

Legislative Analysis



AQUIFER PROTECTION PROGRAM: REINSTATE DISPUTE RESOLUTION PROCESS

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Senate Bill 1008 as enacted

Public Act 602 of 2012

Sponsor: Sen. John Moolenaar

House Committee: Natural Resources, Tourism, and Outdoor Recreation

Senate Committee: Natural Resources, Environment, and Great Lakes

Complete to 1-10-13

A SUMMARY OF SENATE BILL 1008 (H-4) AS ENACTED 12-31-12

The bill would add Part 317 (Aquifer Protection and Dispute Resolution) to the Natural Resources and Environmental Protection Act to provide for a **dispute resolution process** within the Department of Environmental Quality (DEQ) for small-quantity well owners whose wells are thought to have been adversely affected by high-capacity wells.

The bill would reestablish the Aquifer Protection Program, which was eliminated by Public Act 176 of 2009. The program was repealed because of budget constraints and the belief that existing legal remedies were available to protect small-quantity well owners against large scale water withdrawals. A detailed summary of Senate Bill 1008 (S-5) follows later.

FISCAL IMPACT:

Senate Bill 1008 would establish an Aquifer Protection and Dispute Resolution Program similar to a past ground water dispute program within DEQ for which the statutory authority was repealed in 2009. Funding for the program would pay for expenses such as the investigation of complaints, activities to promote resolutions, and the provision of water to complainants, under certain circumstances.

In Public Act 305 of 2012 (House Bill 5400), the Legislature appropriated \$600,000 in restricted funding from the Aquifer Protection Revolving Fund that would be established in this bill to the DEQ Surface Water line item to be used for the Aquifer Dispute Resolution Program. This bill would establish that program. In PA 305, the \$600,000 funding was transferred from the Community Pollution Prevention Fund (CPPF) to the Aquifer Protection Revolving Fund by boiler plate Section 350. However, this transfer will only take place if Senate Bill 1008 is enacted into law. This bill provides that the funding in the Aquifer Protection Revolving Fund remains in the Fund at the close of the fiscal year; thus, any remaining balance will be carried over to be appropriated in subsequent years.

Senate Bill 1008 also establishes civil fines of up to \$1,000 per day for violating issued orders under the program, not to exceed \$50,000. These revenues are also to be

deposited into the Fund. The bill would increase the expenses of the DEQ and DARD by an indeterminate amount, depending upon the number of complaints received, the number of investigations that the DEQ and DARD must conduct, and the amount of any civil fines collected. If Senate Bill 1008 is enacted, however, the additional \$600,000 restricted funding and any civil fine revenues will be available to fund the program, until those amounts are expended.

DETAILED SUMMARY OF SENATE BILL 1008 (S-5)

Complaint Process

The bill would allow a small-quantity well owner to submit a complaint 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.

Complaints would have to be submitted to the DEQ director, or to the director of the Department of Agriculture and Rural Development if an agricultural well is involved. Complaints could be submitted by mail, fax, or in person. The director(s) would be permitted to refuse to accept a complaint deemed unreasonable. A complaint must include all of the following:

- Name, address, and telephone number of the complainant.
- Small-quantity well's location, including the county, township, township section, and address of the property on which the well is located, and all other information that defines the well's location.
- A written assessment from a well drilling contractor that the well's failure was not the result of well design or equipment failure. Any such assessment would have to include a determination of the static water level in the well at the time of the assessment and the type of pump and equipment, if readily available.
- An explanation of why the well owner believes a high-capacity well has interfered with the well's proper function and any information available to the owner about the location and operation of the high-capacity well.
- Date or dates on which the interference by a high-capacity well occurred.
- Sufficient evidence to establish a reasonable belief that any interference was caused by a high-capacity well.

Investigation of complaints

The director(s) would be required to contact the owners of both wells and begin an investigation within two days of receiving a complaint. If the owner of a high-capacity well chooses to not participate in the dispute resolution process, the investigation would be suspended and the dispute would be resolved as provided by law.

The director(s) would be required to conduct an on-site evaluation within five business days of receiving a complaint. An on-site evaluation would not be required if a complaint is for a small-quantity well that is within close proximity to another small-quantity well for which documented complaints have been received and investigated in

the 60 days preceding the complaint, unless the department determines it is necessary. Individuals would be provided an opportunity to contribute to the investigation and in conducting the investigation, the director would have to consider whether an owner of a high-capacity well is using industry-recognized water conservation practices.

Complaint resolution

Upon completion of an investigation, the director(s) would have to make a diligent effort to resolve the complaint and could propose remedies that are believed to provide resolution. If the MDARD director is unable to resolve a complaint involving an agricultural well within 14 days of submission, the complaint would be referred to the DEQ director. The DEQ director would have to provide a toll-free fax line to receive complaints and a toll-free phone line for small-quantity well owners to request forms and to obtain other information regarding the resolution process. Both directors would be required to (1) publicize the toll-free lines and (2) enter into a memorandum of understanding that describes the process that will be followed by each director when a complaint involves an agricultural well.

