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BILL ANALYSIS

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Senate Bill 668 (Substitute S-1 as reported)
Senate Bill 669 (Substitute S-1 as reported)
Sponsor: Senator Gerald Van Woerkom (S.B. 668)
Senator Tony Stamas (S.B. 669)
Committee: Agriculture, Forestry and Tourism

Date Completed: 9-27-05

RATIONALE

In 1998, the Michigan Agricultural Processing Act was enacted in order to shield food processing operations from lawsuits claiming that the activities or conditions of a processor are a nuisance, that is, something that interferes with another person's use or enjoyment of his or her property (described more fully in **BACKGROUND**, below). The Act was modeled after the Right to Farm Act, which was designed to protect farmers from nuisance lawsuits brought by people who object to the noise, odors, and dust that accompany typical farming activities. Under the Right to Farm Act, a farming operation may not be found to be a public or private nuisance if it conforms to generally accepted agricultural and management practices (or GAAMPS) determined by the Michigan Agriculture Commission. Similarly, under the Michigan Agricultural Processing Act, a processing operation may not be found to be a nuisance if it conforms to generally accepted processing practices determined by the Agriculture Commission. Although the Act took effect seven years ago, however, generally accepted practices (or GAPS) for food processors have not been promulgated. As a result, the concerns that led to the law's enactment are still present. To address food processors' fears about potential litigation, it has been suggested that additional protections against liability should be available until the Commission establishes GAPS.

CONTENT

Senate Bill 668 (S-1) would amend the Michigan Agricultural Processing Act to provide that, until the Agriculture Commission establishes generally accepted processing practices, a processing operation could not be found to be a nuisance in court if the Director of the Michigan Department of Agriculture (MDA) determined that the operation was in compliance with specific environmental laws and food manufacturing practices. The bill also provides that this determination, or a determination that a processing operation existed before a change in use or occupancy of land within one mile of its boundaries, would create a rebuttable presumption that the operation was operating under GAPS or was not a nuisance.

Senate Bill 669 (S-1) would amend the Michigan Agricultural Processing Act to provide that a person could not bring a nuisance action against a processing operation until he or she had filed an administrative complaint under the Act and the complaint had been resolved. The bill would require the MDA to resolve an administrative complaint based on assessments by the Department of Environmental Quality and the MDA of the operation's compliance with the laws and practices cited in Senate Bill 668 (S-1), if GAPS were not established.

The bills are tie-barred to each other.

Senate Bill 668 (S-1)

The Michigan Agricultural Processing Act provides that a processing operation may not be found to be a public or private nuisance if it conforms to generally accepted fruit, vegetable, dairy product, and grain processing practices as determined by the Agriculture Commission. Under the bill, until

the Commission establishes GAPS, a processing operation could not be found to be a public or private nuisance in an action brought in a court, if the MDA Director determined that the processing operation was in compliance with both of the following:

-- Part 31 (Water Resources Protection) and Part 55 (Air Pollution Control) of the Natural Resources and Environmental Protection Act (NREPA).
-- The Federal good manufacturing practices adopted under the Food Law (described in **BACKGROUND**).

The Michigan Agricultural Processing Act also provides that a processing operation may not be found to be a public or private nuisance if it existed before a change in the use or occupancy of land within one mile of the boundaries of the land on which the processing operation is located and, before that change in use or occupancy, the operation would not have been found to be a nuisance. The bill specifies that the determination of either these circumstances or the operation's compliance with the laws and practices cited above, would be considered to be a finding as a matter of law and would create a rebuttable presumption that the operation was operating under GAPS or that it was not a public or private nuisance.

Currently, if a processing operation conforms to GAPS, it may not be found to be a public or private nuisance as a result of any of the following:

-- A change in ownership or size.
-- Temporary cessation or interruption of processing.
-- Adoption of new technology.
-- A change in type of fruit, vegetable, dairy, or grain product being processed.

Under the bill, this provision also would apply to a processing operation that was determined to be in compliance with Parts 31 and 55 of NREPA and the Federal good manufacturing practices adopted under the Food Law.

