

# spotlight

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## PRIVATE WELL REGULATION

*A Real Possibility for North Carolinians*

**KEY FACTS:** • Despite claims to the contrary, North Carolina's new drought management bill does not expressly prohibit the regulation of water use from private wells.

• In fact, the bill likely authorizes regulation of water use from private wells.

• The legislation originally had language expressly allowing regulation, but it was removed. Removal does not mean, however, that regulation is prohibited.

• The bill is filled with unclear and misleading language.

• For example, according to the law, the state "shall approve" local regulation plans if, in part, the plan contains no regulation of "private drinking water wells." While that may sound good, it presents two big problems:

1. The law does *not* say the state *may only* approve a local regulation plan if there are no such regulations — in other words, the state still *could* approve plans with such regulations.
2. That provision applies only to wells that are built for drinking purposes. If the well is built for landscaping, for instance, it clearly could be regulated.

• Three days before final passage of the bill, it contained express language prohibiting state and local regulation of water use from private wells — this language was quietly removed, however, and now state and local regulation is very possible.

• The legislature could easily have prohibited regulation of water use from private wells if that is what legislators wanted to do. There is a reason why the bill contains no clear prohibition — legislators want the possibility of regulation.

• The legislature should amend the drought-management bill at the start of the next legislative session and make it clear that water use from private wells will not be subject to state or local regulation.

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**O**n July 18, 2008, the North Carolina legislature enacted a drought management bill (HB 2499). Throughout the bill drafting process, some legislators were concerned that the bill would allow local and state government to regulate water use and conservation from private wells (i.e., private household wells).

After the bill was passed, numerous organizations explained that the bill not only did not authorize regulation but also expressly prohibited regulation of water use from private wells.<sup>1</sup> The North Carolina Division of Water Resources, in a summary of the bill, explained that the bill *forbids* local governments from regulating or metering “private *drinking* water wells”<sup>2</sup> (emphasis added).

These claims, quite simply, are inaccurate. Even immediately after passage of the bill, some legislators were concerned that the law did not protect against regulation of private wells.<sup>3</sup> This *Spotlight* explains why the drought bill does not prevent the regulation and metering of private wells and in fact likely *authorizes* regulation. The report identifies how the drought bill could reasonably be interpreted given the unclear language contained within the bill. Unclear bill language gives the government the wiggle room it needs to achieve its regulatory ends.

## Background

When the drought bill was first introduced, it expressly allowed for local governments to regulate water usage from private wells.<sup>4</sup> Eventually, this provision was removed. At one point, the bill was amended to include language that actually would have *prohibited* local<sup>5</sup> and state<sup>6</sup> regulation of private wells.

At the time of final passage of the law, legislators had a difficult time knowing what they were voting on because the bill had been changed so many times.<sup>7</sup> This confusion also could explain why some organizations and legislators were confused about the enacted bill’s provisions.

## Local Government Regulation

### *The Apparent Limitation*

The bill requires local governments with water systems to develop and implement water conservation plans. They must submit these plans for the review and approval of the North Carolina Department of Environment and Natural Resources (DENR). The bill states:

The Department shall approve the water shortage response plan if the plan meets all of the following criteria:

- (1) The plan includes tiered levels of water conservation measures or other response actions based on the severity of water shortage conditions.
- (2) Each tier of water conservation measures shall be based on increased severity of drought or water shortage conditions and will result in more stringent water conservation measures.
- (3) All other requirements of rules adopted by the Commission pursuant to S.L. 2002-167.
- (4) **Does not contain any provision that meters or regulates private drinking water wells, as defined in G.S. 87-85.**<sup>8</sup> (Emphasis added.)

This bolded language may give the impression that local governments cannot regulate private drinking water wells (note that it is limited to “private drinking water wells,” not all private wells). However, the bill merely states that DENR *shall* approve a plan if it does not regulate private drinking water wells — it does not say that DENR *may only* approve a plan if it does not regulate private drinking water wells.

In other words, because the language is so vague, DENR *could* approve a local government plan that regulates private drinking water wells. There is nothing in the bill that would clearly prohibit DENR from approving such a plan.

### *Private Drinking Water Wells*

The previous versions of the bill never included the term “private drinking water wells.” The first time this term appeared was in the final version of the bill. *The McDowell News* reported “Sen. Fletcher Hartsell, R-Cabarrus, ran a ‘perfecting amendment’ changing ‘private well’ to ‘private drinking water well.’”<sup>9</sup>

Even assuming that the bill really does limit local governments from regulating “private drinking water wells, as defined in G.S. 87-85,” it does not limit the regulation of private wells that fall outside this definition.

Under G.S. 87-85, a “private drinking water well” is any excavation that is constructed “to obtain groundwater for human consumption and that serves or is proposed to serve 14 or fewer service connections or that serves or is proposed to serve 24 or fewer individuals.”<sup>10</sup>

Therefore, private wells that are built for purposes other than for drinking, such as landscaping, could be regulated. It is unclear how the purpose of constructing a well is determined. Since many wells serve multiple purposes in addition to providing drinking water, some private wells *could* be regulated even if they do provide drinking water. For example, if it could be shown that a well that provides drinking water is used primarily for other purposes, this may suggest that it was not constructed “to obtain groundwater for human consumption.”

