

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, P.J., and Sawyer and O'Connell, JJ.

DEPARTMENT OF ENVIRONMENTAL
QUALITY and DIRECTOR OF THE
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Plaintiffs-Appellants,

v

TOWNSHIP OF WORTH,

Defendant-Appellee.

Supreme Court No. 141810

Court of Appeals No. 289724

Ingham Circuit Court No. 07-000970-CE

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

**BRIEF OF APPELLANTS DEPARTMENT OF ENVIRONMENTAL QUALITY AND
DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY**

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Alan F. Hoffman (P24079)
Special Assistant Attorney General
Attorneys for
Plaintiffs-Appellants
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: May 18, 2011



TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Statement of Question.....	v
Statutory Provision Involved	vi
Introduction.....	1
Statement of Facts.....	2
A. The discharge of raw sewage of human origin within the Township into waters of the State violates Part 31 of NREPA.....	2
B. The Township’s past corrective actions have been either nonexistent or ineffective.	4
C. The only practical corrective action available is the installation of a municipal sewer system in the area of concern.	5
Argument	8
I. NREPA empowers the DEQ 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.....	8
A. Standard of Review.....	8
B. Analysis	9
1. Section 3109(2)’s plain language places liability on the Township.....	10
2. The Township’s liability under § 3109(2) is consistent with the predecessor provisions of the State’s water quality statute.....	15
3. The Township is a responsible party with authority to correct pollution caused by the widespread septic system failures.....	18
4. The Court of Appeals’ decision in <i>Lake Isabella Development v Village of Lake Isabella</i> does not exempt the Township from liability under § 3109(2). ..	22
5. The relief granted by the trial court was authorized and warranted in light of the uncontested facts.....	23
Conclusion and Relief Sought	27

INDEX OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Brown v Brown</i> , 478 Mich 545; 739 NW2d 313 (2007).....	9
<i>Frankenmuth Mutual Ins Co v Marlette Homes, Inc</i> , 456 Mich 511; 573 NW2d 611 (1998).....	10
<i>General Motors Corp v Erves (On Rehearing)</i> , 399 Mich 241; 249 NW2d 41 (1976).....	12
<i>Halloran v Bhan</i> , 470 Mich 572; 683 NW2d 129 (2004).....	10
<i>In re Complaint of Rovas Against SBC Michigan</i> , 482 Mich 90; 754 NW2d 259 (2008).....	9
<i>Kizer v Livingston Co Bd of Comm'rs</i> , 38 Mich App 239; 195 NW2d 884 (1972).....	12
<i>Koontz v Ameritech Services, Inc</i> , 466 Mich 304; 645 NW2d 34 (2002).....	10
<i>Lake Isabella Development v Village of Lake Isabella</i> , 259 Mich App 393; 675 NW2d 40 (2003).....	22, 23
<i>Livingston County v Dep't of Management and Budget</i> , 430 Mich 635; 425 NW2d 65 (1988).....	21
<i>McClellan v Collar</i> , 240 Mich App 403; 613 NW2d 729 (2000).....	10
<i>People v Osantowski</i> , 481 Mich 103; 748 NW2d 799 (2008).....	9
<i>Reed v Yackell</i> , 473 Mich 520; 703 NW2d 1 (2005).....	10
<i>Smith v Globe Life Insurance Co</i> , 460 Mich 446; 597 NW2d 28 (1999).....	9
<i>Spiek v Dep't of Transportation</i> , 456 Mich 331; 572 NW2d 201 (1998).....	8
<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230; 596 NW2d 119 (1999).....	10

<i>Sweatt v Dep't of Corrections</i> , 468 Mich 172; 661 NW2d 201 (2003).....	10
<i>Vega v Lakeland Hospitals</i> , 479 Mich 243; 736 NW2d 561 (2007).....	8
<i>Weems v Chrysler Corp</i> , 448 Mich 679; 533 NW2d 287 (1995).....	12

Statutes

1965 PA 328, MCL 323.1 <i>et seq</i>	15, 17, 18
MCL 323.6	17
MCL 323.6(a)	17
MCL 323.6(b)	17, 18
MCL 323.6(d)	18
MCL 324.1703(1)	15
MCL 324.304(h)	11
MCL 324.3101 <i>et seq</i>	7
MCL 324.3109.....	1, 7, 9
MCL 324.3109(1)	passim
MCL 324.3109(2)	passim
MCL 324.3109(3)	1, 13, 14
MCL 324.3112.....	7, 20
MCL 324.3112(1)	7, 9
MCL 324.3115.....	passim
MCL 324.4101	1, 14
MCL 324.4101(h)	14
MCL 324.4301 <i>et seq</i>	19
MCL 333.12753(1)	19
MCL 333.22201 <i>et seq</i>	18

MCL 333.2251 18

MCL 333.2455(1) 18

MCL 41.181 19

MCL 41.411(1) 19

MCL 41.411(3) 18

Rules

MCR 2.116(C)(10)..... 2, 7, 9

Constitutional Provisions

Const 1963, art 4, § 529

Const 1963, art 7, § 1919

Const 1963, art 7, § 29 19

STATEMENT OF QUESTION

Plaintiff-Appellants, the Department of Environmental Quality and its Director, filed an enforcement action against Worth Township because failing septic systems throughout the Township are causing raw sewage of human origin to discharge into waters of the State injuring public health, safety, and welfare. MCL 324.3109 gives the Department the power to file suit and seek injunctive relief in such circumstances. This Court granted the Department's application for leave to appeal limited to the following issue:

1. Does the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*, (NREPA) 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?

Appellants' answer: Yes

Appellee's answer: No

The Court of Appeals answered: No, in a 2-1 decision

The trial court answered: Yes

STATUTORY PROVISION INVOLVED

324.3109 Discharge into state waters; prohibitions; exception; violation; penalties; abatement.

(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.

* * *

(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.

