

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY and
STEVEN E. CHESTER, Director

Plaintiffs/Appellants,

SUPREME COURT NO. 141810

Court of Appeals No. 289724
Ingham County Circuit Ct No 07-970-CE

v

WORTH TOWNSHIP,

Defendant/Appellee.

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MICHIGAN TOWNSHIPS ASSOCIATION'S AMICUS CURIAE BRIEF
IN SUPPORT OF WORTH TOWNSHIP DEFENDANT-APPELLEE



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STATEMENT OF QUESTIONS INVOLVED

As stated by the Michigan Supreme Court in its Order dated March 23, 2011, granting Plaintiffs-Appellants' application for leave to appeal, the issue is limited to:

Whether the Natural Resources and Environmental Protection Act, MCL 324.101 et seq., empowers the Department Of Environmental Quality to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters?

Appellants answers "Yes".

Appellee answers "No"

The Court of Appeals answered "No".

Amicus Curiae Michigan Townships Association answers "No".

AUTHORITY TO FILE AMICUS CURIAE BRIEF

Under Michigan Court Rule 7.306(D)(2), “An association representing a political subdivision” is authorized to file an amicus curiae brief “on behalf of any political subdivision of the state” without obtaining previous authority from the Michigan Supreme Court.

The Michigan Townships Association, filing the within amicus curiae brief, was incorporated in 1953 for the purpose of assisting and educating Michigan township officials in the performance of their statutory obligations, to improve their knowledge of statutory and case law pertinent to township government and to provide amicus curiae support in pending litigation which the board of directors of the Michigan Townships Association believes is of statewide importance to the operation of township government and the citizens represented by township boards of trustees. The Townships Association consists currently of in excess of 1235 Michigan townships out of a potential of 1241 townships within the State of Michigan.

The undersigned firm of Bauckham, Sparks, Lohrstorfer, Thall & Seeber P.C., has been authorized by the Michigan Townships Association to file the within brief on behalf of Worth Township in this Honorable court.

STATEMENT OF FACTS

As succinctly stated by the Michigan Court of Appeals in its August 17, 2010 decision reversing the Sanilac County Circuit Court decision and supporting the Defendant-Appellee Worth Township's lack of any municipal liability for private septic tank failures nor any responsibility to "take necessary corrective action" subject to approval by the Department of Environmental Quality for such failures, the following statement of facts:

"Defendant is a common law township in Sanilac County along the shores of Lake Huron. It does not operate a public sanitary sewer system. All of the residences and businesses within the township rely on private septic systems for waste disposal. A problem has developed with a number of those private septic systems located on a strip of land approximately five miles long located between highway M-25 and Lake Huron. Some of these septic systems are failing, resulting in effluent being discharged into Lake Huron and its tributaries. For the past several years, plaintiff DEQ, as well as the county health department, has been pushing for defendant to install a public sanitary sewer system. Defendant has declined to do so, concluding that such a project was not financially feasible.

"Defendant's refusal to pursue a sanitary sewer project has resulted in the instant litigation to force it to do so. The parties pursued cross-motions for summary disposition, resulting in an order of the circuit court granting summary disposition to plaintiffs, establishing a time frame for defendant to design, begin construction on and begin operating a sewer project intended to remedy the failing septic systems and resulting discharges. The order also imposed a \$60,000 fine and awarded attorney fees. Defendant appeals from this order and we reverse."

Amicus Curiae Michigan Townships Association would add that the record discloses that the Sanilac County Health Department was responsible for issuing private septic tank system construction and installation permits or approvals within Worth Township under section III, 3.3a and 3.3b of the Sanilac Environmental Health Code (pp 48a and 49a of Appellant's Appendix).

Worth Township was not involved in these permits or approvals.

LEGAL ARGUMENT

The Natural Resources and Environmental Protection Act, MCL 324.101 et seq., does not empower the Department Of Environmental Quality to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters?

A. Plaintiff-Appellant MDEQ relies upon the following provisions of the Natural Resources and Environmental Protection Act to support its claim in the within cause of action that Worth Township is obligated to take corrective action to terminate the illegal septic tank discharges pursuant to such methods as are approved by MDEQ within a specific time period. MCL 324.3109 provides in pertinent part as follows:

“(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.

