

STATE OF MICHIGAN  
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

v

WORTH TOWNSHIP,

Defendant-Appellee.

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Supreme Court No. 141810

Court of Appeals No. 289724

Ingham Circuit Court No. 07-970-CE

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

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

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Defendant Worth Township (Township) continues to downplay the plain language of MCL 324.3109 and the seriousness of the contamination taking place within the Township.

With respect to the facts, the Township claims they do not matter. The Township even uses the sanitized version of the facts in the Court of Appeals' majority opinion, rather than summarizing what the trial-court record actually reflects. But the nauseating reality—the unmitigated discharge of human waste into state waters, and the Township's failure to take corrective action—exemplifies why the Legislature chose to make local units of government accountable under § 3109(2), even if the local unit is not itself directly responsible for the discharge. The fundamental charge of a local government is to provide for the rudimentary health and welfare of its citizens, like ensuring basic sanitation. And as the Township acknowledges, local governments have the statutory tools to do precisely that.

With respect to the plain statutory language, the Township's analysis goes off track when it interprets the words “discharge . . . shall be considered prima facie evidence of a violation” as providing a rebuttable presumption with respect to Township conduct, rather than a presumption regarding injury to public health, safety, or welfare. In that analysis, the Township does not even address the DEQ's grammatical elucidation of the relevant language. Instead, the Township merely assumes the DEQ's construction *must* be wrong because under that construction *every* discharge would violate Part 31, mooting any opportunity to rebut the presumption. (E.g., Twp Br at 8, 10.) But the Township's assumption is faulty. If a two-year-old urinates in Lake Huron, it is “prima facie evidence of a violation,” but one that is easily rebutted as to whether the public health, safety, or welfare has been injured. Yet the Township's entire remaining analysis is all dependent on that single, hollow premise. The DEQ respectfully requests that this Court reverse, adopt the dissenting opinion of Judge O'Connell, and reinstate the trial-court order.

## ARGUMENT

- I. **Under established rules of grammar and contextual construction, MCL 324.3109(2) authorizes the imposition of liability on a municipality for illegal discharges of human waste within its borders, unless it can demonstrate that the discharges are not injurious to public health, safety, welfare, or are allowed under a DEQ order or rule.**

There is no dispute about the basic principles of statutory interpretation. Both parties cite the same established line of cases and argue that the plain language of § 3109(2) should control. But the Township then engages in an analysis driven by conclusory statements and *ipse dixit*. As but one example, the Township asserts that § 3109(2), “assists in the prosecution of claims arising under § 3109(1).” (Twp Br at 7.) There is nothing in the language of § 3109(2) that supports this statement.

More important, the Township fails to address the DEQ’s primary argument, which is grounded in the words the Legislature actually used. Recall § 3109(2)’s language:

(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. [Emphasis added.]

As explained in the DEQ’s initial brief, the phrase “of this part” and its location is critical when interpreting § 3109(2). Generally, a modifying phrase (“of this part”) is confined to the last antecedent (“prima facie evidence of a violation”). Thus, the language provides 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 listed in § 3109(1), i.e., a violation of Part 31.

If the municipality can rebut that presumption by showing that the discharge was *de minimis* (e.g., the hypothetical two-year-old described in the Introduction) or otherwise did not

rise to the level that it “is or may become injurious . . .”, or that the discharge was “permitted by an order or rule of the department [DEQ],” then the municipality is not liable. Otherwise the discharge of human waste is “a violation of the part by the municipality in which it originated.”

The Township also argues that § 3109(3) “buttresses the conclusion that a municipality must actually cause the discharge constituting a statutory violation.” (Twp Br at 8.) In fact, the opposite is true. The first few words of that section (“Notwithstanding subsection (2). . .”) make clear that it serves as an exception to the presumed responsibility for the discharge of human waste imposed on a municipality in § 3109(2). The exception applies only if the discharge is from a public sewerage system operated by someone other than the municipality. (MCL 324.4101(h)) defines a sewerage system 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 [. . .]”). If a municipality is never liable for discharges of human waste it did not cause—as the Township contends—then there would be no reason to specifically exempt sewerage systems operated by other parties. So the Township’s position does more than simply misinterpret § 3109(3), its position writes that subsection out of the statutory scheme entirely.

