

WASTEWATER DISCHARGES: MUNICIPAL LIABILITY

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House Bill 4860 as passed by the House

Sponsor: Rep. Kevin Elsenheimer

House Committee: Natural Resources, Great Lakes, Land Use, and Environment

Second Analysis (9-16-05)

BRIEF SUMMARY: The bills would amend NREPA to specify that a municipality would not be responsible for an unauthorized discharge from a sewerage system that is permitted under Part 31 and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system. A municipality would also not be subject to the penalties provided for in Section 3115 of the act.

FISCAL IMPACT: The bill would have no fiscal impact on municipalities, provided they are not held liable for any unauthorized discharge from a private sewer system.

THE APPARENT PROBLEM:

Often new residential developments utilize private sewer systems when connection to a public sewer system is not feasible or when soil conditions are unsuitable for the construction of individual on-site septic systems. Part 41 (Sewerage Systems) of the Natural Resources and Environmental Protection Act regulates the construction and operation of sewerage systems and empowers the Department of Environmental Quality (DEQ) to "exercise due care to see that sewerage systems are properly planned, constructed, and operated to prevent unlawful pollution of the streams, lakes, and other water resources of the state."

Pursuant to Part 41, the DEQ promulgated Rule 33 (R 299.2933), which provided in part that when the owner of a proposed sewerage system is not a governmental agency, the application for a construction permit must include a resolution from the local government having jurisdiction stating that it will assume responsibility for the effective and continued operation of the sewerage system should the actual owner fail to do so. The purpose of Rule 33 is essentially to ensure the continued operation of sewerage systems and prevent the pollution of state waters, in the event that the owner of system fails. The rule was promulgated, in part, because local municipalities are in a unique position to assess property owners for the cost of continuing the operation of the system.

In November 2003, the Michigan Court of Appeals invalidated Rule 33 in *Lake Isabella Development, Inc. v. Village of Lake Isabella* (259 Mich App 393), finding the rule to be inconsistent with legislative intent and to be "arbitrary and capricious." Following the decision, the DEQ revised its policy regarding private wastewater treatment facilities in order, generally speaking, to require an application to construct a private wastewater treatment facility to be accompanied by a resolution from the local government agreeing to accept responsibility for the facility or to require the establishment of some sort of

legal entity capable of supporting the facility. Even though, under current DEQ policy, a local government can refuse to accept responsibility for a failed treatment facility or unauthorized discharge, it may, under Part 31, still be liable for the resulting damages and any necessary remedies. Legislation clarifying the extent to which municipalities are liable for discharges occurring within their boundaries has been introduced.

THE CONTENT OF THE BILL:

Part 31 (Water Resources Protection) of the Natural Resources and Environmental Protection Act (MCL 324.3109) prohibits the discharge of any substance that is injurious to the public health or natural resources and provides that the discharge of human sewage is considered to be prima facie evidence of a violation of Part 31 by the municipality in which the discharge occurred, unless the discharge is authorized by the Department of Environmental Quality.

House Bill 4860 would add that a municipality would not be responsible for an unauthorized discharge from a sewerage system that is permitted under Part 31 and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system. A municipality would also not be subject to the penalties provided for in Section 3115 of the act unless it had accepted responsibility in writing.

BACKGROUND INFORMATION:

In response to the *Lake Isabella* decision, the DEQ established a new policy for instances where the owner of a proposed treatment facility is not a governmental agency. Under the revised policy, the application for a construction permit must include a program that ensures the continued operation of the facility. This can be accomplished in one of two ways: (1) the application can include a resolution from the local governmental agency stating that it will assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner fails, and also include a copy of the contractual agreement between the owner and governmental agency; or (2) the application can include a program establishing a legal entity to own the proposed facility, a fund in escrow maintained for the perpetual operation and maintenance of the proposed facility, and a covenant running with the land for each parcel in the development to establish a financial responsibility on land owners (through the assessment of user fees) for the continued operation and maintenance of the system. The DEQ notes that they have approved 24 permits utilizing this second option, with another 15 currently pending.

The DEQ requires the escrow be established and approved by the department before a construction permit will be issued. Initially, the escrow is to be established by the developer or system owner in an amount sufficient to properly operate the facility, and for conducting maintenance and necessary repairs, for a period of at least two years. Each individual user is required, through the covenant, to contribute an additional prorated amount to cover the costs of operating, maintaining, and repairing the system for five years. The amount of the user fee is to be determined by a licensed professional

engineer or certified wastewater treatment plant operator, and the covenant is to provide for periodic rate increases as necessary.

ARGUMENTS:

For:

The bill provides that municipal governments would only be liable for discharges from private sewerage systems in those instances where it has agreed to accept responsibility. Under the current law, a municipality is liable for any resulting damage and possible remedy from an unauthorized discharge even though the municipality may not be responsible for that discharge. This can be financially burdensome, particularly in an era of revenue sharing cuts and other budgetary constraints. More importantly, the bill is consistent with many other environmental pollution laws in that it seeks to assess liability on those actually responsible.

POSITIONS:

The Department of Environmental Quality indicated it supports the bill. (6-16-05)

The Michigan Municipal League indicated in supports the bill. (6-16-05)

The Michigan Townships Association indicated it supports the bill. (6-16-05)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.