INTRODUCTION

There are precious few threats to the environment more serious than the discharge of human waste into State waters. That is why, in MCL 324.3109(2), the Legislature broadly empowered the Michigan Department of Environmental Quality and its director (DEQ) to seek injunctive relief against a municipality when there is an unpermitted discharge of human waste into Michigan waters within the municipality's borders. The DEQ was forced to invoke that statute here due to the pervasive failure of septic systems throughout defendant Worth Township.

The trial court granted summary disposition to the DEQ and required the Township to take corrective action to stop the flow of human sewage into Lake Huron and its tributaries. But in a 2-1 decision, a Michigan Court of Appeals panel vacated the injunction, concluding that § 3109(2) applies only where the municipality itself is the discharger of waste. The panel majority reasoned that any contrary interpretation of § 3109(2) would create a conflict with § 3109(3), which excuses a municipality from responsibility "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." There are two fundamental problems with the panel majority's reading of the statute.

First, § 4101 relates only to a public sanitary sewer system, so there is nothing contradictory between § 3109(3) and the trial court's reading of § 3109(2). Second, the panel majority's construction of § 3109(2) renders the provision wholly superfluous; if a municipality has itself discharged human waste into State waters, then the DEQ already has enforcement power under § 3109(1). In sum, the panel majority erred in interpreting § 3109's plain and ordinary language, which operates exactly as the trial court applied it.

Accordingly, the DEQ respectfully requests that this Court reverse the Court of Appeals and reinstate the trial court's injunctive order.

STATEMENT OF FACTS

The DEQ filed this suit due to the Township's refusal to address numerous failing septic (on-site sewage) systems in the Township.¹ The Township does not provide a municipal sewage system (a wastewater collection and treatment system) owned and operated by the Township, and a large percentage of the present septic systems in a given area of the Township are old, undersized, and fail to properly function. This "area of concern" in the Township is depicted in the attached map with the approximate borders as follows: Chippewa Drive on the north, Galbraith Line on the south, Lake Huron on the east, and M-25 (Lakeshore Drive) on the west. (App 19a.) The failures in this area of concern have caused deteriorated conditions to the point that raw sewage from the failed septic systems has been emptying into roadside ditches, storm sewers, streams and outfalls that empty into Lake Huron.

A. The discharge of raw sewage of human origin within the Township into waters of the State violates Part 31 of NREPA.

The Township offered mere token resistance to the evidence set forth by the DEQ in its motion for summary disposition pursuant to MCR 2.116(C)(10) in the trial court and virtually none at the appellate level. In the DEQ's application for leave to appeal to this Court, the Department presented numerous and uncontested facts for this Court to gain a full appreciation of the magnitude of the pollution and the exigency of the circumstances caused by the pervasive septic system failures occurring in the Township putting at risk the health, safety, and welfare of

¹ On-site sewage system refers to the treatment and disposal of sewage on land area typically under the use and control of the owner and one which is not connected to a municipal wastewater collection system. In most instances, each system is comprised of one or more septic tanks and a soil absorption system. Wastewater from the home or building enters the septic tank(s) where it separates into liquid and solid waste. The liquid portion of the wastewater, or effluent, passes through the septic tank(s) to the soil absorption system. (Ladouceur Affidavit, ¶ 5; App 98a.)

the local citizenry.² The facts consist of extensive data from numerous water samplings, reports from site investigations, and affidavits from state, county and township officials, all describing in detail the egregious conditions within the Township. For example, sewage from septic systems was observed running into ditches, gullies, and neighboring properties. (Putz Affidavit, ¶ 3; App 109a.) Some of the subdivisions were so saturated with sewage that the ground was spongy requiring the Township Ordinance Enforcement Officer to wear boots when performing inspections due to the raw sewage. (Laughlin Affidavit, ¶ 2; App 5; App 104a.) The failing septic systems created such problems that the residents dug trenches along property lines to drain saturated septic fields to creeks. (Laughlin Affidavit, ¶ 7; App 5; App 104a.) In light of the issue to be addressed as framed by this Court in its March 23, 2011 Order granting the DEQ's application for leave to appeal, there is no need to demonstrate again through a recitation of all the facts the widespread failure of private septic systems in the Township resulting in contamination of the waters of the State. Suffice it to say that the pollution is extensive and alarming. See also O'Connell dissent at 1-6, App 138a-143a, and October 29, 2008 trial court

² The Township attempted to assert the pollution was not of human origin and could have been from local farms. The trial court's response indicated the level of merit that claim warranted:

I would say that the evidence here that it is of human origin isn't just compelling, it's overwhelming, and it's unrebutted. . . . To say that there is no proof that the contamination is of human origin is almost preposterous.

October 29, 2008 trial court Tr at 48, 49. (App 125a.)

Another attempt by the Township to challenge the facts regarding the ongoing contamination was addressed in similar fashion by the trial court:

I would say, again, with respect to that issue, the evidence isn't just compelling, it's overwhelming, and it is unrebutted, and it very clearly entitles the Plaintiff to summary disposition under MCR 2.116(C)(10), . . .

October 29, 2008 trial court Tr at 49. (App 126a.)

hearing Tr at 40-45, App 123a-125a (addressing in detail the foul sewage flowing into residents' lots, drainage ditches, and Lake Huron).

It is important, however, to address some of the facts that demonstrate the corrective action needed to address the ongoing contamination of the waters within the Township's boundaries.

B. The Township's past corrective actions have been either nonexistent or ineffective.

The DEQ conducted four separate Sanitary Wastewater Surveys (Sanitary Survey) in the Township area of concern: one on May 1, 2003; one on September 25, 2006; one on April 9, 2008; and one on September 16, 2008. (App 25a, 50a, 69a, and 111a respectively.) The purpose of the surveys was to scientifically verify and quantify discharges of sewage of human origin to surface waters in the Township. The DEQ staff collected water samples from tributaries and other surface waters to measure fecal coliform and E. coli bacteria. Additionally, sensory observations were made by the DEQ staff trained in evaluating septic systems noting primary indicators of septic system failures in the area of concern as noted in the April 9, 2008 survey packet. (App 69a.) As noted above, the results of the surveys are alarming.