“(3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for 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.”

The forgoing statute is part of the Natural Resources and Environmental Protection Act required by the Supreme Court to be analyzed and briefed by the parties to the within litigation in resolution of the within cause of action.

B. In construing the intent of the Michigan legislature in subparagraph (2), relied upon by Plaintiff-Appellant MDEQ, it is important to review how that word “municipality” was materially changed in 1973 under 1972 PA 293 in the statute which was the forerunner of MCL 324.3109(1)(2).

Previously, in the 1970 Compiled Laws Of Michigan, Compiled Law 323.6(b), did not employ the term “municipality” but instead used the terms “any city, village or township” as being subject to hearings before the state water resources commission if it “allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state.” 1972 PA 293 changed this to read “the state, a county, city, village, or township or an agency or instrumentality of any of these entities.”

Continuing this concept, MCL 324.3101(m) similarly defines “municipality”:

“‘Municipality’ means this state, a county, city, village, or township, or an agency or instrumentality of any of these entities”.

As a result, MCL 324.3109(2), hereinbefore quoted, in using the term “municipality” now refers to “this state, a county,”...“or an agency or instrumentality of any of these entities” in lieu of the designations “city, village, or township.”

The significance of the foregoing change is that MDEQ, as an agency of “this state” and the county health department have been added as responsible entities for “the discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state “in which the discharge originated”. Obviously any discharge originates within this state and within any county of this state.

Michigan Townships Association submits that these larger, more comprehensive units of government with more direct and financial legislative authority to protect and conserve the water resources of the state and control pollution were appropriately added as primary eligible and responsible units of government to protect the waters of the state. The logical reason for the state legislature adding to the list of units of government within which an alleged polluting discharge might have occurred was not to permit MDEQ, as one of those units, to select the smallest unit with the least ability or finances to correct the situation rather than the unit with the greatest legal, practical and financial ability to do so, including MDEQ itself. In this latter category would be included a unit within an existing sanitary sewer system, a unit with existing unilateral, legal authority to do so, or a unit such as the state or one of its agencies with not only local legislative authority but also financial authority from the federal government under Federal Public Act 92-500 enacted October 18, 1972 under the subject "Grants for Pollution Control Programs". Under Section 106(a) the federal government provided for substantial grants to states for "carrying out a pollution program by such state or agency during such fiscal year."

C. Pursuant to the foregoing federal statutes and grants, and in contrast to the minimal statutory authority of a township, the Natural Resources and Environmental Protection Act provides at MCL 324.3103 with respect to the duties of MDEQ which is defined at MCL 324.3101(d) as the department:

"(1) The department shall protect and conserve the water resources of the state and shall have control of the pollution of surface or underground waters of the state and the great lakes, which are or may be affected by waste disposal of any person...."

"(2) The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part...."

“(3) The department may promulgate rules and take other actions as may be necessary to comply with the federal Water Pollution Control Act, 33 USC 1251 to 1387, and to expend funds available under such law for extension or improvement of the state or interstate program for prevention and control of water pollution....” (Emphasis added.)

Promulgated rules by DEQ under NREPA include the following:

R323.2102 at (n) and (o) as follows:

“‘Discharge’, means any direct or indirect discharge of any waste, waste affluent, wastewater, pollutant, or any combination thereof into any of the waters of the state or upon the ground.”

“‘Discharger’ means any person who discharges, directly or indirectly, any substance defined by section 3109 of Part 31 of the Act, any treated or untreated waste, waste affluent, wastewater or pollutant; or cooling waters into any of the waters of the state or upon the ground.”

“(s) ‘state permit’ means a permit or equivalent document or requirements that are issued by the department to a discharger who discharges wastewater on the ground or into ground waters.”

R323.2106 pertaining to “permit requirements of discharges” provides as follows:

“(1) A person discharging waste into the surface or ground waters of the state or on the ground as a point source discharge, whether or not in compliance with an outstanding order of determination, final order of determination, or stipulation with the department, shall promptly make application for and obtain from the department a valid national or state permit pursuant to Section 3112 or 3113 of Part 31 of the Act and according to procedures and deadlines set forth in these rules.”

