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Senate Bill 1177 (as reported without amendment)
Sponsor: Senator Roger Kahn, M.D.
Committee: Natural Resources and Environmental Affairs

(as passed by the Senate)

Date Completed: 5-3-10

RATIONALE

In 2003, legislation was enacted to establish a process for the resolution of disputes over groundwater use, in response to numerous complaints by residents that nearby high-capacity wells used in large farming and other commercial operations were causing water shortages. The resolution program required the Director of the Department of Natural Resources and Environment (DNRE) or the Michigan Department of Agriculture (MDA), as applicable, to investigate complaints regarding small-quantity well failures believed to be caused by high-capacity wells; allowed the DNRE Director to restrict groundwater withdrawals by high-capacity wells under certain circumstances; and required well owners found responsible for water shortages to compensate well owners who were harmed.

Due to Michigan's recent budgetary pressures, Public Act 176 of 2009 eliminated the groundwater dispute resolution program. It has been suggested that the program should be reinstated so conflicts between various water users can continue to be resolved in an equitable manner.

CONTENT

The bill would add Part 317 (Aquifer Protection and Dispute Resolution) to the Natural Resources and Environmental Protection Act to do the following:

- Allow the owner of a small-quantity well to file a complaint with the DNRE or the MDA, if the well failed to furnish its normal water supply or failed to furnish potable water, and**

- the owner believed that the failure was caused by a high-capacity well.**
- Require the Department Director to investigate a complaint and make a diligent effort to resolve it.**
- Require the DNRE Director to declare a groundwater dispute if a complaint could not be resolved and an investigation disclosed lowering of the groundwater beyond seasonal water levels and substantial impairment of continued use of the area's groundwater resources, caused by a high-capacity well, and other factors.**
- Require the DNRE Director, upon declaring a dispute, to order immediate provision of potable water, and permit the Director to restrict the quantity of groundwater that could be extracted from a high-capacity well.**
- Require the owner of a high-capacity well, after a dispute was declared, to provide reasonable and timely compensation, as well as reimbursement.**
- Prescribe a civil fine for violations.**
- Create the "Aquifer Protection Revolving Fund" for the implementation of Part 317.**
- Require the DNRE to submit to the Legislature a biennial report on the Department's implementation costs and recommendations to improve the effectiveness of Part 317.**

Small-Quantity & High-Capacity Wells

"Small-quantity well" would mean one or more water wells of a person at the same

location that, in the aggregate from all sources and by all methods, does not have the capability of withdrawing 100,000 or more gallons of groundwater in one day.

"High-capacity well" would mean one or more water wells associated with an industrial or processing facility, an irrigation facility, a farm, or a public water supply system that, in the aggregate from all sources and by all methods, has the capability to withdraw 100,000 or more gallons of groundwater per day.

"Water well" would mean an opening in the surface of the earth, however constructed, used for the purpose of withdrawing groundwater. The term would not include a drain as defined in the Drain Code.

Complaint Submission

Under proposed Part 317, the owner of a small-quantity well could submit a complaint alleging a potential groundwater dispute if the well had failed to furnish its normal supply or had failed to furnish potable water and the owner had credible reason to believe that the well's problems had been caused by a high-capacity well. ("Owner" would mean either the owner of an interest in property or a person in possession of property. "Potable water" would mean water that is acceptable for human consumption at the point of use.)

The complaint would have to be submitted to the DNRE Director or to the MDA Director if it involved an agricultural well. The complaint would have to be in writing and submitted in person, or via certified mail, a toll-free facsimile line provided by the DNRE Director, or other means of electronic submittal developed by the DNRE. Either the DNRE or the MDA Director could refuse to accept an unreasonable complaint.

A complaint would have to include all of the following:

- The name, address, and telephone number of the small-quantity well owner.
- The location of the small-quantity well, including the county, township, township section, and address of the property on which the well was situated, and all other available information defining its location.

- An explanation of why the small-quantity well owner believed that a high-capacity well had interfered with the proper function of the small-quantity well and any information available to the well owner about the location and operation of the high-capacity well.
- The date or dates on which the interference by a high-capacity well occurred.
- Sufficient evidence to establish a reasonable belief that the interference was caused by a high-capacity well.

The DNRE Director would have to provide for the use of a toll-free facsimile telephone line to receive complaints, as well as a toll-free telephone line for small-quantity well owners to request complaint forms and obtain other information regarding the dispute resolution process. Both the DNRE Director and the MDA Director would have to publicize the toll-free lines.

The Directors would have to enter into a memorandum of understanding that described the process that each would follow when a complaint involved an agricultural well.