Regrettably, the Township reacted to this scientific data by burying its head in the proverbial sand. For example, the DEQ's third survey showed that water quality standards (WQS) for bacterial counts were being violated at several locations, even though the survey was conducted at a time (early April 2008) immediately following the lengthy winter period when seasonal residents were not using their septic systems. (App 69a.) Indeed, because of the timing, the number of violations actually decreased from a September 25, 2006 survey, conducted immediately following the summer season when septic system use is at its peak. (App 50a.) Rather than recognize that high bacterial counts at the end of the winter (i.e. low-use)

season as a serious problem, the Township pronounced that the decreasing number of violations proved “*dramatic water quality improvements*” based on the Township’s construction moratorium and certain individual enforcement actions. (Township’s September 2, 2008 trial court brief at 5; emphasis in original.) Thus, the Township declared the problem “effectively solved.” (Township’s September 2, 2008 trial court brief at 6.)

The Township’s proclamations had no basis in reality. Just two weeks after the Township declared victory in its trial court briefing, the fourth survey, dated September 16, 2008, came in, showing that the illegal discharges were getting worse over time, not better. (App 111a.) Of the 31 sites sampled for E. coli in the area of concern, a shocking 81% failed to satisfy water quality standards (App 112a, 114a-115a), including two locations (stations 9 and 17) where bacterial counts were *10 times* the partial-body-contact standard downstream from the survey area. (*Id.*) With respect to fecal coliform samples, 36% of the sites failed to satisfy water quality standards. (App 112a, 116a.)

In sum, it cannot be seriously disputed that there is a widespread problem of failing septic systems in the area of concern, those failures are resulting in the discharge of raw sewage of human origin into the waters of the State, and a Township-wide solution is needed.

C. The only practical corrective action available is the installation of a municipal sewer system in the area of concern.

Because of the widespread failing septic systems and the need to address them, the Township and the DEQ reached a District Compliance Agreement in April of 2004. (District Compliance Agreement, App 39a; Putz Affidavit, ¶ 5; App 109a.) Under this Agreement the Township was to construct a municipal sewage system by June 1, 2008. Unfortunately, the Township refused to honor that Agreement, and construction never occurred. (Laughlin Affidavit, ¶ 8, App 103a.)

The DEQ cannot specifically compel the Township to engage in a particular corrective action, such as the construction of a wastewater collection and treatment system. But under MCL 324.3115, a trial court can grant the DEQ appropriate relief, including an order to restrain the violation and require compliance. Because of the pervasive septic system failures throughout the area of concern within the Township, and because of the site conditions in the area making septic systems prone to failure, there appears to be no viable alternative to constructing a municipal sewage system. (Putz Affidavit, ¶ 5, App 109a; Laughlin Affidavit, ¶ 8, App 104a; see also Bauer Affidavit, ¶ 9, App 93a; Ladouceur Affidavit, ¶ 10, App 101a; see also O’Connell dissent, fn 3, App 140a.) However, if the Township could come up with some other alternative that would eliminate the illegal discharges, that would be its prerogative.

Requiring a township to take corrective action to address failing septic systems is not a new concept. Mr. Frank Baldwin, DEQ Chief of Field Operations Divisions, has 38 years of experience working in the State’s environmental departments, and for 25 of those years was the Chief Enforcement Officer for water quality issues. (Baldwin Affidavit, ¶ 5, App 106a.) In all his years of State service, Mr. Baldwin is not aware of any local unit of government that has avoided responsibility for community-wide violations as experienced by Worth Township. Rather, the local units of governments have complied with directives to correct the illegal discharges, and most have done so by constructing or otherwise utilizing municipal sewage systems. (Baldwin Affidavit, ¶ 10, App 108a.) Recognizing its responsibility, the Township agreed to construct just such a system in 2004 as evidenced in the District Compliance Agreement. (App 39a.) (See also Putz Affidavit, ¶ 5, App 109a.) For reasons that are not particularly clear, the Township breached the agreement. (Laughlin Affidavit, ¶ 8, App 104a.) It is a reasonable assumption that cost was a factor; however, cost does not excuse violations.

PROCEEDINGS BELOW

The DEQ filed its Complaint against the Township alleging liability under Part 31 of NREPA, MCL 324.3101 *et seq.* The Township filed a motion for summary disposition asserting, among other things, that the Township could not be held liable for the discharge of raw sewage of human origin from private residences into the waters of the State. The trial court rejected the Township's arguments and denied the motion in total. Noteworthy was the trial court's holding that even though the State may have enforcement authority over water pollution:

[T]hat does not eliminate the liability under Section 31.09(sic) that falls squarely on the municipality in which the discharge originated. . . .

Likewise, the Health Department may have jurisdiction with respect to some aspects of the septic systems. But as to enforcement and regulation of Section 31.09(sic), that power lies with the Plaintiff with liability falling under the statute on the Defendant.

(9/26/07 Hr'g Tr at 24, 25, App 67a, 68a.) The Court of Appeals denied the Township's application for an interlocutory appeal on July 2, 2008. (App 89a.)

The DEQ then filed its own summary disposition motion under MCR 2.116(C)(10), arguing that the undisputed facts entitled it to judgment as a matter of law against the Township for violating MCL 324.3109 and MCL 324.3112.³ On December 23, 2008, the trial court granted the DEQ's motion finding the evidence uncontroverted that there are numerous residences within the Township with failing septic systems causing raw sewage of human origin to discharge into waters of this State. Further the court concluded that the discharges are in violation of Part 31 of NREPA, and the Township is liable for the discharges under MCL 324.3109(2). The court then directed the Township to take necessary corrective action under

³ Section 3112(1) states: "A person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department." MCL 324.3112(1).

MCL 324.3115, in accordance with a given time schedule, and pay fines and attorney fees. (App 129a.)