## **State Regulation**

Upon declaration of a water shortage emergency, the state can adopt measures regulating the conservation and use of water that can exceed local government regulations.<sup>11</sup> There is nothing in the bill that prohibits the state from regulating private wells in these “emergencies.”

### *Declaration of a Water Shortage Emergency*

It is unclear what would warrant the declaration of a “water shortage emergency.” The DENR Secretary is supposed to provide “the Governor with written findings setting out the basis for declaration of a water shortage emergency.”<sup>12</sup> The most obvious way to set out the basis for a declaration would be to see if a water shortage emergency exists.

A “water shortage emergency” is defined in the bill:

A water shortage emergency means a water shortage resulting from prolonged drought, contamination of the water supply, damage to water infrastructure, or other unforeseen causes that presents an imminent threat to public health, safety, and welfare or to the environment.<sup>13</sup>

If a declaration could be made on this definition alone, then there is very little protection. The definition only specifies the timing of the threat (i.e., imminent); it does not explain the required severity of the threat. The threat could be minor.

The most troubling language is the inclusion of “or to the environment.” Under the bill, an emergency could exist if there is a water shortage that leads to unforeseen causes and it presents an imminent threat to the environment. If an endangered fungus or weed is threatened by a water shortage, this could constitute an emergency. The legislature went out of its way to make it clear that a threat to the environment by itself can justify an emergency even if it presents no threat to the public.

There is, however, a possibility that a declaration would require more than simply meeting this weak definition of a “water shortage emergency.” Prior to making written findings supporting a declaration, the DENR Secretary must

determine “that the needs of human consumption, necessary sanitation, and public safety require emergency action.”<sup>14</sup> To what extent, if at all, this language would limit declarations of “water shortage emergencies” is unclear.

### *Legislature Knew the State Could Regulate Wells*

As explained, in a water shortage emergency, the state can enact tougher water use regulations than those provided for by local regulations. There is no reason why this could not include the regulation of water use from private wells.

The legislature (or at least some legislators) knew that this regulation was a possibility. Just three days before final passage of the bill, the House passed a version that included the following language in two sections that authorized state regulation of water use (and one section that dealt with local regulation):

This subdivision shall not be construed to authorize a unit of government, public water supply system, or private water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well.<sup>15</sup>

This language quietly disappeared when the bill went over to the Senate.<sup>16</sup> The final bill did not include this language, and as a result, state and local regulation likely could be allowed.

### **The Smoke-and-Mirrors Provision**

After the prohibition language was removed, a new provision was added to the bill.<sup>17</sup> It might appear to provide protection from regulation of private wells — but it is all for show. It states:

Nothing in this act shall be construed to **expand or limit the authority** of a unit of government or public water supply system to regulate water use from a well located outside of its jurisdiction, a well not connected to its water system, or any other private well.<sup>18</sup> (Emphasis added.)

That provision is meaningless and misleading. It does not state anything regarding whether regulation is prohibited or authorized; it just states that the bill maintains the status quo. The authority that existed prior to the bill’s passage is just as unclear as the authority that exists now.<sup>19</sup>

The provision itself suggests that water use from private wells already could be regulated. There would be no reason to include “expand or limit the authority” if regulation was not already possible — the language implies that there is some authority to expand or limit.

If there were no authority, the bill could have easily stated that this legislation in no way creates authority to regulate water use from private wells.

### **Recommendation: Keep it Simple**

If the legislature wanted to protect private well owners, it could have done so easily. There is a reason why the drought bill did not have clear and express language prohibiting regulation of water use from private wells — the legislature did not want to protect against regulation.

Many legislators have expressed concern about private well regulation. They need to do just one simple thing — pass unambiguous language to protect private well owners. Such language could be, for example:

The state and its political subdivisions are expressly prohibited from metering or in any way regulating water use and conservation from any private well.

## Recommendation: Avoid the Misdirection

It is critical to remember that legislation does not need to have express language authorizing regulation of private wells. If a local government is authorized to regulate water use, then there generally is no basis to assume that it could not extend the authorization to the regulation of water use from private wells.

To date, there does not appear to have been state or local regulation of water use from private wells; nevertheless, that fact has nothing to do with whether regulation is allowed. The new drought bill just got passed, so it is too early to tell whether the state or a local government will try to regulate water use from private wells. Public officials could realize that today it would be difficult politically to attempt regulating water use from private wells.<sup>20</sup> That does not mean that tomorrow will be the same as today.

## Conclusion

If legislators have no problem with prohibiting the regulation of water use from private wells, then they should have no issue with clear language that ensures that regulation is prohibited. An amendment to the drought management bill protecting private well owners should be one of the first actions taken by the legislature next year.