The Township proffers two additional arguments divorced from the actual statutory text. First, the Township argues that DEQ’s interpretation is wrong because a municipality could never effectively rebut the presumption that the discharge of sewage of human origin “is or may become injurious,” and breathlessly declares that “one discharge of human sewage from one private septic tank is enough to judicially mandate the adoption of a local sanitary sewer ordinance and compel remedial action by a local unit of government.” (Twp Br at 5.) While that may be true if the discharge were significant, it does not take too much imagination to think of a situation where a single discharge (from the hypothetical two-year-old) would not rise to the level of injurious to the public health. And while this argument may be an interesting theoretical

exercise, the Township presented no evidence to rebut the pervasive and harmful contamination present in the Township from untreated human waste. This case does not involve a single discharge, but years of pervasive discharges of human waste that have found their way into drainage ditches, streams, and Lake Huron itself.

Second, the Township seeks to bolster its non-textual argument by misrepresenting that *any* discharge of sewage would be prohibited by the federal Clean Water Act, 33 USC § 1251 *et seq*, obligating the State, as an approved program, to adhere to the extreme position the Township has crafted. (Twp Br at 10.) But the Township fails to include in the language it quotes from 33 USC § 1311(a) (“the discharge of any pollutant by any person shall be unlawful”), the immediately preceding language: “Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title . . . .” The Clean Water Act is a permitting statute, and the provisions cited above include sections that allow for the discharge of pollutants under certain prescribed situations and/or pursuant to permits. There is no *per se* prohibition on the discharge of sewage under federal law that would bind the State.

The Legislature in § 3109(2) deemed that the discharge of raw sewage of human origin into waters of the State is of such concern that it is prima facie evidence of a Part 31 violation, and that the municipality where the discharge occurs can be held legally responsible for solving the problem. In this case, the pervasive and long running contamination from human waste in the Township was never rebutted, and provided clear authority for the circuit court to order that the Township address the problem. And while the scope of the relief ordered was within the court’s considerable discretion, the Township’s inability to offer any alternates to a sewer system essentially dictated the end result. Having allowed the problem to grow and fester, the Township is hardly in a position to complain about its liability or the court-ordered remedy.

**II. The Township’s base position—that a municipality cannot be held liable unless it directly causes a discharge of human waste—is inconsistent with numerous other parts of NREPA that impose liability without requiring causation.**

The Township cites one other part of the NREPA, along with select sections of Part 31, as support for its argument that the NREPA only allows enforcement against parties that directly cause harm to the natural resources of the State. (Twp Br at 12-17.) According to the Township, § 3109(2) should be read as consistent with the provisions the Township cites from Part 17 and Part 31. To the contrary, there are numerous parts of the NREPA that impose liability without a showing of direct causation, and the courts should honor the Legislature’s deliberate choice *not* to use causation language in § 3109(2).

The Township first relies on Part 17 of the NREPA. DEQ agrees with the Township that under MCL 324.1703(1), a defendant is only subject to a cause of action “[w]hen the plaintiff in the 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 . . .” (Emphasis added.) Likewise, under the various provision of Part 31 the Township cites, liability is based on the “acts” or “actions” of a party. These sections show that the Legislature knows how to use words that require “conduct” or “actions” when it wants. Conversely, the absence of such language in § 3109(2) is a strong indicator that the Legislature did not want such a limitation when dealing with the widespread discharge of human waste into state waters.

Moreover, to the extent the Township is asserting that these provisions reflect a general theme for the NREPA, that assertion is simply wrong. Different parts of the NREPA have and still do impose liability on parties that did not directly cause environmental harm. For example, until 1995, Part 201, Environmental Remediation, of the NREPA, MCL 324.20101 *et seq*, imposed liability for environmental contamination based solely on ownership or operation of a contaminated facility. See former MCL 324.20126(1), 1994 PA 451, amended by 1995 PA 71.

And Part 213 of the NREPA still imposes liability on owners and operators of underground storage tanks even if they did not cause the contamination. See MCL 324.21303(a) (defining “operator” and “owner”) and MCL 324.21307-21313a.

Finally, the Township block quotes the portion of the majority’s opinion below musing that DEQ’s position would potentially impose liability on the State itself because the State is included within the definition of “municipality.” (Twp Br at 13-14.) To begin, the fact that the State could be liable under § 3109(2) is not an argument against applying the statute’s plain language to another liable entity. More important, the only entity with authority to initiate an action under Part 31 is the DEQ. MCL 324.3115(1). There was no reason for the Legislature to expressly exclude the DEQ from Part 31 liability, because the statutory scheme does not authorize any party to pursue such a claim against the DEQ. In sum, this argument is just one more example of the Township’s failure to honor the statutory text as a whole.