In a 2-1 decision, the Court of Appeals reversed. (App 132a.) The panel majority read § 3109(2) as pertaining only to a municipality's direct discharge of waste, rather than imposing responsibility for the discharge on the municipality where the discharge occurred. In dissent, Judge O'Connell rejected the panel majority's "questionable linguistics, unnecessary definitions, and rebuttal presumptions." (App 149a.) Judge O'Connell would have adopted the trial court's reasoning *in toto*, noting that, among other things, "if the majority's interpretation were correct, MCL 324.3109(2) would be unnecessary in light of MCL 324.3109(1)." (*Id.*) "The purpose of MCL 324.3109(2) is to make the local municipality responsible for any discharges within its boundaries, even if the municipality did not actively discharge the sewage in question." (*Id.*)

This Court granted the DEQ's application for leave to appeal on March 23, 2011. (App 151a.)

ARGUMENT

I. NREPA empowers the DEQ 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. Standard of Review

A trial court's ruling on a motion for summary disposition is a question of law that this Court reviews *de novo*. *Vega v Lakeland Hospitals*, 479 Mich 243, 245; 736 NW2d 561 (2007). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party in determining whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is appropriate if there is no genuine issue regarding any material fact and

the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

In *Smith v Globe Life Insurance Co*, 460 Mich 446; 597 NW2d 28 (1999), the Supreme Court further clarified the proper standard under MCR 2.116(C)(10):

Under MCR 2.116, it is no longer sufficient for plaintiffs to *promise* to offer factual support for their claims at trial. . . . [A] party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted.

Smith v Globe Life Insurance Co, 460 Mich at 455, n2 (emphasis in original).

Further, whether the Township may be responsible under MCL 324.3109(2) for the discharge of raw sewage of human origin and subject to the remedies provided in MCL 324.3115 based upon the un rebutted evidence is a question of statutory interpretation. Questions of statutory interpretation are questions of law that appellate courts also review *de novo*. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). Finally, although certainly not binding on the courts, the construction of a statute by a state administrative agency charged with administering it is entitled to respectful consideration. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).

B. Analysis

Michigan's Constitution provides that the protection of the waters of the State from pollution, impairment, and destruction is of paramount concern. Const 1963, art 4, § 52. To that end, the Legislature has provided the DEQ under Part 31 of NREPA broad powers to regulate the discharge of pollutants into the waters of the State and to take enforcement action to compel compliance against those who violate the State's water pollution laws. See MCL 324.3109; MCL 324.3112(1); MCL 324.3115. The question presented on appeal is whether §§ 3109(2) and 3115 empower the DEQ to seek, and the circuit court to grant, an order requiring a township to

take corrective action in order to stop the pollution of the State's waters as a result of the failure of private septic systems within the Township. It necessarily follows that any corrective action to be taken must be effective, depending upon the individual circumstances, which could range from upgrading the septic systems of a couple of residences to the construction and implementation of a township-wide municipal sanitary sewer system.

1. Section 3109(2)'s plain language places liability on the Township.

The foremost rule of statutory construction is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Proper interpretation of a statute is to "ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Statutes should be read as a whole and words should be read in context. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003).

"If the statute is unambiguous, judicial construction is neither required nor permitted." *Reed v Yackell*, 473 Mich 520, 529; 703 NW2d 1 (2005). In such instances, the courts assume the Legislature intended the plain meaning of the statutory language and the statute must be enforced as written. *Halloran v Bhan*, 470 Mich 572, 576-578; 683 NW2d 129 (2004). Unless a word or phrase is explicitly defined in a statute, every word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. *McClellan v Collar*, 240 Mich App 403, 409; 613 NW2d 729 (2000). If judicial interpretation is necessary, legislative intent is determined by giving the statutory language a construction that is both reasonable and that best accomplishes the purpose of the statute. *Koontz*, 466 Mich at 326 (citing *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611

(1998)). Here the language is unambiguous requiring nothing other than to give effect to the language as clearly intended by the Legislature.

To understand § 3109(2)'s scope, it is helpful to compare it to § 3109(1). Section 3109(1) prohibits a *person* from “discharg[ing] into the waters of the state a substance that is or may become injurious” to the “public health, safety, or welfare” and other enumerated items. Under § 3109(1), a governmental entity like the Township is a “person” that is liable when it discharges an injurious substance into the waters of the state. MCL 324.304(h) (defining “person” to include a “governmental entity”).

Section 3109(2) does not impose liability on a person, but specifically imposes liability upon a *municipality* such as the Township, regardless of whether the Township itself discharged directly or indirectly into the waters of the State. Subsection 2 first provides that the discharge of any raw sewage of human origin, either directly or indirectly into any waters of the State, “shall be considered *prima facie* evidence of a violation of this part” (that is, Part 31 of NREPA). The Legislature therefore created the presumption that raw sewage of human origin, when discharged into waters of the State, is a substance that “is or may become injurious” to the “public health, safety, or welfare,” or the other items enumerated in § 3109(1) of Part 31. If a municipality does not present evidence to rebut that presumption, a violation of Part 31 is established.

Section 3109(2) further states that a “violation of this part” is “by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department.” Under § 3109(2), therefore, the Legislature placed the responsibility for the discharge of raw sewage of human origin on the municipality where the discharge occurred, *even when municipal residents caused the discharge*. This scheme makes sense where, as here, there are large numbers of residential septic failures that only a municipality can address on a comprehensive scale.

A municipality's liability for the violation is reinforced by the last sentence of § 3109(2): "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." The § 3115 remedies to which a liable municipality is subject include the remedies sought in this case: injunctive relief to correct the violations and address the injury to the public health, safety, and welfare.

The panel majority below misinterpreted the "prima facie evidence" phrase in § 3109(2) when it concluded a discharge of raw sewage shall be considered prima facie evidence of a municipality's liability for a violation of Part 31, and that such evidence may be rebutted by showing the municipality did not cause the discharge. The Court of Appeals failed to appreciate the location of the phrase "of this part" and ignored general rules of sentence construction.

