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MDEQ's Lacks Power To Require A Township To Install A Public Sewer System If Private Septic Systems Fail – Where the Township Is Not The Cause of the Failure

by [Ronald D. Richards](#)

The MDEQ lacks the power to require a township to install a sanitary sewer system where there is widespread failure of private septic systems resulting in contamination of lake waters. *DEQ v Twp of Worth* (published decision of August 17, 2010). This case involves a dispute between the MDEQ and a township located along Lake Huron and which does not operate a public sewer system. All residences and businesses in the township rely on private septic systems. A number of those private septic systems began to fail, causing effluent being discharged into Lake Huron. When the MDEQ pushed the township to install a public sewer system, the township concluded it was not financially feasible and refused. The MDEQ then sued to compel the township to install a public sewer system.

The trial court sided with the MDEQ, requiring the township to design, construct, and operate a sewer project to remedy the failing system systems and resulting discharges. The trial court also imposed a \$60,000 fine and awarded attorney fees.

The Court of Appeals reversed, and held in favor of the township. The Court's relevant reasoning is below:

- The controlling statutes presume that a discharge of sewage into state waters is a violation by the "municipality in which the discharge originated." But the statutes further state that the "municipality" is not responsible if it has not accepted responsibility in writing for the private system. The Court interpreted the statutes

to impose liability on the "municipality" in which the discharge occurred only if the discharge occurred due to actions of the municipality.

- There was no evidence that the township was the source of the discharge since it did not operate a sanitary system. It viewed this as preventing penalties against the township.
- The Court noted that under the controlling statutes, if the MDEQ were to prevail, the township could counterclaim against the MDEQ and prevail in a claim seeking to require the MDEQ to install the sewer system – since the State is also the "municipality in which the discharge originated" and, so, bears as much responsibility for the unauthorized discharges at issue as does the township.

Notably, the Court's decision may not be the end of this issue. Although the Court of Appeals decision stands as of now, the MDEQ has the option of asking the Michigan Supreme Court to chime in. And the MDEQ may very well pursue that given that the Court's decision was not unanimous – there was, indeed, a stern dissent.

The dissenting judge would have sided with the MDEQ, relying, in part, on the following:

1. he interpreted the controlling statutes to actually allow the MDEQ to compel the township to build the plant;
2. he believed some case law supports compelling a local municipality to construct a sewage treatment plant – even

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- in spite of the municipality's claim that it lacks money to pay for it; and
3. he believed there was evidence to suggest the township caused the discharge – such as through affidavits that 85% of the township's septic systems were failing, that the township adopted a resolution documenting the failing private systems and that action must be taken until functional, and that the township was aware for many years of the discharge through resident complaints and

independent investigation but did not do anything to alleviate the hazard.

4. he noted the significant public issue involved warranting Supreme Court review.

If you have questions about the summarized decision or issues relating to public sewer systems, private septic systems, or regulation of public and private systems, feel free to contact any member of Foster Swift's Municipal Department.

BOND COUNSEL CORNER

Public Finance Team Update

- In published national rankings for 2009, Foster Swift ranked 40th in the "Top 100 Bond Counsel: Short Term Issues" (source: Thomson Reuters, as published in the "Red Book" -- *The Bond Buyer's Municipal Marketplace Directory* - Spring 2010).
- Foster Swift served as Underwriters' Counsel for the new Michigan Finance Authority's (MFA) \$703,610,000 State Aid Revenue Notes, Series 2010D-1, 2010D-2 and 2010D-3, issued August 20, 2010. The MFA loaned the pooled net proceeds to more than 230 Michigan public school districts, secured by their pledged state aid and their limited tax general obligation, to fund their short-term operating cash flow needs.
- On July 13, 2010, Foster Swift delivered an unprecedented opinion that helped make possible a historic milestone in the Michigan film industry, the issuance of tax-exempt Recovery Zone Facility Bonds

to finance construction of Michigan's first major motion picture studio complex, Raleigh Michigan Studios, in Pontiac, Michigan. The bonds were secured by an innovative credit enhancement that was the first of its kind in Michigan. Foster Swift is the bond law firm the parties relied on for the needed opinion that the novel credit enhancement was legal, binding, and enforceable.

- Foster Swift's Lansing, Grand Rapids and Farmington Hills offices have listings in the *Red Book* directory of Municipal Bond Attorneys. With additional Foster Swift offices in Detroit, Holland, and Marquette in the UP, our 12 Red Book listed municipal bond lawyers can serve clients everywhere in Michigan. Collectively, they have represented public finance clients in 19 states, the District of Columbia, and Puerto Rico.

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