Investigation; Effort to Resolve

The DNRE or MDA Director, as appropriate, would have to contact a complainant and begin an investigation within two business days after receiving a complaint, and conduct an on-site evaluation within five business days after receiving a complaint. If the complaint were for a small-quantity well in close proximity to other small-quantity wells for which documented complaints had been received and investigated during the previous 60 days, however, the DNRE would not have to conduct an on-site evaluation unless the Department determined that one was necessary.

If the DNRE Director or MDA Director, as appropriate, considered an investigation necessary, he or she could require that the small-quantity well owner provide a written assessment by a well drilling contractor that the well failure was not the result of well failure or equipment failure. The assessment would have to include a determination of the static water level in the well at the time of the assessment and, if readily available, the type of pump and equipment.

The DNRE or MDA Director would have to give affected people an opportunity to contribute to the investigation. In conducting the investigation, the Director would have to consider whether the owner of the high-capacity well was using industry-recognized water conservation management practices.

After investigating, the DNRE or MDA Director would have to make a diligent effort to resolve the complaint. In attempting to do so, the Director could propose a remedy that he or she believed would equitably resolve the complaint. If the MDA Director could not resolve a complaint within 14 days after it was submitted, he or she would have to refer the complaint and provide all relevant information to the DNRE Director.

If a person submitted more than two unverified complaints within one year, the DNRE Director could order the person to pay for the full costs of investigating any third or subsequent unverified complaint. (A complaint would be "unverified" if the Director, in response to it, determined that there was not reasonable evidence to declare a groundwater dispute.)

Declaration of Dispute

The DNRE Director would have to declare a groundwater dispute, by order, if he or she were unable to resolve a dispute within a reasonable amount of time and an investigation of the complaint disclosed all of the following, based upon reasonable scientifically based evidence:

- The small-quantity well had failed to furnish its normal water supply or to furnish potable water.
- The small-quantity well and its equipment were functioning properly at the time of the failure (according to an assessment from a well drilling contractor provided by the small-quantity well owner).
- The failure was caused by the lowering of the groundwater level in the area.
- The lowering of the groundwater level exceeded normal seasonal water level fluctuations and substantially impaired continued use of the groundwater resource in the area.
- The lowering of the groundwater level was caused by at least one high-capacity well.

- The small-quantity well owner did not unreasonably reject a remedy proposed by the DNRE or MDA Director.

In addition, the DNRE Director could declare a groundwater dispute, by order, if he or she had clear and convincing scientifically based evidence that continued groundwater withdrawals from a high-capacity well would exceed the recharge capability of the groundwater resource of the area.

An order declaring a groundwater dispute 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. If the dispute required action before the copy could be served, oral notification in person by the Director would be sufficient until service could be completed, but not for more than 96 hours.

As soon as possible after issuing an order declaring a groundwater dispute, the Director would have to give copies to the local units of government in which the high-capacity and small-quantity wells were located, and to the local health departments with jurisdiction over those wells.

The Director could amend or terminate an order declaring a groundwater dispute at any time.

Provision of Potable Water; Restricted Extraction

Upon declaring a groundwater dispute, the DNRE Director would have to require, by order, the immediate temporary provision at the point of use of an adequate supply of potable water.

The Director also, by order, could restrict the quantity of groundwater that could be extracted from a high-capacity well under either of the following conditions:

- The high-capacity well was reasonably believed to have caused the failure of the small-quantity well and the high-capacity well owner had not immediately provided a temporary adequate supply of potable water.
- 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.

If a high-capacity well operator withdrew water by a means other than pumping, the Director could, by order, temporarily restrict the quantity of groundwater that could be extracted only if the conditions described above had not been met.

In issuing an order to restrict extraction, the Director would have to consider the impact that the order would have on the viability of a business associated with the high-capacity well or other use of that well.

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 & Reimbursement

If a groundwater dispute had been declared, the owner of a high-capacity well would be required, subject to an order of the DNRE Director, to provide timely and reasonable compensation if there were a failure or substantial impairment of a small-quantity well and the following conditions existed:

- The failure or substantial impairment was caused by the groundwater withdrawals of the high-capacity well.
- The small-quantity well either had been constructed before February 14, 1967, or was in compliance with Part 127 (Water Supply and Sewer Systems) of the Public Health Code.

In addition, the high-capacity well owner would have to reimburse the DNRE Director an amount equal to the actual and reasonable costs incurred by the Director in investigating and resolving the groundwater dispute, not to exceed \$75,000. This money would have to be forwarded to the State Treasurer for deposit into the Aquifer Protection Revolving Fund.

Timely and reasonable compensation would include the reimbursement of expenses reasonably incurred by the complainant beginning 30 days before the complaint was made, in doing the following:

- Paying for the cost of determining that the small-capacity well and its

equipment were functioning properly at the time of the failure.