**III. The Township’s responsibility for remediating its sewage problems does not implicate the Headlee Amendment, does not improperly interfere with the right of local self government, and does not violate the separation of powers doctrine.**

The Township continues to assert that the DEQ, and the lower court through its order, are forcing the Township to construct a municipal sewer system. DEQ acknowledges that as a practical matter, the most efficient way to address the problem (other than each of the homeowners taking responsibility for their own property) is to create some sort of public sewer system. But DEQ has *not* expressly demanded that the Township construct a sewer system. Instead, it demanded, and the circuit court ordered, that the Township “take *necessary* corrective action[, whatever that might be,] to cease the illegal discharges and comply with Part 31 within [a specific time frame] . . .” (Trial court order at 3, App 130a.) This demand was in accord with the remedy provisions in MCL 324.3115(1). It was also consistent with the Township’s

longstanding obligation to ensure that human waste within its borders does not create a health threat, an obligation that predates modern environmental statutes and the health amendment.

Based on the faulty premise that this case is about construction of a sewer system rather than remediating a health threat, the Township engages in a lengthy discussion about how such a mandate would violate the Headlee Amendment (Const 1963, art 9, § 29), the right of local self government, and the separation of powers doctrine. (Twp Br at 19-30.) Although DEQ submits that these arguments go beyond the limited issue on appeal, DEQ is compelled to respond, albeit briefly.

Imposing responsibility on the Township for the illegal discharge of raw sewage of human origin does not implicate article 9, § 29 of the Headlee Amendment. The Headlee Amendment provides, in relevant part:

The state is hereby prohibited from reducing the state financed proportion of necessary costs of any existing activity or service required of units of Local Government by state law. 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.

Const 1963, art 9, § 29 (emphasis added).

Courts read the two sentences of the Amendment together. The Amendment is an effort to prevent the Legislature from imposing responsibilities for new or increased activities on the local government without appropriate funding. But if there is no change in the existing law or responsibilities of the local government, then the Amendment is irrelevant. “[T]he second sentence of § 29 is only triggered by a mandate that requires local units to perform an activity that *the state previously did not require* local units to perform *or at an increased level* from that previously required of local units.” *Judicial Attys Ass’n v State*, 460 Mich 590, 606 (1999) (emphasis added).

The imposition of a municipality's responsibility for the discharge of raw sewage within its boundaries is not a "new" or "increased" level of activity. Rather, it is a responsibility that existed since at least 1965. 1965 PA 328 provided:

323.6 Unlawful discharge into waters [M.S.A. 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.*

MCL 323.6 (emphasis added).

As noted by Judge O'Connell in his dissent, "There exists no Headlee Amendment violation because even before the Headlee Amendment was implemented, a township has been responsible for remediating sewage problems within its boundaries." (O'Connell dissent, p 9, n 6; App 146a.)

Neither the DEQ nor the trial court (in its order) has compelled the Township to construct a municipal sewer system. Rather, in accordance with MCL 324.3115, the Township was ordered to *correct the problem* within a given schedule. (Trial court's December 23, 2008 order, p 2; App 130a.) If the injurious discharges can be stopped by requiring the residents to vacate

their houses, or requiring replacement of septic systems, or requiring pump and haul programs, then the violations would be remedied. In short, the Township may choose how to correct the problem. No judicial directive was given to construct, maintain or operate a sanitary sewer system; thus, the trial court's order did not interfere with the right of local self government, nor did it constitute an exercise of legislative authority in violation of the separation-of-powers doctrine. The Township has the option regarding how it wants to address the problem, but the problem must, nevertheless, be addressed.

### CONCLUSION AND RELIEF SOUGHT

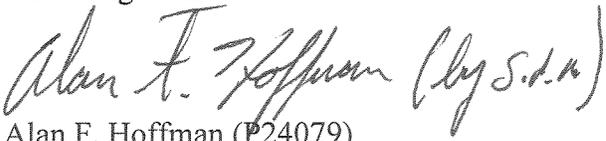
The Legislature spoke plainly when it enacted § 3109(2). The DEQ asks that this Court enforce the Legislature's plain language, reverse the Court of Appeals' decision, and reinstate the trial court's order as entered.

Respectfully submitted,

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