

Township's Liability for Discharges of Sewage By Private Parties Within Its Borders

On May 17, 2012, the Michigan Supreme Court, in a 6 to 1 decision, held that a municipality can be liable for, and required to prevent, the discharge of raw sewage into state waters when the raw sewage originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself. In *Department of Environmental Quality v Worth Township*, 491 Mich. 227 (2012), the Supreme Court held that a township can be held responsible under MCL 324.3109(2) of the Natural Resources and Environmental Protection Act ("NREPA") for raw sewage discharged into state waters by private citizens within the township's borders.

The case arose from the contamination of surface waters within and surrounding Worth Township, including Lake Huron and several of its tributaries. The Department of Environmental Quality ("DEQ") conducted surveys of water quality in the area in 2003, 2006 and 2008. The survey data demonstrated that the surface waters were contaminated with both fecal coliform and *E. coli* bacteria. There is no municipal sewer system located within Worth Township. The Township and DEQ agreed that the contamination originated from septic systems on privately owned properties within the Township. The properties were located in an area along the shoreline of Lake Huron. A majority of the septic systems in the area were old, undersized and failing.

Worth Township and the DEQ attempted to remedy the problem and entered into a district compliance agreement pursuant to which Worth Township agreed to construct a municipal sewer system by June 1, 2008. The Township ultimately was unable to

construct a system due to a lack of funds. The DEQ filed suit under the NREPA seeking injunctive relief to compel the Township to prevent the discharge of raw sewage into the waters of the state. The trial court granted the DEQ's motion for summary disposition and directed Worth Township to take necessary corrective measures within a given time frame to prevent the discharge of raw sewage and to pay fines and attorney fees. The Court of Appeals reversed the trial court's ruling and remanded the matter for entry of summary disposition in favor of the Township. The Michigan Supreme Court granted the DEQ's application for leave to appeal and reversed the Court of Appeals.

The Supreme Court framed the issue as "whether a municipality can be held responsible under NREPA for raw sewage discharged into state waters by private citizens within the municipality's borders." The Supreme Court began its analysis by noting that, "the Legislature intended to create a presumption that the municipality is in violation of NREPA when a discharge originates within its borders, irrespective of who actually caused the discharge." The Court also explained that, "the Legislature intended to hold the local unit of government responsible for such a discharge regardless of whether the governmental unit itself caused the discharge or whether the discharge was caused by 'inhabitants or persons occupying lands from which' the raw sewage originated." In summarizing its holding, the Supreme Court stated:

In sum, we conclude that under MCL 324.3109(2), a municipality can be held responsible for preventing a discharge of raw sewage that originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself. Additionally, we hold that a township, as a municipality, can be held responsible for such a discharge. Accordingly, we agree with the Court of Appeals dissent that the trial court correctly interpreted MCL 324.3109(2) by granting an injunction requiring Worth Township to take necessary measures to stop the discharge of the raw sewage emanating from private septic systems within its borders.

The Supreme Court's decision in *WorthTownship* resolves any ambiguity as to a township's obligations to prevent the discharge of sewage that originates within its borders even when discharged by private parties. The Court did not address, however, the issue of whether requiring remedial action constitutes an unfunded mandate in violation of the Headlee Amendment to the Michigan Constitution. Const 1963, art 9, §29. That issue is yet to be resolved by the courts.