“MCL 324.3112 hereinbefore referred to, provides as follows:

“(1) A person shall not discharge any waste or waste affluent into the waters of this state until a person is in possession of a valid permit from the department.”

“(4) If the department determines that a person is causing or is about to cause unlawful pollution of the waters of this state, the department may notify the alleged defender of its determination and enter an order requiring the person to abate the pollution or refer the matter to the Attorney General for legal action or both.” (Emphasis added to Rules and Statutes.)

NREPA further provides at MCL 333.2455 and MCL 333.2497:

MCL 333.2455 provides:

“(1) a local health department or the department may issue an order to avoid, correct or remove, at the owners expense, a building or condition which violates health laws or which the local health officer or director reasonably believes to be a nuisance, unsanitary condition or cause of illness. (“Department” means the DEQ.)

“(2) If the owner or occupant does not comply with the order, the local health department or department may cause the violation, nuisance, unsanitary condition or cause of illness to be removed and may seek a warrant for this purpose. The owner of the premises shall pay the expenses incurred.”

MCL 333.2497 provides:

“Upon a finding that a local health department is not able to provide or to demonstrate the adequate provision of 1 or more of the required services, or fails to meet the requirements of this part or the rules promulgated under this part, the department may issue an administrative compliance order to the local health department’s local governing entity. The order shall state the nature of the deficiencies and set forth a reasonable time by which the deficiencies shall be corrected.” (Emphasis added to statutes.)

The foregoing provisions obviously grant plenary duties to MDEQ to protect, conserve and control pollution of surface and groundwater of the state including “ordering” the governing entity of the “local health department” to do so and not the township. MDEQ’s plenary duties are further directed over a “discharger” as defined in R 323.2102(o), supra, and not over a township engaging in no discharging of raw sewage in any form.

D. The county health department, included under the definition of “municipality” in MCL 324.3109(2) cited by Plaintiff-Appellant MDEQ in its claim against Worth Township, has plenary authority in its control over the protection of the public health and environment as follows:

1. MCL 333.2455 provides:

“(1) a local health department or the department may issue an order to avoid, correct or remove, at the owners expense, a building or condition which violates health laws or which the local health officer or director reasonably believes to be a nuisance, unsanitary condition or cause of illness.

“(2) If the owner or occupant does not comply with the order, the local health department or department may cause the violation, nuisance, unsanitary condition or cause of illness to be removed and may seek a warrant for this purpose. The owner of the premises shall pay the expenses incurred.”

2. MCL 333.2433 provides:

“(1) A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazardous, prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law.”

“(2) A local health department shall:

“(a) Implement and enforce laws for which responsibility is vested in the local health department; and

“(f) have powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law.

“(3) This section does not limit the powers or duties of the local health officer otherwise vested by law.”

3. MCL 333.2435 contains the following additional powers:

“A local health department may:

“(d) adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination.”

4. MCL 333.2441 provides:

“(1) A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department...the regulation shall be at least as stringent as the standard established by state law

applicable to the same or similar subject matter. Regulations of local health department supersede inconsistent or conflicting local ordinances.”

5. MCL 333.2451 further provides:

“(1) Upon a determination that an eminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the eminent danger and issue an order which shall be delivered to a person authorized to avoid, correct or remove the eminent danger or be posted at or near the eminent danger. The order shall incorporate the findings of the local health department and require immediate action necessary to avoid, correct or remove the immediate danger.

6. MCL 333.2455 provides:

“(1) A local health department or the department may issue an order to avoid, correct, or remove, at the owners’ expense, a building or condition which violates health laws or which the local health officer or director reasonably believes to be a nuisance, unsanitary condition, or cause of illness. (Emphasis added to all cited statutes.)

Significantly, the Sanilac County Health Department, pursuant to the foregoing statutory provisions, took charge of granting private septic tank sewage system permits in Worth Township under Section III, 3.3(a) and 3.3(b) of its health code as appears on pages 48(e) and 49(a) of Appellant’s Appendix.

Again, Worth Township was in no manner involved in such permits or septic tank construction and has no municipal sanitary sewage system. It is MDEQ and/or the Sanilac County Health Department that have the control over polluting discharges and not the Township.

