



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 356 (Substitute H-1 as passed by the House)

Senate Bill 419 (Substitute H-3 as passed by the House)

Senate Bill 719 (as passed by the Senate)

Sponsor: Senator Bruce Patterson (S.B. 356)

Senator Jason E. Allen (S.B. 419 & 719)

Senate Committee: Economic Development, Small Business and Regulatory Reform

House Committee: Natural Resources, Great Lakes, Land Use, and Environment

Date Completed: 9-15-05

RATIONALE

In 2003, the Michigan Court of Appeals issued a decision in *Lake Isabella Development, Inc. v Village of Lake Isabella* invalidating the Department of Environmental Quality's (DEQ's) R 299.2933(4) ("Rule 33") related to private sewerage systems that service a specific development. (The litigation is described below, under **BACKGROUND**.) Rule 33 required an applicant seeking to construct a private sewage system to obtain a resolution from the local government that it would assume responsibility for the wastewater system if the developer failed to maintain or operate it properly. Although local governments still may assume responsibility for private wastewater treatment systems, they sometimes are reluctant to do so. Without the backing of the local government, a developer may have difficulty getting the necessary permits from the DEQ. To address this situation, it has been suggested that private, wastewater utilities could assume the responsibility for operating and managing private sewage treatment systems, under the purview of the Public Service Commission (PSC).

CONTENT

Senate Bill 356 (H-1) would amend Part 41 (Sewage Disposal and Waterworks Systems) of the Natural Resources and Environmental Protection Act to require private wastewater utilities to comply with the Act, local ordinances, and certain Federal laws. Senate Bill 419 (H-3) would amend the Public Service

Commission law to give the PSC jurisdiction over private wastewater utilities. Senate Bill 719 would amend Public Act 299 of 1972, which provides for an assessment against public utilities, to include wastewater companies in the Act's definition of "public utility".

Senate Bills 356 (H-1) and 419 (H-3) would define "private, investor-owned wastewater utility" as a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

All of the bills are described in more detail below.

Senate Bill 356 (H-1)

The bill states that the activities of a private, investor-owned wastewater utility would have to comply with all applicable provisions of the Natural Resources and Environmental Protection Act, local zoning and other ordinances, and the construction and operation requirements of the Federal Water Pollution Control Act and the Federal Natural Environmental Policy Act.

The bill also would delete a provision requiring the DEQ to counsel owners and operators of sewerage systems or any parts of sewerage systems when disputes between public agencies over sewerage service or sewerage treatment rates occur, and allowing

the DEQ to act as arbitrator when called upon to do so by a majority of the parties to the controversy.

Senate Bill 419 (H-3)

Under the PSC law, the Commission has the power and jurisdiction to hear and pass upon all matters pertaining to the regulation of public utilities, including electric light and power companies; water, telegraph, oil, gas, and pipeline companies; motor carriers; and transportation and communication agencies. The bill would add private wastewater treatment facilities to those entities.

The bill would allow a private, investor-owned wastewater utility to apply to the PSC for rate regulation. If an application were filed under this provision, the PSC would be vested with the specific grant of jurisdictional authority to regulate the rates, fares, fees, and charges of private, investor-owned wastewater utilities.

Senate Bill 719

Under Public Act 299 of 1972, an amount attributable to the regulation of public utilities must be assessed against the utilities and apportioned among them by the PSC. A utility's assessment is based on its proportionate share of the gross revenue for the preceding calendar year derived from intrastate operations. The minimum assessment is \$50.

The Act defines "public utility" as a steam, heat, electric, power, gas, water, telecommunications, telegraph, communications, pipeline, or gas producing company regulated by the PSC, whether private, corporate, or cooperative, except a municipally owned utility. The bill would include a wastewater company in that definition.

MCL 324.4108 (S.B. 356)
460.6 (S.B. 419)
460.111 (S.B. 719)

BACKGROUND

In the *Lake Isabella Development, Inc. v Village of Lake Isabella* case, the developer had sought to develop a condominium project, along with a private wastewater system. The village did not operate a municipal sewerage system, and individual septic systems were not a viable option due

to geography. The developer submitted its site plan to the village, and the planning commission approved it. When the developer submitted its permit application to the DEQ, however, the Department refused to review the plan or issue the permit until the village provided the resolution required under Rule 33. The developer requested the resolution from the village, which rejected the request and effectively halted the project.

