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Attorney/Client Privilege

Via Email Only

Chet Janik, Administrator
Leelanau County
8527 E. Government Center Drive, Suite 101
Suttons Bay, MI 49682

Re: County/Township Liability for Private Septic Waste Contamination

Dear Mr. Janik:

This is in response to your request for an opinion on whether a municipality such as a County or township may be held liable for septic waste contamination occurring within its borders, including instances where the contamination was caused by private property owners.

The Michigan Supreme Court has held that, under applicable statutes, a municipality such as a township can be held responsible for the discharge of raw sewage of human origin into State waters by private citizens within the township's borders, regardless of whether the sewage was discharged by the municipality itself. *Dep't of Environmental Quality v Worth Twp*, 491 Mich 227, 254; 814 NW2d 646 (2012). Under MCL 324.3109, there is a rebuttable presumption that the municipality is liable for a discharge of raw sewage into State waters that originates within its borders. The municipality may rebut the presumption by showing that the discharge is not injurious to the public health, safety and welfare. The responsible municipality is subject to the remedies in MCL 324.3115, including injunctive relief, fines and other sanctions.

The *Worth Twp* case involved numerous failed private septic systems in one area of the township, resulting in the discharge of septic waste to surface waters draining into Lake Huron. The DEQ's enforcement action against the Township sought injunctive relief to compel the Township to prevent the discharge of raw sewage into the waters of the State.

The trial Court in *Worth Twp* ruled in favor of the DEQ, and ordered the Township to take necessary corrective measures in a given time frame to prevent the discharge of raw sewage, and to pay $60,000 in fines and the DEQ's attorney fees. Although the Court did not

specifically order the Township to construct a municipal sewerage system to serve the affected area, the DEQ determined that that was the only feasible remedy.

On appeal, the Court of Appeals reversed, and held that a municipality cannot be required to prevent the discharge of raw sewage into state waters when the municipality itself has not discharged the raw sewage, and the municipality has not otherwise accepted responsibility for the sewage system. 289 Mich App 414; 808 NW2d 260 (2010). On further appeal, the Supreme Court reversed, and found in favor of the DEQ, finding that the trial Court had jurisdiction to grant injunctive relief and impose fines and other sanctions. 491 Mich 227,

In *Worth Twp*, the Supreme Court reviewed two relevant provisions from Part 31 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.3101 *et seq*. MCL 324.3109 states, in pertinent part[1]:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
>
> (c) To the value or utility of riparian lands.
>
> (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
>
> (e) To the value of fish and game.
>
> (2) **The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated** unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.

[1] This statute was subsequently amended effective January 15, 2015 by adding Subsections (3)(b) and (7). See 2014 PA 536. These amendments do not alter the Supreme Court's holding, but rather add another exception to municipal liability by narrowing its scope.

(3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies or penalties provided in section 3115 under either of the following circumstances:

(a) The discharge is an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under section 3115, the municipality has been notified in writing by the department of its responsibility for the sewerage system.

(b) The discharge is from 3 or fewer on-site wastewater treatment systems.

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(6) A violation of this section is prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this part may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction.

(7) As used in this section, "on-site wastewater treatment system" means a system of components, other than a sewerage system as defined in section 4101, used to collect and treat sanitary sewage or domestic equivalent wastewater from 1 or more dwellings, buildings, or structures and discharge the resulting effluent to a soil dispersal system on property owned by or under the control of the same individual or entity that owns or controls the dwellings, buildings, or structures. (Emphasis added).

As set forth in MCL 324.3109(1), a "person" is responsible for directly or indirectly discharging a substance into the waters of the State that "is or may be injurious" to the public health, safety and welfare. For purposes of Part 31, the term "person" includes a "governmental entity," such as a county or township. MCL 324.301(h).

MCL 324.3109(2) provides specific language with regard to violations by governmental entities. That subsection states that the discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality[2] in which the discharge originated. There are certain exceptions noted within that subsection, depending on whether the discharge was permitted by the State. The import of this subsection is that there is a rebuttable presumption that the municipality is liable for a discharge of raw sewage into State waters that originates within its borders. The municipality may rebut the presumption by showing that the discharge is not injurious to the public health, safety and welfare.

[2] "Municipality" means the State, a county, city, village, or township or an agency or instrumentality of any of these entities. MCL 324.3101(n).

MCL 324.3109(3) sets forth another exception to municipal liability, which applies where the discharge is from a sewerage system[3] that is not owned by the municipality, unless the municipality has agreed in writing to accept responsibility for the system.

