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BILL ANALYSIS

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

**PUBLIC ACT 282 of 2005**  
**PUBLIC ACT 283 of 2005**

Date Completed: 1-9-06

### **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 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 in October 1998, 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 was been suggested that additional protections against liability should be available until the Commission establishes GAPS.

### **CONTENT**

**Senate Bill 668** amended the Michigan Agricultural Processing Act to provide that, until the Agriculture Commission

establishes generally accepted processing practices, a processing operation may not be found to be a nuisance in court if the Director of the Michigan Department of Agriculture (MDA) has determined that the operation is in compliance with the Act (as provided by Senate Bill 669). The bill also specifies 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, creates a rebuttable presumption that the operation is operating under GAPS or is not a nuisance. In addition, the bill includes meat in the definition of "processing" and in GAPS.

**Senate Bill 669** amended the Michigan Agricultural Processing Act to require the MDA to make a finding as to whether a processing operation is in compliance with the Act based on an assessment by the Department of Environmental Quality (DEQ) of the operation's compliance with the Natural Resources and Environmental Protection Act (NREPA) and an assessment by the MDA of the operation's compliance with the Federal good manufacturing practices adopted under the Food Law. The bill prohibits a court from proceeding with a nuisance action brought against a processing operation unless the complainant exhausted all administrative remedies, which will occur if a person is granted a determination by the MDA Director.

The bills were tie-barred to each other, and took effect on December 19, 2005.

### **Senate Bill 668**

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. The bill refers to generally accepted fruit, vegetable, dairy product, meat, and grain processing practices.

Under the bill, until the Commission establishes GAPS, a processing operation may not be found to be a public or private nuisance in an action brought in a court, if the MDA Director has determined that the processing operation is in compliance with the Act as described in Section 4(3). (Under Senate Bill 669, that section requires the MDA to make a finding as to a processing operation's compliance based on assessments of the DEQ and the MDA.)

The 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 Act, as described above, is considered to be a finding as a matter of law and creates a rebuttable presumption that the operation is operating under GAPS or that it is not a public or private nuisance.

Under the Act, 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 applies to a processing operation that is determined to be in compliance with the Act.

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.

The bill refers to the commercial processing or handling of fruit, vegetable, dairy, meat, and grain products, and includes references to meat where the other items are mentioned.

### **Senate Bill 669**

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, and requires the investigation and resolution of

nuisance complaints to be conducted pursuant to the memorandum of understanding.

The bill prohibits a court from proceeding with an nuisance action brought against a processing operation until the court finds that the complainant exhausted all administrative remedies. If the MDA Director grants a person a determination under the Act, the person is be considered to have exhausted his or her administrative remedies with regard to that matter.

Under the bill, if no generally accepted fruit, vegetable, dairy product, meat, and grain processing practices have been established, any nuisance complaint received by the DEQ or the MDA must be resolved under Section 3 (the section that Senate Bill 668 amended) in the following manner:

- The DEQ must assess compliance of an operation or practice with NREPA.
- The MDA must assess the processing operation or practice under Federal good manufacturing practices adopted under the Food Law.

Each Department must conduct an inspection within 10 working days of receiving the complaint.

Based upon these determinations, the MDA must make a finding as to whether a processing operation is 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 requires notice that a person is in compliance with GAPS or otherwise in compliance with law as described in Section 3(2). If a problem was caused by the use of other than GAPS or other than compliance with law as described in Section 3(2), the Director or designee must 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). (Under Senate Bill 668, that section provides that a processing operation may not be found to be a nuisance if the MDA Director has determined that it is in compliance with the Act.)

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 enacted 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 over 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 will help ensure the viability of Michigan’s food processing industry by providing that, until GAPS are established, processing operations may not be found to be a nuisance, and are presumed to be operating under generally accepted practices, if they comply 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 will help address this situation, and prevent unnecessary litigation, by prohibiting a court from proceeding with an action claiming that a processor is a nuisance until the MDA determines whether the processor is in compliance with the Act. In addition, until GAPS are established for food processors, if either the DEQ or the MDA receives a nuisance complaint, it must be determined according to the procedures set forth in the bill.

### **Opposing Argument**

Senate Bill 669 effectively denies 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 the previous law, the individual could go to court and seek an order for the processor to abate the nuisance. Under the bill, however, he or she first must 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. Although the MDA and the DEQ will have to conduct an inspection within 10 working days after receiving a complaint, the bill sets no deadline for the Department of Agriculture to make a finding. By the time a complaint is administratively resolved, it might be moot and the person simply will have had to tolerate the nuisance.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

#### **Senate Bill 668**

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

#### **Senate Bill 669**

The bill may increase the administrative costs to the Departments of Environmental Quality and Agriculture associated with the compliance assessments that will be required under the bill. It is unknown at this time how many assessments will 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).

To the extent that the bill limits the number of cases brought in local courts, it potentially may decrease local court costs.

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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.