The developer filed a complaint against the DEQ seeking a declaratory ruling that Rule 33 exceeded the scope of the DEQ's rule-making authority and, thus, was invalid. The trial court agreed and granted summary disposition to the plaintiff. The DEQ appealed to the Court of Appeals, which affirmed the trial court's decision (259 Mich App 393).

The Court of Appeals based its reasoning in the case on the following three-pronged test: 1) whether the rule was within the subject matter of the DEQ's enabling statute; 2) whether it complied with the legislative intent of the enabling statute; and 3) whether it was arbitrary or capricious.

The Court determined that Rule 33 was within the subject matter of the enabling statute, i.e., the operation of sewerage systems. According to the Court, however, the discretion granted by Rule 33 to the local unit transferred decision-making authority from the State to local governments in conflict with the underlying legislative intent of the DEQ's enabling statute.

Further, the Court determined, "...Rule 33 is arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to municipalities, seeks to impose operational mandates upon municipalities ill-adapted to comply with those mandates, and is unnecessary to the DEQ for enforcement."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

When local units decline to assume responsibility for private sewerage systems in the event that developers are unable to

maintain them properly, development plans must be abandoned if the developers cannot get the necessary permits. Under the DEQ's current policy, if the owner of a proposed wastewater facility does not have a resolution from the local government that it will assume responsibility, the owner can obtain a permit by meeting other criteria, which include the establishment of a legal entity to own the proposed facility, and a perpetual operation and maintenance fund. Private wastewater utilities can provide the underwriting and security needed for permits and operation of the private treatment facilities.

The bills would relieve developers and local governments of the responsibility for sewage treatment, and encourage the development of private, on-site wastewater treatment facilities. These facilities would serve as an economic stimulus and protect the State's water resources, particularly in rural areas where the low population density does not make municipal sewerage systems practical or cost-effective. The DEQ would experience the same level of reliability, expertise, and efficiency in interacting with the PSC as it does with municipal utilities, and homeowners could rely on adequate sewerage services for the life of their property.

Supporting Argument

In recent years, Michigan developers have been making increased use of residential cluster developments. The developments place homes in small groups, or clusters, surrounded by expanses of communal green space. Residential clusters do not allow for each home to have its own septic system, which require large individual lots. Also, in rural areas, the cost of running sewerage lines to the nearest municipality can be prohibitively expensive. As a result, developers building residential clusters are constructing their own, privately owned, wastewater companies to serve their developments. The private wastewater facilities are self-contained and allow for greater open space around areas of dense development, helping to limit sprawl.

Supporting Argument

The bills would encourage job creation and contribution to the local tax base. Developers would need to employ workers to build the investor-owned utilities and the neighborhoods they would serve, as well as to replace existing septic systems that are

failing or near the end of their life cycles. Several thousand workers would be needed to perform this construction and upgrade work.

Supporting Argument

Investor-owned sewerage systems provide an alternative to septic systems, which present risks to public safety and the environment. Commission-regulated systems would be guaranteed to be professionally operated and maintained, whereas the responsibility for a septic system is left to the individual homeowner.

Legislative Analyst: Julie Koval
J.P. Finet

FISCAL IMPACT

Senate Bill 356 (H-1)

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

Senate Bill 419 (H-3)

The bill would increase the responsibilities of the Public Service Commission. The increased costs would be funded by utility assessments on the industry. The amount of costs and revenue would depend on the number of wastewater utilities regulated.

Senate Bill 719

The bill would provide the Commission with the authority to assess fees on wastewater treatment plants that would be eligible to be regulated under Senate Bill 419 (H-3). The amount of revenue that would be generated from the fees would depend on the number of treatment facilities that chose to participate in this program. These fees would cover the staffing and administrative costs associated with this regulation.

Fiscal Analyst: Elizabeth Pratt
Jessica Runnels
Maria Tyszkiewicz

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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.