To begin, "it is a general rule of statutory construction as well as grammatical construction that a modifying clause is confined to the last antecedent unless a contrary intention appears." *Weems v Chrysler Corp*, 448 Mich 679, 700; 533 NW2d 287 (1995). See also *General Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 273; 249 NW2d 41 (1976) (opinion of Williams, J.); *Kizer v Livingston Co Bd of Comm'rs*, 38 Mich App 239, 252; 195 NW2d 884 (1972). Here, the modifying phrase "by the municipality" immediately follows the antecedent phrase "of this part" and can only apply to that last antecedent phrase. Furthermore, the phrase "of this part" in turn becomes a modifying phrase relative to the antecedent clause "shall be considered *prima facie* evidence of a violation." This necessarily means that the discharge of raw sewage is *prima facie* evidence of a violation of Part 31. The panel majority, in effect, rewrote § 3109(2) by switching the order of the wording "of this part" and "by the municipality" so that "by the municipality" modifies "*prima facie* evidence of a violation." That is not what the statute provides or what the Legislature intended.

The *prima facie* evidence (or presumption) is that the discharge of raw sewage of human origin is or may become injurious to the public health, safety, or welfare. If the discharges were nominal, and the municipality demonstrated such, then the presumption would be rebutted. Here, as exhaustively demonstrated, the discharges are pervasive, extensive, and of such high concentrations of pollutants that they easily meet the criteria in § 3109(1) of being injurious to the public health, safety, or welfare.

The panel majority also overlooked § 3109(1) in reaching its flawed conclusion. Section 3109(1) already prohibits a person (which includes a township) from discharging a harmful substance into the waters of the State. As Judge O’Connell stated in his dissent, “[i]f the majority’s interpretation were correct [that a municipality is liable under § 3109(2) only when it causes the discharge itself, then] MCL 324.3109(2) would be unnecessary in light of MCL 324.3109(1).” (O’Connell dissent at 12, App 149a.) Furthermore, use of the term “municipality” in § 3109(2) evidences an intent to distinguish that term, which necessarily excludes individuals, from the inclusive term “person” used in § 3109(1) for purposes of assigning responsibility without causation to a local governmental entity who has the legislative authority to address the raw sewage problem on a large scale.

The panel majority erred a second time when it determined that its interpretation of § 3109(2) was supported by § 3109(3). (App 135a.)

Section 3109(3) provides:

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.

MCL 324.3109(3).

The panel majority reasoned:

... that [section] 3109(3) explicitly states that a municipality is not responsible for a discharge from a sewerage system that is not operated by the municipality unless the municipality has accepted responsibility in writing for the sewerage system. If the purpose of *subsection (2)* was to impose liability upon a municipality merely because a discharge occurred within its boundaries, then *subsection (3)* becomes contradictory.

Panel majority at 4 (emphasis in original). (App 135a.)

The majority panel failed to appreciate the fact that § 3109(3) did not address private septic systems, rather it addressed “sewerage systems” as defined in § 4101. A sewerage system is defined in § 4101 as a “system of pipes and structures” that include a “waste treatment works” and that is “actually used or intended for use by the *public*[.]” MCL 324.4101(h) (emphasis supplied). As the majority of the Court of Appeals noted, the Township “does not operate a public sanitary sewer system. All of the residences and businesses within the [T]ownship rely on private septic systems for waste disposal.” (App 132a.)

Section 3109(3) is therefore irrelevant to this case. Again, As Judge O’Connell explained in his dissent:

MCL 324.3109(3) solely concerns a municipality’s responsibility for an unauthorized discharge by a sewerage system that services, but is not owned by, the municipality. Because no sewerage system even exists within in [sic] the township, this subsection is wholly inapplicable to the present case.

O’Connell dissent, at 11, fn 8. (App 148a.)

In addition to Judge O’Connell’s observation, the first few words of subsection (3) (“Notwithstanding subsection (2) . . .”) make clear that it serves as an exception to the responsibility the Legislature imposed upon a municipality under § 3109(2) for discharges of raw sewage within its borders, regardless of whether the municipality itself caused the discharges. The panel majority’s attempt to equate private septic systems with “a sewerage system as defined in section 4101” cannot be reconciled with the types of systems that § 4101 actually describes.

Finally, the Township references MCL 324.1703(1) in an attempt to show that a defendant is subject to a cause of action “when the plaintiff in such an action has made a prima facie showing that the ‘conduct of the defendant has polluted, impaired, or destroyed, or is likely to pollute, impair, or destroy . . . the water’” (Township October 19, 2010 response brief in opposition to application for leave to appeal, at 12; emphasis in original.) That language merely reinforces the DEQ’s point that the Legislature did not intend under § 3109(2) that a municipality’s responsibility rests *solely* on the fact that it actively discharge the sewage. This is because no language exists under § 3109(2) imposing responsibility based upon the *conduct* of the defendant as it exists under § 1703(1).

2. The Township’s liability under § 3109(2) is consistent with the predecessor provisions of the State’s water quality statute.

The liability scheme imposed by the predecessor to § 3109(2) reinforces the conclusion that the Township is responsible for correcting the dangerous and pervasive discharges of raw sewage within its borders.

Historically, the Legislature has assigned the obligation to the local unit of government, i.e., the Township, to address issues such as failing septic systems and the discharge of human waste into the waters of the State. The Township’s historical obligations are reflected in 1965 PA 328, MCL 323.1 *et seq.* (App 20a.) Since 1965 PA 328 was enacted, it has gone through several amendments and codification in 1994 to become Part 31 of the NREPA. However, the Legislature did keep most of the language of 1965 PA 328. Sections 6 and 7 of the old law provided:

323.6 Unlawful discharge into waters [MSA 3.526]

Sec. 6. (a) It shall be unlawful for any person directly or indirectly to discharge into the waters of the State any substance which is or may become injurious to the public health, safety, or welfare: or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or

may be made of such waters: or which is or may become injurious to the value or utility of riparian lands: or which is or may become injurious to livestock, wild animals, birds, fish aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected: or whereby the value of fish and game is or may be destroyed or impaired.