E. The foregoing broad health authority of the department MDEQ, and the county health departments is in contrast with the powers granted to townships which are limited to those specifically granted by the legislature or which can be reasonably implied from such specific powers. The case of *Michigan Municipal Liability and*

Property Pool v Muskegon, 235 Mich App 183 (1999) fully supports this limitation at 190 as follows:

“The legislature has granted the authority to create the county road law and the road commission pursuant to Const. 1963, Art 7 §16. FN5. However, a county’s authority like the authority of townships, cities and villages is derived from and limited by the constitution and valid state statutes...Our supreme court ‘has repeatedly stated, local governments have no inherent powers and possess only those limited powers which are expressly conferred upon them by the statute, constitution, or state statutes or which are necessarily implied there from...A power is ‘necessarily implied’ if it is essential to the exercise of authority that is expressly granted...‘(Municipal corporations possess only those powers which are expressly conferred or necessarily implied in consequence of their being essential to the exercise of their proper functions’)....” (Supporting citations in the decision omitted.) (Emphasis added.)

As previously stated, MDEQ and the county health department have been “expressly granted” pollution control authority; not a township.

F. Contrary to the financial and administrative authority of “this state” and the cited authority of a county, a general law township such as Worth Township has extremely limited authority or ability to finance or construct a major sanitary sewer system in the following respects:

1. Act 116 of 1923 (MCL 41.411 et seq.) relied upon Plaintiff-Appellant as financing authority for Worth Township to construct a sanitary sewer system through special assessments can only be utilized if the record owners of not less than 51% of the land actually created into a special assessment district sign a petition for such purpose. (MCL 41.412.) With only a small portion of Worth Township experiencing failing septic tanks, the likelihood of obtaining a 51% petition to fund approximately \$40 million of costs estimated for such a system, is not only unlikely, if not impossible to secure; but even if secured, unmarketable as a special assessment bond issue.

2. Act 188 of 1954, as amended, (MCL 41.721 et seq.) is similarly available to a Township but remains subject to a petition of the record owners of more than 50% of the land within the special assessment district required to be created for such a project and is subject to a veto by a petition from the record owners of the lands constituting more than 20% of the total area in the proposed district if the Township attempts to proceed without the 50% petition. (See MCL 41.723 et seq.) With only a small area of the township being liable for such installation and construction, it again, would be unlikely if not impossible to accomplish or to market the obligation if the proceedings could be accomplished.

3. Under Article 9, § 31 of the Michigan Constitution, financing through township-wide taxation can only be accomplished by a favorable vote of the entire electorate of the Township which again, because of the size of the area involved is unlikely, if not impossible to accomplish.

4. A regular law township such as Worth Township is allocated by the county, a tax of 1 mill under MCL 211.211 which would not begin to secure the necessary funds for the sanitary sewer project, especially considering that this 1 mill tax is also for the operation of the Township government's many other governmental functions. It can only be increased under the Article 9, §6 and Article 9, § 31 of the Michigan Constitution by favorable vote of the electorate which, again, under the circumstances is not going to be possible.

5. The foregoing difficulties of a township financing a sanitary sewage system to correct failing private septic tanks systems in a portion of the township undoubtedly was the basis for adding "this state" and "a county" to the definition of "municipality" as those units that would be responsible for a discharge of raw sewage into the waters of the state under MCL 324.3109.

G. The decision of the Michigan Court of Appeals in the case of *Lake Isabella Development, Inc., v Village of Lake Isabella and Department of Environmental Quality*, 259 Mich App 393 (2004) certainly supports the foregoing lack of township liability in the within cause as distinguished from the liability of MDEQ and/or Sanilac County.

The case involved an administrative rule of MDEQ which provided that a private sanitary sewage system could not be constructed without the municipality, within which it was to be located, agreeing to being responsible for its operation and maintenance if the private owner failed in this regard. Since the Village of Lake Isabella declined to accept such responsibility, the construction of the private system was denied by MDEQ.

MDEQ claimed that their plenary authority to protect the waters of the state authorized this administrative rule as a method of enforcing their authority. It further argued that MCL 324.3109(2), relied upon by MDEQ in the case at bar, "imposes strict liability" upon the village "for the discharge of sewage that originates in the municipality." (P 404.)