(The Act defines "processing operation" as the operation and management of a business engaged in processing. "Processing" means the commercial processing or handling of fruit, vegetable, dairy, and grain products for human food consumption and animal feed, including the following:

-- The generation of noise, odors, waste water, dust, fumes, and other associated conditions.
-- The operation of machinery and equipment necessary for a processing operation, including irrigation and drainage systems and pumps and the movement of vehicles, machinery, equipment, and fruit and vegetable products, dairy products, and grain products and associated inputs necessary for fruit and vegetable, dairy, and grain, food, or feed processing operations on the roadway as authorized by the Michigan Vehicle Code.
-- The management, storage, transport, use, and land application of fruit, vegetable, dairy product, and grain processing by-products consistent with generally accepted agricultural and management practices as established under the Michigan Right to Farm Act.
-- The conversion of one processing operation activity to another processing operation activity.
-- The employment and use of labor engaged in a processing operation.)

Senate Bill 669 (S-1)

The Michigan Agricultural Processing Act requires the Michigan Agriculture Commission to request that the MDA Director or his or her designee investigate all nuisance complaints under the Act involving a processing operation. The Act allows the Commission and the Director to enter into a memorandum of understanding with the Department of Environmental Quality (DEQ), and requires the investigation and resolution of nuisance complaints to be conducted pursuant to the memorandum of understanding.

The bill would prohibit a person from bringing an action for nuisance in a court of this State until he or she had filed an administrative complaint under the Act. A court could not proceed with an nuisance action against a processing operation until the court found that the complaint was brought to final determination under the Act.

Under the bill, if no generally accepted fruit, vegetable, dairy product, and grain

processing practices had been established, any nuisance complaint received by the DEQ or the MDA would have to be resolved under Section 3 (the section Senate Bill 668 (S-1) would amend) in the following manner:

-- The DEQ would have to assess compliance of an operation or practice with Parts 31 and 55 of NREPA, and issue a report of conclusions within 60 days of receiving the complaint.
-- The MDA would have to assess the processing operation or practice under Federal good manufacturing practices adopted under the Food Law.

Based upon these determinations, the MDA would have to make a finding as to whether a processing operation was in compliance with the Act.

Under the Act, if the MDA Director or his or her designee finds, upon investigation, that the person responsible for a processing operation is using GAPS, the Director or designee must give that person and the complainant written notice of this finding. If the Director or designee finds that the source or potential source of the problem is the use of other than GAPS, he or she must advise the person responsible for the operation that necessary changes should be made to resolve or abate the problem and to conform to generally accepted practices. The bill would require notice that a person was in compliance with GAPS or otherwise in compliance with law as described in Section 3(2) (i.e., compliance with Parts 31 and 55 of NREPA and with Federal good manufacturing practices under the Food Law). If a problem were caused by the use of other than GAPS or other than compliance with law as described in Section 3(2), the Director or designee would have to advise the person that necessary changes should be made to resolve or abate the problem and to conform with GAPS or with applicable law as described in Section 3(2).

MCL 289.823 (S.B. 668)
289.824 (S.B. 669)

BACKGROUND

Nuisance

The term "nuisance" has a number of definitions, which vary depending upon the type of nuisance involved. In general, the term refers to conduct that endangers or inconveniences the public, or interferes with the property or personal rights of individuals. The first definition given in *Black's Law Dictionary*, Eighth Edition, is "a condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property…". Among the different types of nuisances are public and private nuisances. According to *Black's*, a public nuisance is "an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property". A private nuisance is defined as "a condition that interferes with a person's enjoyment of property…". A particular condition or activity may constitute either a public nuisance or a private nuisance, or both; the distinction is whether the interference or injury affects the community at large or an individual.

Good Management Practices

Federal good management practices for food are found in the Code of Federal Regulations, 21 CFR Part 110, which is entitled, "Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food". Under Michigan's Food Law, food processing plants are required to comply with these regulations (MCL 289.7101). The Food Law defines "food processing plant" as a food establishment that processes, manufactures, packages, labels, or stores food and does not provide food directly to a consumer. "Food establishment" means an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, sold, or offered for sale.