Raw Sewage; *prima facie* evidence of violation of act.

(b) 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 the violation of section 6(a) of this act* unless said discharge shall have been permitted by an order, rule, or regulation of the commission. *Any city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the State by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in section 7 of this act.*

Township sewage disposal systems; approval, bonds.

(c) Whenever a court of competent jurisdiction in this state shall have ordered the installation of a sewage disposal system in any township, and the plans therefore shall have been prepared, and approved by the state health commissioner, the township shall have authority to issue and sell the necessary bonds for the construction and installation thereof, including the disposal plant and such intercepting and other sewers as may be necessary to permit the effective operation of such system. Such bonds shall be issued in the same manner as provided for in Act No. 320 of the Public Acts of 1927, being sections 123.241 to 123.253, of the Compiled Laws of 1948; or any other act providing for the issuance of bonds in townships.

Abatement of public nuisance.

(d) *Any violation of any provision of section 6 shall be prima facie evidence of the existence of a public nuisance* and in addition to the remedies provided for this act may be abated according to law in action brought by the attorney general in a court of competent jurisdiction.

323.7 Notice of violations, contents hearing, date; extension; order of determination, review [MSA 3.527]

Sec. 7. Whenever in the opinion of the commission any person shall violate or is about to violate the provisions of this act, or fails to control the polluting content or substance discharged or to be discharged into any waters of the State, the commission may notify the alleged offender of such determination by the commission. Said notice shall contain in addition to a statement of the specific violation which the commission believes to exist, a *proposed form of order or other action which it deems appropriate to assure correction of said problem with*

a reasonable period of time and shall set a date for a hearing on the facts and proposed action involved, said hearing to be scheduled not less than 4 weeks or more than 8 weeks from the date of said notice of determination.

1965 PA 328 (emphasis added). (App 20a.)

Since 1965, the Legislature has clearly intended that a local unit of government such as the Township be responsible for the direct or indirect discharge of human sewage within its boundaries. Comparison of the controlling provision of 1965 PA 328 with the NREPA provision is instructive.

Section 3109(2) of NREPA:

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.

MCL 324.3109(2) (emphasis added).

Section 6(b) of 1965 PA 328:

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 the violation of section 6(a) of this act* unless said discharge shall have been permitted by and order, rule, or regulation of the commission.

MCL 323.6 (emphasis added).

There is no question that the Legislature's intent in drafting each section was to create a presumption of a violation of a separate provision prohibiting the discharge of injurious substances — § 3109(1) as an attendant of § 3109(2) and § 6(a) as an attendant of § 6(b). Certainly, the prima facie evidence in § 6(b) is that the discharge of raw sewage is a violation of § 6(a). That is consistent with the fact that the prima facie evidence in § 3109(2) is that the discharge of raw sewage is a violation of "this part" (Part 31, § 3109(1)). Responsibility for the violation was addressed in the subsequent sentence of § 6(b) (upon any city, village, or township) and is addressed in the subsequent phrase of § 3109(2) (upon the municipality). Thus,

the discharge of raw sewage is prima facie evidence of a violation of the statute. As noted in § 6(b), prima facie evidence has nothing to do with identifying who caused the discharge. This fact is further buttressed by § 6(d) of 1965 PA 328 which stated:

Any violation of any provision of section 6 shall be prima facie evidence of the existence of a public nuisance. . .

MCL 323.6(d).

Again, the Legislature chose to use the term “prima facie evidence” for the purpose of establishing a rebuttable presumption of a violation of the law, not for purposes of identifying responsibility.

3. The Township is a responsible party with authority to correct pollution caused by the widespread septic system failures.

The Township attempts to escape responsibility for the septic system failures simply because another governmental entity has jurisdiction over “the subject matter.” Certainly, other governmental entities have authority to take action relative to the failing septic systems. For example, and as the Township has noted, the local county health departments have limited authority under the Public Health Code, MCL 333.22201 *et seq.* The actions available under the Public Health Code allow the health department to investigate such matters and compel corrective action at “the owner’s expense” of an individual property, but does not provide for a system-wide correction. See MCL 333.2455(1). While it is true that a local health department may declare a dwelling a health hazard and order the premises vacated, MCL 333.2251, it is the Township that has been given the statutory authority under the Public Health Code, NREPA, and the Township and Village Public Improvement and Public Service Act to address the widespread problem the Township is now experiencing.

Under the Township and Village Public Improvement and Public Service Act, townships are given the authority to acquire property (i.e., condemnation), MCL 41.411(3), finance,

construct, and maintain a wastewater treatment system, MCL 41.411(1), and adopt ordinances regulating public health, MCL 41.181, to require individual property owners to hook up to public system, MCL 333.12753(1). See also Part 43 of NREPA, MCL 324.4301 *et seq* (authorizing local units of government to construct, operate and maintain sanitary and storm sewer systems). The Township's authority is further noted under Michigan's Constitution that gives Townships the authority to grant public utility franchises within in its constituted boundaries. Const 1963, art 7, §§ 19, 29. The intent has been and continues to be that the responsibility rests upon the local governmental units.