In rejecting MDEQ's interpretation of MCL 324.3109(2), and its promulgated rule to impose liability on the Village to accept responsibility for maintenance of a private sanitary sewer system if it is to be allowed, the court stated at 408 and 409:

"We do not find the promulgation of a rule imposing a new burden on a municipality an appropriate method of enforcement and again find this contrary to the legislative intent underlying the enabling statute."

"In sum, we find that Rule 33 effectively confers on municipalities indirect veto power in contravention of a grant of exclusive jurisdiction to the DEQ."

In further rejection of MDEQ's arbitrary rule shifting liability to the village, the court states at p 411 and at p 412:

"The parties also dispute whether the DEQ or the local municipality is in the better position to assess the costs of operations and maintenance on the users of the system. The DEQ argues that municipalities can use assessments to adequately fund and manage sewer systems in the event they are called on to

take over a sewage system pursuant to a resolution. The village states that it has no funds to build a sewer system for its citizens, much less guarantee the obligations of a private developer. Where, as here, the village has no money, public works, law enforcement, or operating engineers to effectuate a safe, let alone efficient sewerage system, we fail to understand how the village is in a superior position than the DEQ to further the purpose of the statute, i.e., efficient enforcement of the laws preventing pollution of the waters of the state.

"The DEQ is empowered to enforce laws directly without the application of Rule 33 by operation of MCL 333.2455 concerning nuisance and unsanitary conditions. MCL 333.2455 declares that "a local health department or the department" is authorized to "correct" unsanitary conditions at the expense of the owner. Hence, like a local municipality, the DEQ is able to directly assess the costs of operations and maintenance of a sewerage system on the users of the system in the instance where a wastewater system is not properly operated or maintained. Unlike a local municipality like the village, however, the DEQ has tools, including expert managers and engineers who can ensure that abandoned wastewater systems are quickly made operational, to prevent pollution of the waters of the state.

"We find that Rule 33 is arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to municipalities, seeks to impose operational mandates upon municipalities ill-adapted to comply with those mandates, and is unnecessary to the DEQ for enforcement."

It is interesting to note that Justice O'Connell of the Michigan Court of Appeals who issued a dissenting opinion in the case at bar also unsuccessfully issued a dissenting opinion in *Village of Lake Isabella, supra*, hereinbefore cited.

H. The relief requested in MDEQ's Complaint in the within cause is to compel the Township to construct a sanitary sewage treatment and collection facility, subject to MDEQ's approval, to serve a small portion of the Township within which are located failing septic tank systems installed under the authority of the Sanilac County Health Department as well as its overseer MDEQ. Such requested relief, because of the failure of any proofs showing compliance with the legal requirements for granting a writ of mandamus, must be denied.

1. Although Plaintiffs-Appellants' complaint does not expressly request a writ of mandamus, the relief it demands against Worth Township is to compel

the Township to construct a sanitary sewage facility within a given time limit that is exclusively satisfactory to MDEQ which is tantamount to “mandamus”. As stated by this Honorable Court in *Burch v Mackie*, 362 Mich 488 (1961) at p 493:

“No litigant can mandamus a state officer in the circuit court simply by using the term injunction instead of mandamus when it is the latter remedy that he seeks. The circuit judge correctly held that Plaintiffs were seeking a mandamus under the guise or misnomer of a mandatory injunction.”

See also *Mount Clements Harness Ass'n v Michigan Racing Commissioners*, 360 Mich 467 (1960) at 476 where similar language was employed.

The case at bar, of course, is not against a state officer but the legal principle that a mandamus proceeding, identified by law as an extraordinary proceeding with specific required elements of proof, cannot be avoided “under the guise or misnomer of a mandatory injunction” or some other camouflaged identification.

2. The elements of proof required to sustain a writ of mandamus are clearly set forth in the case of *White-Bey v Department of Corrections*, 239 Mich App 221 (1999) at 223:

“The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff....To obtain a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duties sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy.” (Supporting citations omitted.)

