a groundwater dispute by order if there exists clear and convincing scientifically-based evidence that indicates that continued groundwater withdrawals from a high-capacity well will exceed the recharge capability of the groundwater in the area. Additionally, the DEQ director would be able to amend or terminate a groundwater dispute order at any time.

Once a groundwater dispute is declared, the director can restrict the quantity of groundwater that can be pumped from a high-capacity well if (1) the high-capacity well is reasonably believed to have caused the failure of the complainant's small-quantity well and an immediate temporary provision of adequate supply of potable water has not been provided, or (2) there is clear and convincing scientifically-based evidence that continued groundwater withdrawal from the high-capacity well will exceed the recharge capacity of

the area. Additionally, the high-capacity well owner would be responsible for providing compensation to the impacted small quantity well owners, under certain conditions.

During deliberations prior to the passage of Public Act 602 of 2012, many expressed concern with allowing high-capacity well owners to opt out of the program at any time. Once a complaint reaches this level, the small-capacity well owner is likely experiencing significant well problems that could limit the amount of water being pumped. Without a firm timeline for a party to opt out, the resolution process could play out only to result in a party choosing to no longer participate. Such action would leave the small-capacity well owner without a resolution for an extended period of time, both the amount of time spent in the resolution process and the time spent in the court system. As a result, it has been proposed to remove the opt-out provisions for agricultural wells and to provide an appeals process for high-capacity well owners involved in a groundwater dispute.

THE CONTENT OF THE BILL:

The bill would amend Part 317 (Aquifer Protection and Dispute Resolution) of the Natural Resources and Environmental Protection Act to make the following changes regarding the groundwater dispute resolution process:

- Allow agricultural well owners, within 14 days after service of a dispute order, to contest the order by filing an appeal with the Agriculture Commission. Appeals would have to be scheduled for consideration at the next commission meeting and all terms of the order, except for the provision providing for an adequate supply of potable water, would be stayed until a determination is made. If a groundwater dispute order is dismissed by the Commission, the Department of Agriculture and Rural Development (MDARD) would be required to provide reimbursement for the cost of providing potable water.
- Remove the ability of all high-capacity well owners to opt out of the dispute resolution program, and allow only non-agricultural, high-capacity well owners to opt out and resolve the dispute as otherwise provided by law.
- Require the department(s) to provide actual notice of a complaint to the owner of each high-capacity well that is identified in a complaint.
- Provide the MDARD director with the same authority currently given to the director of the Department of Environmental Quality (DEQ) in disputes involving agricultural wells.
- Require an on-site investigation to begin within five business days of the owner of each high-capacity well being provided with the actual notice of complaint. Currently, an investigation must begin within five business days of the department receiving a complaint.

- In the case of a complaint involving an agricultural well, require the DEQ to consult with and provide technical assistance to MDARD regarding the on-site evaluation.
- Remove a provision that requires the MDARD director to refer a complaint to the DEQ director if the MDARD director is unable to resolve a complaint within 14 days of it being submitted.
- Redefine agricultural well to mean a high-capacity well that is "located on a farm and is used for an agricultural purpose."

ARGUMENTS:

For:

As enacted in 2012, the dispute resolution program in Part 317 allows high-capacity well owners to opt out of dispute resolution at any time. Once a complaint reaches the department, the small-capacity well owner is likely experiencing significant well problems that could limit the amount of water being pumped. Without a firm timeline for a party to opt out, the resolution process could play out only to result in a party choosing to no longer participate. Such action would leave the small-capacity well owner without a resolution for an extended period of time, both the amount of time spent in the resolution process and the time spent in the court system. The opt-out provision for agricultural wells is removed in the bill to ensure groundwater disputes involving agricultural wells are handled promptly.

The bill also shifts the dispute resolution process involving agricultural wells so that they will mainly be handled by MDARD, with technical expertise provided by the DEQ. This change allows MDARD, which has individuals well versed in agricultural water withdrawal issues, to be directly involved in the dispute resolution process. The bill also creates a process for high-capacity well owners to appeal groundwater dispute orders to the Agriculture Commission. By placing MDARD in the primary dispute resolution role, agricultural well owners will interact primarily with MDARD, with whom many in the agriculture community have a positive working relationship.

Against:

Currently, under Part 317, any high-capacity well owner can opt out of the dispute resolution program at any time. The bill would remove the opt-out ability for agricultural well owners and require they participate in the program. While many in the agriculture community believe mandatory participation by agricultural well owners is necessary to ensure the program works as designed, there are some who are uncomfortable with the mandate. According to testimony, those individuals believe groundwater disputes should be handled on a case-by-case basis. Additionally, many non-agricultural high-capacity well owners do not want to participate in a mandatory dispute resolution program. [It should be noted that non-agricultural high-capacity well owners are not mandated to participate in the program.]

The DEQ director has the authority to restrict the amount of groundwater that can be pumped from a high-capacity well if a groundwater dispute is declared. Some are uncomfortable with the director having such power and believe it encroaches on the rights of private property owners. Mandatory participation in the dispute resolution program is thought to be sufficient to get parties to come together and the authority to limit groundwater withdrawal is unnecessary.

POSITIONS:

The Michigan Department of Agriculture and Rural Development supports the bill. (5-22-13)

Michigan Agri-Business Association supports the bill. (5-28-13)

Michigan Corn Growers Association supports the bill. (5-15-13)

Michigan Farm Bureau supports the bill. (5-28-13)

Michigan League of Conservation Voters supports the bill. (5-28-13)

Michigan Sugar Company supports the bill. (5-28-13)

Potato Growers of Michigan supports the bill. (5-15-13)

Walter Farms supports the bill. (5-22-13)

Michigan Chamber of Commerce is neutral on the bill. (5-22-13)

Michigan Groundwater Association is neutral on the bill. (5-22-13)

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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.