Further, the Township's claim that it is not responsible for the illegal discharges within its borders is contrary to action the Township has taken by unanimously passing the Worth Township Board of Trustees' Resolution 2005-10. (App 48a.) The Resolution directed a moratorium on the issuance of new building permits and a prohibition on the County Health Department from issuing any private sewage disposal permits in the area of concern until a wastewater collection and treatment system is functional. Perhaps most striking in Resolution 2005-10, signed as adopted by Township Supervisor Ed Smith, is the fact that the Township acknowledges its obligation to address and correct the failing septic systems that are causing the discharge of sewage into the waters of the State:

WHEREAS it is the obligation of government in general and Worth Township in particular to promote and provide for the health, safety and welfare of the residents of this Municipality and to preserve property values, and

It is the mission of the Sanilac County Health Department to promote and protect the public health of the citizens of the county in general, and

Included in these obligations is the maintenance of high quality of ground water by reduction and eventual elimination of contamination of surface water run-off, creeks, streams, ponds, Lake Huron, etc., and

There are failed sewage systems within the densely populated area of Worth Township, hereby defined as the MDEQ District D.C.A. (District Compliance

Agreement) area mandated between Woodbine of Blue Water Beach Subdivision and the street of Chippewa, and

Those failed systems deposit sewage effluent directly to the surface and ground water, thereby creating a public health hazard. . . .

Worth Township Resolution 2005-10. (App 48a.)

As noted in the DEQ's September 25, 2006, April 9, 2008, and September 16, 2008, Sanitary Surveys, the conditions in Worth Township have not improved and, in fact, appear to have deteriorated since the Resolution was signed by the Supervisor August 18, 2005. (App 50a, 69a, 111a.) The responsibility to take corrective action as required by MCL 324.3109(2), and the prohibition of the discharge of waste without a valid permit, MCL 324.3112, is recognized by the Township through the Resolution and the District Compliance Agreement. (App 39a.) Now that the Township is confronted with the cost of installing a system that will address the problem, the Township is balking at meeting its responsibility. Such avoidance comes at the expense not only of the Township's residents' health, but at the expense of the Great Lakes ecosystem.

The Township's financial constraints are certainly not unique and do not excuse its lack of action or its obligations. In order to fund municipal sewer systems, other townships have made use of 1) open market funding (utilizing special assessment bonds), 2) Clean Water State Revolving Fund (overseen by the DEQ and Michigan Municipal Bond Authority) with interest rates well below the market rates, and 3) Rural Utility Service funding providing for both federal loans and grants based upon community needs. Funding sources are available, and the Township's claim of inability to pay argument cannot serve as an excuse to allow the violations to continue.

In addition, the fact that a "municipality" under § 3109(2) includes a township along with other governmental entities does not exempt the Township from responsibility to address its own sewage problem. As Judge O'Connell stated in his dissent,

I disagree with the majority's rationale that because it can identify another entity that it believes should also hold some responsibility for the discharges, the township should automatically be let off the hook. The fact that another governmental entity, such as the state, a county, a city, or a village, has overlapping jurisdiction over the area where the discharge originated and could potentially be held liable for the discharge is irrelevant to the fact that the township can *also* be held responsible for a discharge of raw sewage within its borders and be subject to the remedies set forth in MCL 324.3115(1).

O'Connell dissent at 11, n 9, App 148a.

Further, the Township has failed to note that § 3115 of NREPA, MCL 324.3115, gives authority to the DEQ to request the Attorney General to commence a civil action for relief, including an injunction, for a violation of Part 31. The DEQ is utilizing its enforcement discretion by bringing this case against the Township, where the discharges originated. This election is reasonable because the authority and responsibility to perform the requested relief has been imposed upon townships by the constitution and statute, as has been recognized by countless other townships who accept their responsibilities.

In addition, the Township has no viable claim that another governmental entity should bear the responsibility of taking the necessary corrective action. Such a conclusion is inescapable, especially when considering the inequity of shifting the burden of local sewage disposal from the residents of a local municipality to taxpayers statewide. Certainly those taxpayers that have already born the costs for the construction and operation of sanitary sewer systems within their locale would have cause for objection if they were now required to pay for a system in another municipality. *See Livingston County v Dep't of Management and Budget*, 430 Mich 635, 645; 425 NW2d 65 (1988) (addressing the inequity for local units of government to pass along to taxpayers statewide the cost of improvements to a sanitary landfill).

4. The Court of Appeals' decision in *Lake Isabella Development v Village of Lake Isabella* does not exempt the Township from liability under § 3109(2).

In the courts below, the Township cited *Lake Isabella Development v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003), to support its claim that it is not subject to the penalties under MCL 324.3115 unless the municipality is “responsible for the discharge” under § 3109(2). Again, the clear language of § 3109(2) imposes liability upon “the municipality in which the discharge originated . . .” In other words, the municipality is made responsible by statute. *Lake Isabella* is inapplicable.

In *Lake Isabella*, the Court of Appeals addressed the validity of a DEQ rule requiring applicants seeking to construct a private sewage system to obtain a resolution from the local government agency agreeing to take over the sewage system if the owner fails to operate or maintain it properly. The court declared the rule invalid. The court reviewed the statutory scheme and discussed whether the Legislature intended in § 3109(2) to make a municipality strictly liable for the discharge of sewage that originates in the municipality. In holding that § 3109(2) does not impose strict liability on municipalities, the Court of Appeals stated:

In order to find a violation of MCL 324.3109(2), MCL 324.3115 states that liability requires actual knowledge, constructive knowledge, or disregard. Clearly, the operation of MCL 324.3115 makes MDEQ's assertion that local governments will be strictly liable for a discharge under MCL 324.3109(2) erroneous. And we therefore agree with the circuit court that MCL 324.3109(2) does not impose strict liability on municipalities and does not provide statutory authority for the challenged Rule 33 requirement.

Lake Isabella, 259 Mich App at 404.

Thus, according to a majority the Court of Appeals' panel in *Lake Isabella*, municipalities cannot be strictly liable for the discharge of sewage that originates in the municipality because, under the criminal provisions in § 3115, “liability requires actual knowledge, constructive knowledge, or disregard.” *Id.* Importantly, the Court of Appeals did

not distinguish between municipal liability in a civil versus a criminal context. It did not, for example, explain the relevance to a civil enforcement case of a knowledge requirement that is only applicable to an alleged criminal violation. There is none. *Lake Isabella* is not relevant here.