See also, *Keaton v Village of Beverly Hills*, 202 Mich App 681 (1993) at p 683 and *Solo v City of Detroit*, 303 Mich 672 (1942) at p 676 requiring similar proofs for a writ of mandamus.

3. In the case at bar, Amicus Curiae Michigan Townships Association submits:

- (a) MDEQ does not have a clear legal right to require Worth Township to construct a sanitary sewage system and provide such sanitary sewer service to a small area of the township when there is no law specifying such authority or township duty.
- (b) Worth Township has no clear legal duty to construct such a sanitary sewage system when it has never previously done so and there is no statutory obligation to so perform.
- (c) Such sanitary sewer construction is, at best, discretionary in nature.
- (d) MDEQ has adequate other statutory remedies as hereinbefore outlined in this brief.

As a result of the foregoing, MDEQ cannot demand and the circuit court of Sanilac County cannot grant an order requiring Worth Township to construct a sanitary sewage system to correct pollution from private septic tank systems which it has neither permitted to be installed nor itself caused.

I. MDEQ's demands of Worth Township for the construction of a sanitary sewer system to correct pollution caused by failing private septic tank systems, if valid, are unenforceable under the Michigan Constitutional sections art 9, § 25 and 29 without the full funding of the costs of such construction by the State of Michigan.

1. Article 9, § 25 and 29 of the Michigan Constitution provide in pertinent part as follows:

“Sec 25. “...the state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government....”

“Sec. 29. “...a new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of local

government, unless a state appropriation is made and disbursed to pay the unit of local government for any necessary increased costs...." (Emphasis added.)

2. MDEQ is, of course, a "state agency" under the foregoing section 29 and certainly its requiring Worth Township to provide a public sanitary sewer system to avoid pollution from private septic tank systems is a "new or expanded activity" and a "new activity or service beyond ...that required by existing law" under the foregoing constitutional provisions.

Worth Township has never previously engaged in such sanitary sewer service and has never previously been required to do so by state law. In contrast, both the Sanilac County Health Department and MDEQ have been active in these activities under statutory authority previously cited in the within brief. As stated in the *Village of Lake Isabella, supra*, cited at p 409, DEQ has been granted by the legislature "exclusive jurisdiction" over sanitary sewage systems; with power "to enforce laws directly...by operation of MCL 333.2455 concerning nuisance and unsanitary conditions." (P 411 of said Lake Isabella decision.)

Again, as stated in *Lake Isabella, supra*, at 407 and 408, DEQ's attempt under its Rule 33 to make a municipality "responsible for the effective and continued operation and maintenance of the proposed sewage system if the owner in any way fails to perform in this capacity", "is a liability shifting provision" which "imposes a new burden on municipalities".

Similarly, in the case at bar, MDEQ's demand that Worth Township provide a public sanitary sewer system to correct the pollution caused by the failing private septic tank systems previously authorized by the Sanilac County Health Department is a "liability-shifting mechanism (and) an impermissible delegation of authority". (*Isabella supra* p 403.)

As previously indicated, it is the statutory duty of MDEQ and/or the County Health Department to regulate and control pollution of the waters of the State of Michigan; not a township. It is undisputed that Worth Township does not have in existence, and never has had, any facilities within Worth Township to solve such septic tank failure problems as demanded by MDEQ and ordered by the circuit court. This new Township obligation, if validly required, which Amicus Curiae Michigan Townships Association vigorously disputes, can only be enforced after "state appropriation is made and dispersed to pay the unit of local government for any necessary increased costs" under the provisions of the Michigan Constitution.

CONCLUSION

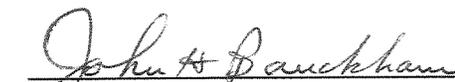
For all of the foregoing statutory, constitutional and legal reasons, Amicus Curiae Michigan Townships Association submits the Natural Resources and Environmental Protection Act does not empower MDEQ to seek, and the circuit court to grant, any order requiring Worth Township to install a sanitary sewer system to correct pollution caused by the failing of private septic tank systems within a small portion of the Township approved for installation by the Sanilac County Health Department and not by Worth Township.

The Michigan Court of Appeals decision should be affirmed with costs to be taxed by Worth Township.

Respectfully Submitted.

DATED: July 11, 2011

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