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

Agriculture is Michigan's second largest industry, and an integral part of it is the processing of raw agricultural commodities into food products. Food processors operating in the State range in size from large companies, such as the Kellogg Company in Battle Creek, which produces

cereal for national and international distribution, to small individually owned operations, such as cider mills where the owners grow the apples and process them into cider that is sold to local customers. While some food processors are located in urban areas near major transportation routes, many are situated in rural settings that are close to where the raw materials are grown. In recent years, the rural landscape has been undergoing a transition as many urban and suburban dwellers move to the country. Just as there has been controversy between residents and farmers, there have been conflicts between processing operations and their neighbors over the noise, odor, and other conditions associated with food processing activities.

Since the Right to Farm Act apparently reduced the number of lawsuits brought against those who engage in legitimate farming activities and follow GAAMPS, the Michigan Agricultural Processing Act was designed to provide similar protection to food processors. Without the establishment of generally accepted processing practices, however, food processors still may be subject to the expense, inconvenience, and stress of defending lawsuits complaining about conditions that are inherent in typical food processing operations. Although it has been seven years since the law was enacted, the development of GAPS continues to be a challenge. Unlike farming operations, the food processing industry is subject to pervasive regulation under both State and Federal law, including environmental statutes. Evidently, this has contributed largely to the difficulty in reaching a consensus on generally accepted food processing practices.

Considering that food processing is essential to the agricultural industry, and that agriculture is vital to Michigan's economy, it is important that food processors not be driven out of business or out of the State by unwarranted litigation. Senate Bill 668 (S-1) would help ensure the viability of Michigan's food processing industry by providing that, until GAPS are established, processing operations could not be found to be a nuisance, and would be presumed to be operating under generally accepted practices, if they complied with the State's water and air pollution laws and Federal good management practices for food. If and when GAPS are developed, the original provisions of the Act will apply, and a processing operation may not be found to be a nuisance if it complies with the generally accepted practices determined by the Agriculture Commission.

Supporting Argument

One factor that may account for litigation against food processors is lack of awareness of the administrative remedy under the Michigan Agricultural Processing Act. Apparently, in some cases, a resident will complain to the DEQ when he or she is bothered by a food processor's activities. In other cases, the food processor itself might contact the DEQ, which evidently is what occurred in a dispute involving the New Era Canning Company. Although the DEQ is responsible for determining whether environmental laws have been violated, the Department of Agriculture might not learn of the situation for some time, if at all, which means that the Act's process for the MDA to investigate and resolve the problem is not triggered.

Senate Bill 669 (S-1) would help address this situation, and prevent unnecessary litigation, by requiring a person to exhaust his or her administrative remedy before pursuing a lawsuit against a food processor. The bill also would prohibit a court from proceeding with an action claiming that a processor was a nuisance until the complaint had been administratively decided. In addition, until GAPS are established for food processors, if either the DEQ or the MDA received a nuisance complaint, it would have to be determined according to the criteria set forth in Senate Bill 668 (S-1).

Opposing Argument

Senate Bill 669 (S-1) effectively would deny a person the opportunity to protect his or her property rights by going to court for immediately relief. In many, if not most, cases, the situation causing a complaint is temporary. For example, a pile of decomposing waste product may create a stench that makes it unbearable for a neighboring homeowner to go outdoors until the waste dries up or is removed. Under current law, the individual may go to court and seek an order for the processor to abate the nuisance. Under the bill, however, he or she first would have to file a complaint with the Department of Agriculture and wait for the MDA and/or the DEQ to assess the operation or practice in question and for the

MDA to make a determination. The bill would give the DEQ 60 days to make its assessment, and would set no deadline for the MDA to act. By the time it was administratively resolved, the complaint would be moot and the person simply would have had to tolerate the nuisance. Compounding this problem are the significant budgetary cutbacks that the Departments have experienced in recent years, which would make it difficult for them to respond to nuisance complaints in a timely manner.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bill 668 (S-1)

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

Senate Bill 669 (S-1)

To the extent that the bill would limit the number of cases brought in local courts, it potentially could decrease local court costs.

The bill could increase the administrative costs to the Departments of Environmental Quality and Agriculture associated with the compliance assessments that would be required under the bill. It is unknown at this time how many assessments would have to be performed. In regard to a similar program, the Department of Agriculture reports that it received five complaints under the Right to Farm Program dealing with fruit and vegetable food processing operations (Right to Farm Program, Fiscal Year Report 2004).

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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.