The remedies for a violation of Part 31 of the NREPA are set forth in MCL 324.3115, which states, in part:

> (1) The department may request the attorney general to commence a civil action for appropriate relief, including a permanent or temporary injunction, for a violation of this part or a provision of a permit or order issued or rule promulgated under this part. An action under this subsection may be brought in the circuit court for the county of Ingham or for the county in which the defendant is located, resides, or is doing business. If requested by the defendant within 21 days after service of process, the court shall grant a change of venue to the circuit court for the county of Ingham or for the county in which the alleged violation occurred, is occurring, or, in the event of a threat of violation, will occur. The court has jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted under this subsection, the court, except as otherwise provided in this subsection, shall impose a civil fine of not less than $2,500.00 and the court may award reasonable attorney fees and costs to the prevailing party. However, all of the following apply:
>
> (a) The maximum fine imposed by the court shall be not more than $25,000.00 per day of violation.
>
> (b) For a failure to report a release to the department or to the primary public safety answering point under section 3111b(1), the court shall impose a civil fine of not more than $2,500.00.
>
> (c) For a failure to report a release to the local health department under section 3111b(2), the court shall impose a civil fine of not more than $500.00. (Emphasis added).

The Court may also impose additional fines of up to $5 million where the defendant's actions pose or posed a substantial endangerment to the public health, safety, or welfare, i.e., the defendant knowingly or recklessly acted in such a manner as to cause a danger of death or serious bodily injury. MCL 324.3115(3), (5).

The Supreme Court in *Worth Twp* upheld the trial Court's injunction, but noted that constructing a municipal sewerage system was not the only method available to remedy a widespread discharge. For example, properties that produce discharge could be condemned.

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[3] "Sewerage system" is a statutorily defined term covering public sewerage systems that does not include private septic systems. MCL 324.4101.

Another option would be to institute a pump-and treat program requiring individual properties' septic systems to be pumped and the contents treated off-site.

On remand, the Court of Appeals in *Worth Twp* rejected the Township's claims that requiring it to construct a municipal sewerage system would be contrary to the prohibition against unfunded mandates under the Headlee Amendment to the Michigan Constitution, Const 1963, art. 9, sec. 29. 299 Mich App 1, 10; 829 NW2d 31 (2012).[4] The Supreme Court declined to grant leave to appeal on this issue. 494 Mich 860; 831 NW2d 239 (2013).

With regard to municipal responsibility for sewage discharges, the Supreme Court in *Worth Twp* noted that the most localized form of government involved, such as a township, has the authority to prevent the discharge of raw sewage. Historically, townships have been responsible for overseeing the disposal of sewage generated within the township. A township has the power to finance, construct, and maintain a sewerage system. MCL 41.411(1). A township also has the power to condemn individual properties that are injurious to public health, and a township has the authority to grant franchises to public utilities within its boundaries. Moreover, townships have the authority to adopt ordinances regulating public health, safety, and welfare, including ordinances that require individual property owns to hook up to a sewerage system. 491 Mich at 249-250.

This analysis suggests that enforcement against municipalities under this Part would focus on the most local form of government, i.e., city, village or township, rather than on Counties, which lack the police powers of a local municipality. A County would likely respond to a sewage discharge issue through its County or District Health Department, which has jurisdiction to condemn properties and order compliance with sanitary regulations. Thus, a County would likely not be held responsible to prevent the discharge of raw sewage by private properties within the County, unless it had a written agreement with a township or other local municipality to take responsibility for sewage disposal in the township.

In summary, a municipality such as a township can be held responsible under MCL 324.3109(2) 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 discharge by the municipality itself. The recent statutory amendments do not impose liability where the discharge was from three or fewer private wastewater treatment systems Under MCL 324.3115, the Court can order the municipality to take necessary corrective measures in a given time frame to prevent the discharge of raw sewage, and impose fines and other sanctions. This would apply to the municipality itself, and to any other governmental entity which has contractually agreed to be responsible for the municipality's sewage disposal.

[4] The Court of Appeals' determination that requiring the Township to construct a new sewerage system did not violate the unfunded mandate in the Headlee Amendment applied only to townships, and was silent as to Counties, because the Court relied upon the pre-1978 version of the applicable statute, which at that time applied only to cities, villages and townships, and did not include Counties within its scope. Therefore, a County that is ordered to expend funds to prevent the discharge of sewage by others under MCL 324.3115 would have an argument challenging the expense as an unfunded mandate under Headlee.

Please contact us if you have any questions.

Very Truly Yours,

COHL, STOKER & TOSKEY, P.C.

David G. Stoker

Timothy M. Perrone

DGS/TMP/gmk
cc: Leelanau County Board of Commissioners

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