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BILL



ANALYSIS

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Senate Bill 1008 (as enacted)

**PUBLIC ACT 602 of 2012**

Sponsor: Senator John Moolenaar

Senate Committee: Natural Resources, Environment and Great Lakes

House Committee: Natural Resources, Tourism, and Outdoor Recreation

Date Completed: 1-16-13

**CONTENT**

The bill added 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 Department of Environmental Quality (DEQ) or the Michigan Department of Agriculture and Rural Development (MDARD), if the well fails to furnish its normal water supply or fails to furnish potable water, and the owner believes 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 DEQ Director to declare a groundwater dispute if a complaint cannot be resolved and an investigation discloses 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 DEQ Director, upon declaring a dispute, to order immediate provision of potable water, and permit the Director to restrict the quantity of groundwater that may be extracted from a high-capacity well.
- Require the owner of a high-capacity well, after a dispute is declared, to

provide reasonable and timely compensation.

- Allow a high-capacity well owner to opt out of participation in the resolution process.
- Prescribe a civil fine for violations.
- Create the "Aquifer Protection Revolving Fund" for the implementation of Part 317.
- Require the DEQ to submit to the Legislature a biennial report on the Department's implementation costs and recommendations to improve the effectiveness of Part 317.

The bill took effect on January 9, 2013.

**Small-Quantity & High-Capacity Wells**

The bill defines "small-quantity well" as one or more water wells of a person at the same location that, in the aggregate from all sources and by all methods, do not have the capability of withdrawing 100,000 or more gallons of groundwater in one day.

The bill defines "high-capacity well" as one or more water wells associated with an industrial or processing facility, an irrigation facility, or a farm that, in the aggregate from all sources and by all methods, have the capability to withdraw 100,000 or more gallons of groundwater per day.

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

### Complaint Submission

The owner of a small-quantity well may submit a complaint alleging a potential groundwater dispute if the well has failed to furnish its normal supply or has failed to furnish potable water and the owner has credible reason to believe that the well's problems have been caused by a high-capacity well. (The bill defines "owner" as either the owner of an interest in property or a person in possession of property. "Potable water" means water that is acceptable for human consumption at the point of use.)

The complaint must be submitted to the DEQ Director or to the MDARD Director if it involves an agricultural well. The complaint must be in writing and submitted in person or via certified mail, a toll-free facsimile line provided by the DEQ Director, or other means of electronic submittal developed by the DEQ. Either the DEQ or the MDARD Director may refuse to accept an unreasonable complaint.

A complaint must 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 is situated, and all other available information defining its location.
- A written assessment by a well drilling contractor that the small-quantity well failure was not the result of well design or equipment failure.
- An explanation of why the owner believes that a high-capacity well has interfered with the proper function of the small-quantity well and any information available to the owner about the location and operation of the high-capacity well.
- The date or dates on which the interference occurred.
- Sufficient evidence to establish a reasonable belief that the interference was caused by a high-capacity well.

The contractor's assessment must 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 DEQ Director must 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 DEQ Director and the MDARD Director must publicize the toll-free lines.

The Directors must enter into a memorandum of understanding that describes the process that each will follow when a complaint involves an agricultural well.

### Investigation; Effort to Resolve

The DEQ or MDARD Director, as appropriate, must contact a complainant and each high-capacity well owner identified in the complaint 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 is for a small-quantity well in close proximity to other small-quantity wells for which documented complaints have been received and investigated during the previous 60 days, however, the DEQ need not conduct an on-site evaluation unless the Department determines that one is necessary. In any case, however, if the high-capacity well owner notifies the DEQ that he or she does not wish to participate in the dispute resolution process, the investigation must be suspended and the dispute must be resolved as otherwise provided by law.

The DEQ or MDARD Director must give affected people an opportunity to contribute to the investigation. In conducting the investigation, the Director must consider whether the owner of the high-capacity well is using industry-recognized water conservation management practices.

After investigating, the DEQ or MDARD Director must make a diligent effort to resolve the complaint. In attempting to do so, the Director may propose a remedy that he or she believes will equitably resolve the complaint. If the MDARD Director cannot resolve a complaint within 14 days after it is submitted, he or she must refer the complaint and provide all relevant information to the DEQ Director.