Unverified complaints

A well owner that submits more than two unverified complaints within a one-year period may be ordered by the DEQ director to pay for the full investigation costs of any third or subsequent unverified complaint. [Unverified complaint would mean a complaint in response to which the director determines there is not reasonable evidence to declare a groundwater dispute.]

Declaration of groundwater dispute

The director would declare a groundwater dispute by order if an investigation discloses all of the following, based on reasonable scientifically based evidence, and within a reasonable amount of time a complaint is unable to 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 that is 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 director or MDARD director.

In addition to the authority to declare a groundwater dispute discussed above, the DEQ director would have the authority to declare a groundwater dispute by order if there exists clear and convincing scientifically-based evidence that indicates the 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.

Groundwater dispute order

A groundwater dispute order would become effective once served on the high-capacity well owner that is reasonably believed to have caused the small-quantity well's failure. If a dispute requires action before service can be completed, oral notification in person by the DEQ director would be sufficient until service can be completed and would not be effective for more than 96 hours.

Copies of the groundwater dispute order would have to be provided to the local units of government and the local health departments with jurisdiction over the wells as soon as possible after being issued.

Temporary orders to restrict withdrawal

Once a groundwater dispute is declared, the DEQ director must, by order, require the immediate temporary provision at the point of use of an adequate supply of potable water. The director may also 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. The order's impact on the viability of a business associated with the high-capacity well would have to be considered prior to issuing an order. If water is withdrawn by means other than pumping and the above conditions are not met, the DEQ director could temporarily restrict the quantity of groundwater withdrawn from the well.

Compensation for declared dispute

A high-capacity well owner would be required to provide timely and reasonable compensation if a groundwater dispute has been declared if there is a failure or substantial impairment of a small-quantity well and the following exist:

- The failure or substantial impairment was caused by the high-capacity well water withdrawal.
- The small-quantity well was constructed prior to February 14, 1967, or if the well was constructed on or after February 14, 1967, the well was constructed in compliance with Part 127 of the Public Health Code.

Timely and reasonable compensation

Timely and reasonable compensation would consist of and be limited to either or both of the following:

- The reimbursement of expenses reasonably incurred by the small-quantity well owner beginning 30 days before the date on which a complaint was made in (1)

paying for the cost of conducting a well assessment; (2) paying for the cost of obtaining an immediate temporary provision at the prior point of use of an adequate supply of potable water; or (3) obtaining either the restoration of the affected well to its normal operation or the permanent provision of an alternative potable supply of equal quantity at the point of use.

- If an adequate remedy is not achievable, the restriction or scheduling of groundwater withdrawals of the high-capacity well so that the small-quantity well continues to produce its normal supply or a normal supply of potable water.

A small-quantity well owner's refusal to accept timely and reasonable compensation would be sufficient grounds for the DEQ director to terminate an order imposed on the high-capacity well owner.

Appeal process

Any owner of a high-capacity well subject to an order under Part 317 could appeal the order directly to circuit court.

Wells exempt from Part 317

Part 317 would not apply to potential groundwater disputes involving any of the following situations:

- A high-capacity well that is a dewatering well.
- A high-capacity well that is used solely for fire suppression purposes.

Aquifer Protection Revolving Fund

The bill would create the Aquifer Protection Revolving Fund within the state treasury and allow for deposits from any source. Money in the fund at the end of the fiscal year would stay in the fund and not lapse to the General Fund. The DEQ would be the administrator for auditing purposes and money could only be expended to implement Part 317.

Money expended to conduct hydrogeological studies to gather data on the nature of aquifers or groundwater resources would have to be included in the groundwater inventory and map prepared under Section. 32802.

Biennial reports

No later than April 1, 2013, and every two years after that, the DEQ would have to submit a report to the Legislature that includes (1) an analysis of the DEQs costs of implementing Part 317 and (2) recommendations on modifications to Part 317 that would improve the overall effectiveness of the program.

Violations

Anyone found in violation of Part 317 would be guilty of a civil fine of not more than \$1,000 for each day in violation, but not to exceed a total of \$50,000. A default in payment could be remedied by any means authorized under the Revised Judicature Act. All civil fines recovered under this section would be deposited into the Aquifer Protection Revolving Fund.

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

BACKGROUND INFORMATION AND DISCUSSION:

The bill is intended to create a dispute resolution process for small-quantity well owners whose wells are thought to have been adversely affected by high-capacity wells, in an effort to keep such disputes out of the court system.

During deliberations on the bill, there were concerns 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. If a time limit were established on when a party could opt out of the resolution process would limit the potential time a small-capacity well owner would be without a properly functioning well.

As noted earlier, the bill would reestablish the Aquifer Protection Program, which was eliminated by Public Act 176 of 2009. The program was repealed because of budget constraints and the belief that existing legal remedies were available to protect small-quantity well owners against 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.

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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.