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## End Notes

1. For example, the North Carolina Conservation Network wrote that the state's newly enacted drought management bill (HB 2499) "explicitly does not affect private wells" (see [ncconservationnetwork1.org/because\\_you\\_love\\_nc/alert-description.html?alert\\_id=25925024](http://ncconservationnetwork1.org/because_you_love_nc/alert-description.html?alert_id=25925024)); see also North Carolina Farm Bureau's web site, specifically their environment policy page, which states the bill prohibited "the regulation of water use from private wells," [www.ncfb.org/publicPolicy/environment.cfm](http://www.ncfb.org/publicPolicy/environment.cfm); and also see "Capital News Update," North Carolina Chamber, July 18, 2008, stating "amendments were passed to specify that government officials cannot regulate private wells," [www.ncchamber.net/mx/hm.asp?id=ThisWeek](http://www.ncchamber.net/mx/hm.asp?id=ThisWeek).
2. "Session Law 2008-143 Summary," North Carolina Division of Water Resources, [www.ncwater.org/drought/presentations/Summary%20of%20Session%20Law%202008-143.pdf](http://www.ncwater.org/drought/presentations/Summary%20of%20Session%20Law%202008-143.pdf).
3. Whitney Woodward, "Drought response plan gets OK, sent to Easley," WCNC.com, July 18, 2008, [www.wcnc.com/sharedcontent/APStories/stories/D920GU881.html](http://www.wcnc.com/sharedcontent/APStories/stories/D920GU881.html).
4. General Assembly of North Carolina, Session 2008, House Bill 2499, Bill as Filed and Edition One, Section 4 adding § 143-354.1(c), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v0.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v0.html); see also Sharon McBrayer, "Restrictions won't apply to private wells," *Winston-Salem Journal*, July 27, 2008, [www2.journalnow.com/content/2008/jul/27/restrictions-wont-apply-to-private-wells](http://www2.journalnow.com/content/2008/jul/27/restrictions-wont-apply-to-private-wells).
5. General Assembly of North Carolina, Session 2008, House Bill 2499, Third Edition, Section 5 adding § 143-355.2(h), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v3.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v3.html).
6. General Assembly of North Carolina, Session 2008, House Bill 2499, Third Edition, Section 8 adding § 143-355.3(b)(2) and (3), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v3.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v3.html).
7. *Op. cit.*, note 3.
8. S.L. 2008-143 (HB 2499), General Assembly of North Carolina, Section 5 adding § 143-355.2(a)(1)-(4), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html). Any argument that the "shall" language is supposed to mean that plans are allowed only if they do not regulate private drinking water wells is extremely weak, not only because of the bolded provision's plain language, but also because of the language of the entire section addressing water shortage response plans. In that section, a local government can have an acceptable plan if it meets default provisions set out in S.L. 2002-167. Those default measures do not include anything about prohibiting the regulation of private drinking water wells. To put in another way, if the bolded provision did say that the state "may only" approve plans that have no regulation of private drinking water wells, this would conflict with other provisions in the section.
9. Britt Combs, "Rep. Gillespie defends efforts on well monitoring issue," *The McDowell News*, August 12, 2008.
10. N.C. Gen. Stat. § 87-85(10a), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_87/GS\\_87-85.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_87/GS_87-85.html).
11. S.L. 2008-143 (HB 2499), General Assembly of North Carolina, Section 8 adding § 143-355.3(b)(2) and (3), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html).
12. S.L. 2008-143 (HB 2499), General Assembly of North Carolina, Section 8 adding § 143-355.3(a), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html).
13. S.L. 2008-143 (HB 2499), General Assembly of North Carolina, Section 3 adding § 143-350(7), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html).
14. *Op. cit.*, note 12.
15. *Op. cit.*, note 6.
16. General Assembly of North Carolina, Session 2008, House Bill 2499, Fourth Edition, Section 8 adding § 143-355.3(b)(2) and (3), (3), [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v4.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v4.html).
17. General Assembly of North Carolina, Session 2008, House Bill 2499, Fourth Edition, Section 20, [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v4.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v4.html); the provision exists in the final bill as well, S.L. 2008-143 (HB 2499), General Assembly of North Carolina, Section 20, [www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html](http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H2499v6.html).

18. *Ibid.*
19. Local governments were required to develop water use and conservation plans before HB 2499 — to what extent they actually had to implement these plans was not absolutely clear, although it seems absurd to require detailed plans and not expect that the local governments were supposed to implement these plans. One of the changes made in the new bill is expressly to require that the plans have to be implemented. This goes to show that nothing should be taken for granted when dealing with the government complying with statutory language. There was no language in the statute that indicated private well regulation could not be included. See N.C. Gen. Stat. § 143-355(1), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-355.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-355.html). Prior to the new bill, the state could already develop regulations that exceeded local regulations in the event of a “water emergency.” See N.C. Gen. Stat. § 143-354(c)(2), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-354.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-354.html).
20. There may be legal questions regarding the regulation of water use from private wells that may be playing a role in why regulation has not existed to date. The issues are beyond the scope of this paper. However, some legal issues may involve how regulation of water use from private wells affect private property rights. The government also would need to show at least some rational basis for the regulations — something that it may not be able to do given that there is little or no evidence that private well owners (i.e., household wells) are having any affect on water supplies. These legal questions have nothing to do with whether HB 2499 authorizes such regulation.