If a person submits more than two unverified complaints within one year, the DEQ Director may order the person to pay for the full costs of investigating any third or subsequent unverified complaint. (A complaint is "unverified" if the Director, in response to it, determines that there is not reasonable evidence to declare a groundwater dispute.)

#### Declaration of Dispute

The DEQ Director must declare a groundwater dispute, by order, if he or she is unable to resolve a dispute within a reasonable amount of time and an investigation of the complaint discloses all of the following, based upon reasonable scientifically based evidence:

- The small-quantity well has 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 exceeds normal seasonable water level fluctuations and substantially impairs 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 DEQ or MDARD Director.

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

An order declaring a groundwater dispute will be effective when a copy is served upon the owner of a high-capacity well that is reasonably believed to have caused the failure of the complainant's small-quantity well. If the dispute requires action before the copy can be served, oral notification in person by the Director will be sufficient until

service can be completed, but not for more than 96 hours.

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

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

#### Provision of Potable Water; Restricted Extraction

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

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

- The high-capacity well is reasonably believed to have caused the failure of the small-quantity well and the high-capacity well owner has not immediately provided a temporary adequate supply of potable water.
- There is clear and convincing scientifically based evidence that continued groundwater withdrawals from the high-capacity well will exceed the recharge capability of the groundwater resource of the area.

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

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

The Director may not issue an order that diminishes 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 has been declared, the owner of a high-capacity well is required, subject to an order of the DEQ Director, to provide timely and reasonable compensation if there is a failure or substantial impairment of a small-quantity well and the following conditions exist:

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

Timely and reasonable compensation includes 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 conducting a well assessment to determine 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 cannot be achieved in this way, timely and reasonable compensation includes the restriction or scheduling of the groundwater withdrawals of the high-capacity well so that the affected small-quantity well continues to produce either its normal water supply or its normal supply of potable water. Timely and reasonable compensation is limited to these remedies.

If a small-quantity well owner refuses to accept timely and reasonable compensation, as described above, the refusal will be sufficient grounds for the Director to

terminate an order imposed on the responsible high-capacity well owner.

#### Violations & Penalties

A person who violates an order issued under Part 317 will 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 may be remedied by any means authorized under the Revised Judicature Act.

All civil fines recovered must be forwarded to the State Treasurer for deposit into the Aquifer Protection Revolving Fund.

#### Enforcement & Appeal

The DEQ Director may 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 may appeal it directly to circuit court pursuant to the Revised Judicature Act.

#### Aquifer Protection Revolving Fund

The bill created the Fund within the State Treasury. The DEQ may spend Fund money only to implement Part 317 and to reimburse MDARD for its actual implementation costs.

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

The Fund may receive money or other assets from any source for deposit. The State Treasurer must 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 will remain in the Fund and not lapse to the General Fund. The DEQ is the Fund administrator for auditing purposes.

#### Biennial Report

Every two years, beginning April 1, 2013, the DEQ must prepare a report and submit it to the Legislature. The report must include

an analysis of the Department's costs of implementing Part 317, as well as recommendations on modifications to Part 317 that would improve its overall effectiveness.

#### Exclusions

Part 317 does not apply to a dispute involving a high-capacity well that is used solely for the purpose of fire suppression or a high-capacity well that is a dewatering well.

(A "dewatering well" is a well or pump that is used to remove water from a mining operation or 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.)

MCL 324.31701-324.31712

Legislative Analyst: Julie Cassidy

#### **FISCAL IMPACT**

The bill will have a negative fiscal impact of about \$200,000 annually on the Department of Environmental Quality and the Department of Agriculture and Rural Development. Both Departments will experience increased costs related to the investigation of groundwater complaints. A similar program previously conducted by the DEQ cost approximately \$200,000 annually, depending on the number of complaints investigated. However, this amount could be mitigated to some extent, as the bill allows high-capacity well owners to opt out of the groundwater dispute resolution process, and allows the complainant to pursue other legal recourse.

The new costs incurred by both the DEQ and MDARD will be offset to a very small extent if small well owners who submit more than two unverified complaints within one year are ordered to reimburse the DEQ for the full costs of investigation of the third and subsequent investigations, and if civil fines of up to \$1,000 per day are levied against people who violate orders issued under Part 317. It is unknown how much revenue will be generated by these two mechanisms, but the amount almost certainly will be insufficient to cover the costs of the program.

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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.

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