- Paying for the cost of obtaining an immediate temporary provision of an adequate supply of potable water at the prior point of use.
- Obtaining the restoration of the affected small-quantity well to its normal supply of water, or the permanent provision at the point of use of an alternative potable water supply of equal quantity.

If an adequate remedy could not be achieved in this way, timely and reasonable compensation would include the restriction or scheduling of the groundwater withdrawals of the high-capacity well so that the affected small-quantity well continued to produce either its normal water supply or its normal supply of potable water. Timely and reasonable compensation would be limited to these remedies.

If a small-quantity well owner refused to accept timely and reasonable compensation, as described above, the refusal would be sufficient grounds for the Director to terminate an order imposed on the responsible high-capacity well owner.

Violations & Penalties

A person who violated an order issued under Part 317 would be responsible for a civil fine of up to \$1,000 for each day of violation, but not more than 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 have to be forwarded to the State Treasurer for deposit into the General Fund.

Enforcement & Appeal

The DNRE Director could bring an action in a court of competent jurisdiction to enforce an order under Part 317, including injunctive or other equitable relief.

A high-capacity well owner subject to an order could appeal it directly to circuit court pursuant to the Revised Judicature Act.

Aquifer Protection Revolving Fund

The bill would create the Fund within the State Treasury. The Fund could receive money or other assets from any source for deposit. The State Treasurer would have to direct the investment of the Fund, and credit to it any interest and earnings from investments. Money in the Fund at the close of the fiscal year would remain in the Fund and would not lapse to the General Fund. The DNRE would be the Fund administrator for auditing purposes. The DNRE could spend Fund money only to implement Part 317.

If money in the Fund were used to conduct hydrogeological studies or other studies to gather data on the nature of aquifers or groundwater resources in Michigan, the DNRE would have to include this information in its groundwater inventory and map.

Biennial Report

Every two years, the DNRE would have to prepare a report and submit it to the standing committees of the Senate and the House of Representatives. The report would have to include an analysis of the Department's costs of implementing Part 317 and whether the \$75,000 limitation on reimbursable costs should be modified. The report also would have to include recommendations on modifications to Part 317 that would improve its overall effectiveness.

Exclusions

Proposed Part 317 would not apply to a potential groundwater dispute 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 installation costs paid by the local unit.

Part 317 also would not apply to a dispute involving a high-capacity well associated with a public water supply system that was owned or operated by a local unit if the recharge area of the water well were protected by a wellhead protection program approved by the DNRE.

In addition, Part 317 would not apply to a dispute involving a high-capacity well that was used solely for the purpose of fire suppression or a high-capacity well that was a dewatering well.

(A "dewatering well" would be a well or pump that is used for a limited time as part of a construction project to remove or pump water from a surface or subsurface area, and that ceases to be used when or shortly after the project is completed.)

Proposed MCL 324.31701-324.31712

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

The groundwater dispute resolution process was effective in bringing affected parties together to find solutions without costly, time-consuming litigation. This program embodied a common-sense approach to identifying the cause of well failures, facilitating remedies for problematic situations, and ensuring that high-capacity well owners implemented water conservation practices. In light of the program's usefulness to Michigan residents and industry, it should be reinstated.

Opposing Argument

Substantial cuts to the DNRE budget have been made in recent years due to the State's economic situation. As a result, Department staff have been reduced and some activities and programs have been eliminated, the original groundwater dispute resolution program among them. While restoring this program could be beneficial to water users, the bill does not identify a source to fund it.

Opposing Argument

The bill would create a certain amount of ambiguity by failing to define several key terms, such as "clear and convincing scientifically based evidence", "timely and reasonable compensation", and "substantial impairment of a small-quantity well". Furthermore, the bill would not authorize the DNRE to promulgate rules to define the relevant terms. The lack of specificity, either statutory or administrative, could

leave the proposed law open to legal challenges.

Response: The same terminology was used in Public Act 177 of 2003, which created the original groundwater dispute resolution process.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill is similar to the former Part 317 of the Act which was repealed in December 2009 as part of the FY 2009-10 budget resolution. In a 2008 memo regarding this former program, the Department estimated that to be fully funded, the program would need approximately \$180,000: \$50,000 for the MDA's responsibilities, and \$130,000 for the DNRE's responsibilities. Additionally, 2.0 FTEs were assigned to resolving groundwater disputes. Under the bill, costs similar to these would likely be incurred, and additional funds would need to be appropriated to both the DNRE and the MDA to avoid having an unfunded mandate.

Fiscal Analyst: Josh Sefton

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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.