Regardless of the holding in *Lake Isabella*, the Township is responsible to correct the injurious discharges based on the uncontested facts in this case. The DEQ established that the discharges of raw sewage of human origin have been and are occurring into waters of the State, and that was considered prima facie evidence of a violation of § 3109(1) by the Township because it is where the discharges originated. The DEQ also established that the discharges were not permitted by an order or rule of the DEQ and that the Township had been aware of violations for several years as noted in the letter from the Township Supervisor (App 18a), the District Compliance Agreement (App 13a), and the Bauer Affidavit (App 16a). Certainly the Township was given an opportunity to rebut what is considered prima facie evidence of the violation. It failed to do so.

5. The relief granted by the trial court was authorized and warranted in light of the uncontested facts.

The DEQ is extremely concerned about the impact the majority's decision is having and will have on the State's enforcement authority to effectively protect the waters of its citizens. Indeed, Judge O'Connell expressed his frustration about the void caused by the majority's holding:

The majority effectively concludes that the state has no authority to order local units of government to remediate sewage problems. The unintended consequence of this decision is that no one is responsible for the abominable and unsanitary conditions in Worth Township.

O'Connell dissent, at 13, n 13. (App 150a.)

The primary objective of this litigation initiated by the DEQ has always been to obtain injunctive relief requiring the Township to address the “abominable and unsanitary conditions” within its borders.

Pursuant to MCL 324.3115, the trial court ordered the Township “to take necessary corrective action to cease the illegal discharges and comply with Part 31” within a specific period of time (almost five years). The order included interim deadlines for submitting plans to the DEQ and dates for constructing and operating the remedy selected by the Township (December 23, 2008 trial court order, App 130a.) The Township was not ordered to necessarily install a sewer system; rather, it was ordered to fix the problem that was pervasive.

Well, the remedy is as provided by law. To stop the discharge of raw human sewage into the waters of this state. Now, I agree it’s been demonstrated that it is a pervasive problem. It cannot occur on a household-by-household basis. But there has to be—there has to be an abatement of the situation by Worth Township that addresses all discharges from Worth Township into the waters of this state.

October 29, 2008 trial court Tr, pp 50, 51. (App 126a.) The deadlines and submittal requirements contained in the trial court’s order are all appropriate matters for inclusion in the summary disposition order; otherwise, such an order would obviously be of little value.

The Township had an opportunity to address each of these matters before the lower court issued its final order. In fact, the Township had the opportunity to choose an effective corrective action. The Township presented a proposed order, but it was for all practical purposes anemic, vague, and assured continued delay:

Defendant Worth Township shall, with all deliberate speed, take appropriate action to stop discharges of raw human sewage originating in said Township directly or indirectly into the waters of this state. Appropriate action within the meaning of this order is that which will result in an abatement of the situation by addressing all such discharges from the Township into state waters.

Township’s November 20, 2008 proposed trial court order, at 2.

Without deadlines and specifics, however, enforcement of the trial court's order would be extremely difficult and invite additional litigation. The Township's suggestion to proceed "with all deliberate speed" without specific deadlines was specifically rejected by the court:

But this Court has the jurisdiction to order Worth Township to stop violating Part 31 of NREPA, and to say at this point that they have to do it with all deliberate speed in hopes that the Defendant will comply, I think, would be delusional, given the history of this case. I reviewed the timelines proposed, and they are very generous timelines.

December 23, 2008 trial court Tr at 27. (App 128a.)

An additional point must be addressed about the corrective action. The DEQ and the trial court repeatedly stated that § 3115 did not authorize the court to compel a specified corrective action such as court-ordered installation of a collection and treatment sewer system. However, the Township and Court of Appeals have repeatedly stated and framed the issue as though the Township had been ordered to install such a system. (See Court of Appeals majority opinion at 1, 2, 4, 5, 6; App 132a.) The Court of Appeals acknowledged that the trial court's order does not specifically compel the construction of a sewer system, but then goes on to say that plaintiff's explicitly stated that "it views as the only practical option the construction of a municipal sewer system. . ." (Court of Appeals majority opinion, at 2, n 2; App 133a.)

Clearly, the best solution to correct the problem would be to construct a municipal sewer system. There is, however, no directive to construct one. What is required is that the corrective measure chosen be comprehensive. To demonstrate the need for a comprehensive solution required extensive evidence gathering by the DEQ. A major concern existed because it was

anticipated that various, ineffective band-aid “solutions” would be offered.⁴ The Township is always free to require impractical solutions—such as pumping and hauling sewage from individual residences, red-tagging (closing) houses, etc.—so long as they achieve compliance with Part 31 of NREPA and eliminate the injurious discharges of raw sewage to the waters of the state.

The DEQ proposed and the trial court accepted a schedule with staged completion dates to assure progress toward compliance is made. As the trial court noted, it is a generous time-frame with a completion date for the corrective action being September 1, 2013. This is especially true in light of the fact that the District Compliance Agreement the parties previously entered into in April 2004 required the Township to complete a sewage collection and treatment system by June 1, 2008. (App 39a.)

⁴ The DEQ’s efforts to demonstrate that a quick fix would not suffice were taken to avoid repeated, subsequent, expensive, and time-consuming surveys. Neither the DEQ, nor the courts for that matter, have the resources to revisit the conditions in the area of concern each time the Township takes some minor action, i.e., a building moratorium, and then announces that the widespread pervasive problem is somehow miraculously fixed. Clearly, any “fix” will require a significant “project.”

CONCLUSION AND RELIEF SOUGHT

The Township has been and continues to experience extensive sewage problems due to the septic system failures which pose not just an environmental threat but a public health threat as well. Effective, corrective action needs to be taken without further delay, and under MCL 324.3109(2) and MCL 324.3115, the circuit court has the authority to require that action by injunction.

Accordingly, the DEQ requests that this Court reverse the decision of the Court of Appeals and reinstate the order of the trial court as entered.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel



Alan F. Hoffman (P24079)
Special Assistant Attorney General
Attorneys for
Plaintiffs-Appellants
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: May 18, 2011